A BILL IN RESPECT OF AN ACT TO REPLACE THE OATHS ACT 1867 - 1981

Working Paper 31

Queensland Law Reform Commission

February 1988

Q U E E N S L A N D

A WORKING PAPER OF THE LAW REFORM COMMISSION

ON A BILL IN RESPECT OF AN ACT TO REPLACE THE OATHS ACT 1867-1981

Q.L.R.C. W.P.31

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LAW REFORM COMMISSION

The Law Reform Commission has been functioning since the 1st March, 1969 and is constituted by the Law Reform Commission Act 1968 - 1984.

MEMBERS:-

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OFFICERS:-

Mr. P.M. McDermott, Senior Legal Officer

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The office of the Commission is at the Central Courts Building, 179 North Quay, Brisbane.

The short citation for this Working Paper is Q.L.R.C. W.P.31.

PREFACE

LAW REFORM COMMISSION

WORKING PAPER ON A BILL TO REPLACE THE OATHS ACT 1867-1981

The Third Programme of the Law Reform Commission as approved by the Governor-in-Council on 1st September, 1983 includes a review of the Oaths Act 1867-1981.

As part of this review this working paper has been prepared which contains a discussion on the law relating to oaths, and a proposed Bill to replace the Oaths Act. This Bill is also titled the Oaths Act. The working paper is being circulated to persons and bodies from whom comment and criticism are invited.

This working paper is circulated on a confidential basis and recipients are reminded that any recommendations for the reform of the law must have the approval of the Governor-in-Council before being laid before Parliament. No inferences should be drawn as to any Government policy.

It is requested that any observations you may desire to make be forwarded to the Secretary, Law Reform Commission, P.O. Box 312, Brisbane North Quay, Qld. 4002, so as to be received no later than 30th May, 1988.

The Hon. Mr. Justice
B.H. McPherson,
Chairman.

Brisbane,

29th February, 1988.

CHAPTER ONE

GENERAL INTRODUCTION

At present there are four statutes which contain the law of oaths in Queensland, viz., the Oaths Act 1867-1981; (1) The Oaths Act Amendment Act of 1876; (2) the Oaths Act Amendment Act of 1884, (3) and the Oaths Act Amendment Act of 1891-1974. (4) These statutes, and a number of other consequential enactments, would be replaced by one statute entitled the Oaths Act upon implementation of the recommendations of the Commission.

The Oaths Act of 1867 essentially consolidated existing New South Wales statutes that also had force in Queensland. This statute was enacted prior to the introduction of a number of reforms in the United Kingdom. In the same year that the Oaths Act was enacted the oaths that were taken upon appointment to various offices in the United Kingdom were comprehensively examined by the Oaths Commissioners. (5) These oaths are referred to as promissory oaths, or what the dissenting Oaths Commissioners in 1867 referred to as "oaths without penalties". (6) It has long been recognised that promissory oaths are only binding in conscience. In 1647, Seldon, in his transcription of Fleta (1290), wrote that "an attaint, however justifiable, does not lie for a breach of a promissory oath". (7)

The report of the Oaths Commissioners resulted in the enactment at Westminister of the Promissory Oaths Act 1868 (Imp.). (8) The oaths and affirmations that are taken upon appointment to

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(1) 31 Vict. No.12, as amended (Qld.).

(2) 40 Vict. No.10, as amended (Qld.).

(3) 48 Vict. No.19, as amended (Qld.).

(4) 55 Vict. No.14, as amended (Qld.).

(5) See, "Report of the Oaths Commission" (Command 3885, 1867).

(6) Id., p.xiv.

(7) See, Fleta, Book V c.21 (Of Attaints), reproduced in (1983) Vol.99 Seldon Society, p.66.

(8) 31 & 32 Vict. c. 72 (Imp.).

various public offices in Queensland have not been similiarly examined until this review of the Oaths Act was placed on the Third Programme of this Commission. The Commission examined executive oaths and affirmations of office, including the oaths and affirmations of office of the Governor of Queensland, and members of the Executive Council. Oaths and affirmations that are taken by various public officers are also considered.

The Commission also considered the oaths and affirmations of office that are taken by those officials and persons who are involved in the administration of justice. The oath of office and the affirmation of office that are taken by Judges of the Supreme Court of Queensland, and other judicial officials is presently prescribed by the Oaths Act. The oath of office and the affirmation of office of justices of the peace is prescribed by the Justices of the Peace Act 1975. (9) The Commission has also examined the oaths and affirmations of office that are taken by Her Majesty's Counsel, notaries, barristers and solicitors.

The Commission has prescribed forms of oath and affirmation of allegiance to be taken whenever a person is required to take the oath or affirmation of allegiance under State law. The oath of allegiance was originally prescribed by the Oaths Act, and is now prescribed by the Act Interpretation Act 1954-1977. (10) This form of oath of allegiance is not universally adopted as a matter of practice, presumably because it is not contained in the Oaths Act. The Commission has recommended that forms of oath and affirmation of allegiance derived from the Promissory Oaths Act should be contained in the proposed Oaths Act.

The provisions in the Oaths Act that relate to statutory declarations are derived from the Statutory Declarations Act 1835 (Imp.). (11) As well as modernising the law relating to statutory declarations, the Commission has recommended the adoption of uniform legislation that will sanction the use of statutory declarations that are made by persons who reside in other States.

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(9) No.51 of 1975 (Qld.).

(10) 3 Eliz.II No.3 (Qld.).

(11) 5 & 6 Will.IV c.62 (Imp.).

It has also recommended that consideration be given to the enactment of uniform legislation which would enable statutory declarations to be made in one State for the purpose of the law of another State. A recommendation has also been made that affidavits required for legal proceedings should no longer be verified upon oath, but upon a statutory declaration.

The Commission has considered the circumstances in which a person is permitted to make an affirmation whether as a witness or upon appointment to an office. The Commission has taken the view that if a person desires to make an affirmation, instead of swearing an oath, it should not be necessary to require a person to disclose the nature of his religious or philosophical objection to swearing an oath.

Consideration has also been given to the circumstances in which children under fourteen years of age are permitted to give evidence in court. It was considered that the giving of such testimony should be permitted where a court is satisfied that a child understands the obligation to tell the truth, and promises to tell the truth.

The Commission has also examined the oaths and affirmations that are taken in court proceedings, and other proceedings. The Commission has recommended that the forms of oaths and affirmations that are taken by witnesses and interpreters should be prescribed. It is also recommended that the oaths and affirmations that are taken by court officials be also prescribed. The Commission has also made provision in the draft Bill for the manner of administration of oaths and affirmations.

CHAPTER TWO

OFFICIAL OATHS - Early Colonial Legislation

In the early nineteenth century various Imperial statutes required public officers to take certain oaths and also make certain declarations upon appointment to a public office. In England most of these statutes were effectively abrogated by the Promissory Oaths Act 1868 (Imp.) (1) which prescribes a form of oath of allegiance and judicial oath to be taken by certain public officials. Section 9 of that Act, with certain exceptions, prohibited the taking of an oath of allegiance except in accordance with the Act. As a consequence of the enactment of the Promissory Oaths Act there were many statutes which no longer served any purpose. These statutes, the earliest of which were enacted in the reign of Edward III, were later repealed by the Promissory Oaths Act 1871 (Imp.) (2).

IMPERIAL STATUTES

When the colony of New South Wales was established the colonists as subjects of the Crown inherited the law of England, (3) including any Imperial statutes which required a holder of an office to take an oath. In 1788, at the time of the foundation of the colony of New South Wales, Governor Phillip took the oath of abjuration of the Pretender and the assurance oath, under the statutes 1 Geo.I c.13 and 6 Geo.II c.53, acknowledging King George III as the lawful Sovereign of the realm. He also subscribed the requisite declaration under the Test Act as required by 9 Geo.II c.26. (4) The common law and Imperial statutes were also received into the colony by virtue of s.28 of the Australian Courts Act

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(1) 31 & 32 Vict. c.72 (Imp.). This statute was enacted following the "Report of the Oaths Commission" (Command 3885, 1867).

(2) 34 & 35 Vict. c.48 (Imp.).

(3) See, Sir V. Windeyer, "A Birthright and Inheritance" (1962) 1 Uni. of Tasmania Law Rev. 635, at p.636.

(4) Id., p.639 (n.11).

1828 (Imp.). (5) The Australian Courts Act provided for statutes, which were in force in England at the time of the enactment of that Act, to be applied in the courts of New South Wales where they were applicable in the colony. (6) It is apparent from s.1 of the Oaths Act 1857 (N.S.W.) (7) that, prior to the enactment of that Act, the following oaths and declarations had to be taken by a holder of a public office in the colony:

(i) the oaths of allegiance, supremacy, and abjuration that all persons who held any office, civil or military, were required to take under the statute 1 Geo.I stat.2 c.13 (1714) (Imp.) (8) that related to the security of the Sovereign;

(ii) the declaration under the statute 9 Geo.IV c.17 (1828) (Imp.); (9) and

(iii) the oath under the Roman Catholic Relief Act 1829 (Imp.). (10)

The Imperial Laws Application Act 1984 (11) terminated the operation in Queensland of most Imperial statutes that were enacted prior to the Australian Courts Act, including the statutes 1 Geo.I stat.2 c.13 (1714) (Imp.) and 9 Geo. IV c.17 (1828) (Imp.). The only Imperial statute of relevance that remains on the statute book is the Roman Catholic Relief Act.

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(5) 9 Geo.IV c.83 (Imp.). This provision is restated in s.20 of the Supreme Court Act 1867 (21 Vict. No.23) (Qld.) so that relevant English statutes that were in force when the Australian Courts Act was enacted could be applied in the courts of Queensland: see Bilby v. Hartley (1892) 4 Q.L.J. 137, 143-144.

(6) See, Delohery v. Permanent Trustee Co. of N.S.W. (1904) 1 C.L.R. 283, 311.

(7) 20 Vict. No.9 (N.S.W.) (see Vol.2 Cary's Statutes (1861), p.110).

(8) This statute was amended, from time to time, by other statutes, see e.g., 2 Geo.II c.21 (1728) (Imp.), 9 Geo.II c.26 (1735) (Imp.).

(9) This statute repealed statutes which imposed a sacramental test as a qualification for certain public offices, and instead required the holder of an office to make and subscribe a declaration not to injure the established Church.

(10) 10 Geo.IV c.7 (Imp.).

(11) No.70 of 1984 (Qld.).

ROMAN CATHOLIC RELIEF ACT

The Roman Catholic Relief Act 1829 (Imp.) was not directly received into New South Wales as it was enacted after the Australian Courts Act was passed. The Imperial statute was adopted in New South Wales upon the enactment of the Roman Catholic Relief Act 1829 (N.S.W.). (12) At the time of the enactment of the Colonial Act the territory of the colony included the States of Queensland and Victoria so that the Act also was in force in those jurisdictions. The Roman Catholic Relief Act removed various disabilities which were imposed on Roman Catholic subjects of the Crown. Before the enactment of the statute those subjects were required under various Imperial statutes to take oaths of allegiance and abjuration, and to make a declaration against transubstantiation before they became eligible to hold any important office. The statute substituted a new oath, that was prescribed by s.2 of the Act, which was to be taken instead of those oaths. It is generally acknowledged that the form of the oath prescribed by that Act contains words which are objectionable to anybody required to take that oath. (13)

The Imperial statutes which were superseded by the Roman Catholic Relief Act are no longer on the statute book in Queensland since the enactment of the Imperial Laws Application Act. The Roman Catholic Relief Act 1829 (N.S.W.) was itself repealed in New South Wales in 1976. (14) However, the mere repeal of this statute in New South Wales did not remove that statute from the statute books in Queensland and Victoria. (15) It might be mentioned that the Colonial Statute remains on the statute book in Victoria. (16) The Roman Catholic Relief Act 1829

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(12) 10 Geo.IV No.9 (N.S.W.) (Vol.2, Oliver's Statutes (1879), p.2085; Vol.15 Statutes of Queensland (1962 ed., p.33). See also, Gleeson v. Phelan (1914) 15 S.R. (N.S.W.) 30, 34.

(13) See, Vol.II, Halsbury's Laws of England, (2nd ed., 1933), p.958, para. 1710 (n.k.).

(14) See, Statute Law Revision Act 1976 (1976 No.63) (N.S.W.), s.2 & Sch.1.

(15) Cf., Copyright Owners Reproduction Society Ltd. v. E.M.I. (Australia) Pty. Ltd. (1958) 100 C.L.R. 597.

(16) See, Victorian Acts Index (1986), p.85.

(N.S.W.) was not one of the Colonial statutes which were affected by the New South Wales Act (Termination of Application Act) 1973. (17) The Colonial Act, which imposes a discriminatory requirement based on religious grounds, is outmoded. The statute ceased to have any operation upon the enactment of the Oaths Act 1857 (N.S.W.). (18) The draft Bill accordingly provides for the termination of the operation in Queensland of the Roman Catholic Relief Act 1829 (N.S.W.): see cl.4(2).

OATHS ACT

Prior to the separation of Queensland from New South Wales, the New South Wales Parliament enacted the Oaths Act 1857 which was entitled "An Act to simplify the Oaths of Qualification for Office". The Oaths Act prescribed a simplified form of oath of allegiance to be taken whenever a person was required to take the oaths and declarations under the various Imperial statutes (including the Roman Catholic Relief Act) which have been discussed. Similar legislation which required a public officer to only take the oath of allegiance appears to have been enacted in other colonies. (19) The Oaths Act, by prescribing a simplified form of oath of allegiance, to some extent anticipated the reforms that were later achieved in England under the Promissory Oaths Act. The statute also prescribed an oath of judicial office. The Oaths Act of 1867 (Qld.) (20) prescribed the simplified form of oath of allegiance contained in the New South Wales Oaths Act with the essential difference that the reference in the oath to "New South Wales" was replaced by a reference to "Queensland". The Queensland Act also prescribed an oath of judicial office. The New South Wales Oaths Act, which was part of the law of Queensland upon the creation of that colony, was repealed by The Repealing Act of 1867. (21)

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(17) No.1 of 1973 (Qld.).

(18) 20 Vict. No.9 (N.S.W.).

(19) See, e.g. Oaths Act 1858 (21 Vict. c.13) (Bahamas) reproduced in G.C. Campbell, The Statute Law of The Bahamas (1862), p.82.

(20) 31 Vict. No.12 (Qld.).

(21) 31 Vict. No.39 (Qld.).

CHAPTER THREE

OATH AND AFFIRMATION OF ALLEGIANCE

Sir Paul Hasluck in his Queale Memorial Lecture discussed the relevance of the oath of allegiance. He commented:

> "the Crown, being outside politics, attracts the same loyalty from all subjects all the time and stands for those matters on which the nation is undivided. Perhaps this is best expressed by the convention that the party or parties out of office are referred to as Her Majesty's Opposition, just as those in office are referred to as Her Majesty's Government. It is also expressed by the fact that persons who take oaths of office, whether as Ministers, judges, members of parliament, public servants, sailors, soldiers and airmen or citizens undertaking public duties, pledge their loyalty to the Queen, that is to someone who stands for the whole nation. They do not pledge themselves just to serve the government of the day; they pledge themselves to serve the Queen, who stands for the whole nation." (1)

The requirement of a subject of the Crown to take the oath of allegiance is of great antiquity. The Sovereign had the power at common law to require subjects to take the oath of allegiance. (2) Statutes were later enacted which required various officials to take the oath of allegiance to the Sovereign. (3) In England the form of the oath of allegiance is prescribed by s.2 of the Promissory Oaths Act 1868 (Imp.). (4) It was earlier mentioned that a simplified oath of allegiance was prescribed by s.1 of the Oaths Act of 1867 (Qld.). (5)

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(1) See, The Office of Governor-General (1979), p.8.

(2) See, J. Chitty, Prerogatives of the Crown (1820), p.16. See also J.W. Salmond, "Citizenship and Allegiance" (1902) 18 L.Q.R. 49, 62.

(3) See, M. Bacon, Vol.IV Abridgement of the Law (1832), pp.11-18. See also, Promissory Oaths Act 1871 (34 & 35 Vict. c.48) (Imp.), Sch.

(4) 31 & 32 Vict. c.72 (Imp.).

(5) 31 Vict. No.39 (Qld.). The oath of allegiance prescribed under s.4 of the Constitution Act was substituted by the form of oath of allegiance contained in s.16 of the Constitution (Office of Governor) Act 1987.

The Oaths Act was one of a number of consolidating statutes that were enacted in 1867. Other consolidating statutes were enacted in that year which prescribed an oath of allegiance to the Sovereign. The Constitution Act of 1867 (6) provided in s.4 that no member of the Legislative Assembly shall be permitted to take a seat and vote therein unless he shall have taken and subscribed the oath of allegiance prescribed in that section before the Governor or some person authorised by the Governor to administer the oath. A more elaborate form of oath of allegiance to be taken by certain aliens, who thereupon became naturalized British subjects, was also prescribed by s.5 of The Aliens Act of 1867. (7)

The oath of allegiance prescribed by the Oaths Act, the Constitution Act, or any other Act was later superseded by the form of oath of allegiance prescribed by s.31(1) of the Acts Interpretation Act 1954. (8) However, the form of oath of allegiance which is prescribed by the Acts Interpretation Act does not, as a matter of practice, appear to have been universally adopted. This may be because this form of oath of allegiance is not apparent merely upon an examination of the Oaths Act. The Commission considers that the oath or affirmation of allegiance should be contained in the proposed Oaths Act where an inquirer would reasonably expect to find it.

The oath of allegiance that is prescribed by the Acts Interpretation Act conforms closely to the Royal Style and Titles that was authorised by the Royal Style and Titles Act 1953 (9) (Cth.), with the difference that the form of oath omitted any

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(6) 31 Vict. No.38 (Qld.).

(7) 31 Vict. No.28 (Qld.). "The Aliens Act of 1867" was repealed by "The Aliens Act of 1965" (No.19 of 1965) (Qld.). The naturalization provisions of the 1867 statute were inoperative after the Commonwealth Parliament, pursuant to the Constitution, enacted the Naturalization Act 1905: see now Australian Citizenship Act 1948 (No.83 of 1948) as amended (Cth.).

(8) 3 Eliz.II No.3 (Qld.).

(9) No.32 of 1953 (Cth.).

reference to the defence of the faith. The Royal Style and Titles Act was enacted following the Commonwealth Economic Conference that was held at London in 1952. At that conference it was resolved that it would be in accord with current constitutional relations within the Commonwealth for individual member countries of the Commonwealth to adopt a form of Royal Title which was considered appropriate for that country.

At the Commonwealth Economic Conference it was agreed that there would be a substantial element of the Royal Title which would be common to all countries, namely the description of the Sovereign as "Queen of Her other Realms and Territories and Head of the Commonwealth". The Conference also considered that Her Majesty would be advised to exercise the prerogative power to issue Proclamations giving effect to the changes in all the Commonwealth countries concerned. (10) This occurred when the Royal and Parliamentary Titles Act 1927, (11) which contained a form of Royal Title which did not accord with later constitutional developments within the Commonwealth, was later repealed by the Royal Titles Act 1953. (12)

The Royal Style and Titles of Her Majesty to be used in relation to the Commonwealth of Australia was amended in 1973 to remove references to the United Kingdom and to the defence of the faith. On October 19, 1973 Her Majesty, by a Proclamation made pursuant to s.2 of the Royal Style and Titles Act 1973 (Cth.), (13) adopted the following Royal Style and Titles:

> "Elizabeth the Second, by the Grace of God Queen of Australia and Her Other Realms and Territories, Head of the Commonwealth". (14)

The Royal Style and Titles Act 1973 was reserved by the Governor-General for the personal assent of the Her Majesty under s.58 of

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(10) See, "The Title of the Sovereign", Home Office, (Cmnd.8748, 1953).

(11) 17 & 18 Geo.V c.4 (U.K.).

(12) 1 & 2 Eliz.II c.9 (U.K.).

(13) No.114 of 1973 (Cth.).

(14) See, Gazette 1973, No.152 (October 19, 1973).

the Commonwealth Constitution. (15)

The Commission does not propose to make any recommendations as to whether a differing form of Royal Style and Titles could or should be adopted for use within Queensland. This is a policy matter which can only be determined by the Government in consultations with Her Majesty. This question also raises constitutional difficulties. In 1974 jurisdictional difficulties precluded the Attorney-General of Queensland from prosecuting a reference to the Judicial Committee of the Privy Council on this question. (16) It might be mentioned that State legislation itself recognises that it is appropriate for Commonwealth legislation to be enacted in relation to the Style or Titles appertaining to the Crown. (17)

The oath of allegiance which is now prescribed by the Acts Interpretation Act contains a superseded form of Royal Style and Titles which does not conform to the Royal Style and Titles Act 1973. There is no reason why an oath of allegiance to the Sovereign should incorporate the Royal Style and Titles of that Sovereign. The oath of allegiance that is prescribed under s.2 of the Promissory Oaths Act does not incorporate the Royal Style and Titles of the Sovereign. This was recognised in Nicholls v. Board of Examiners for Barristers and Solicitors (18) by Ormiston J. who remarked that "after the passing of the Promissory Oaths Act in England in 1868, a simple form of oath has been required". (19)

It is the general practice that most oaths of allegiance that are prescribed by statute in Australia follow the precedent of s.2

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(15) See, C. Howard, Australian Federal Constitution Law (3rd ed., 1985), p.110. Cf. Statute of Westminster Adoption Act 1942 (No.56 of 1942) (Cth.), Sch. Statute of Westminster 1931, recital.

(16) See, Commonwealth v. Queensland (1975) 134 C.L.R. 298.

(17) See, Acts Interpretation Act 1954-1977, s.32(3)(b) (Qld.).

(18) [1986] V.R. 719.

(19) Id., 727.

of the Promissory Oaths Act. (20) The oath of allegiance which is prescribed by the Acts Interpretation Act, and the Constitution Act (as amended by Constitution (Office of Governor) Act 1987 (21)) constitutes a departure from that practice. (22) There may be instances where a more elaborate form of oath of allegiance is warranted. This is so in respect of the oath or affirmation of allegiance that is taken during a naturalisation ceremony. The form of the oath or affirmation of allegiance that is taken during a naturalisation ceremony contains a renunciation of all other allegiance. (23)

The Commission recommends the adoption of an oath of allegiance which conforms to the precedent established by s.2 of the Promissory Oaths Act 1868 (Imp.). The recommended form of oath of allegiance is as follows:-

> "I (name) do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors, according to law.
> So help me God."

At present a person may make an affirmation of allegiance by virtue of s.5 of the Oaths Act which provides authority for the modification of the form of oath of allegiance contained in s.1 of the Act (which has been superseded by the Acts Interpretation Act) by substituting the words "solemnly and sincerely promise and affirm" for the words "sincerely promise and swear". No authority is given by s.5 of the Oaths Act to delete the words "So Help me God" from the form of oath of allegiance. Those words are on the form of affirmation of allegiance that are printed to

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(20) See, e.g. Commonwealth Constitution, s.42 (Sch.); Oaths Act 1900 (Act No.20, 1900), Second Schedule (N.S.W.); Oaths Act 1936 (No.2278 of 1936), s.8 (S.A.); Constitution Act 1899 (52 Vict. No.23), Schedule E (W.A.); Promissory Oaths Act 1869 (33 Vict. No.25), s.2 (Tas.).

(21) No.73 of 1987 (Qld.).

(22) See also Constitution Act 1975 (No.8750), Second Schedule (Vict.).

(23) See, Australian Citizenship Act 1948 (No.83 of 1948) as amended (Cth.), Sch. 2 & 3. See also, Nicholls v. Board of Examiners for Barristers and Solicitors [1986] V.R. 719, 728 per Ormiston J.

enable a member of the Legislative Assembly to comply with s.5 of the Constitution Act. The form was drafted at a time when the law only permitted an affirmation to be taken for conscientious reasons. (24) Since the enactment of the Oaths Acts Amendment Act 1981 (25) an affirmation may be made, under s.17 of the Oaths Act, by a person without religious beliefs. It is accordingly appropriate to prescribe a form of affirmation which may be used whenever a person desires, for any reason, to make an affirmation instead of taking the oath of allegiance. (26) The forms of oath and affirmation of allegiance that are prescribed by cl.5 of the draft Bill are intended to be uniformly adopted whenever a person is required under State law to take the oath or affirmation of allegiance. The prescribed forms are contained in the Second Schedule of the draft Bill. These forms of oath and affirmation of allegiance will supersede the oath of allegiance prescribed by the Constitution Act, and the Acts Interpretation Act. A consequential amendment will be made to the Constitution Act: See, cl.4(3). Subsection (1) of section 31 of the Acts Interpretation Act will itself be repealed by the draft Bill: see cl.4(1), First Schedule. The proposed forms will also replace the composite forms of oath and affirmation of allegiance and office prescribed by s.10 of the Justices of the Peace Act 1975 (27) which will also be repealed by the draft Bill: see cl. 4(3).

DEMISE OF THE CROWN.

At common law the demise of the Crown had the consequence of vacating offices under the Crown. (28) In the colonies difficulties occurred because public offices became vacant before the inhabitants of those colonies became aware of the demise of the Crown. This position was ameliorated in the colonies by the

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(24) See, p.47, infra.

(25) No.61 of 1981 (Qld.).

(26) A form of affirmation of allegiance is prescribed by s.7 (2A)(b) of the Local Government Act 1936-1985 (1 Geo. VI No.6) (Qld.).

(27) No.50 of 1975 (Qld.).

(28) See, Vol.8 Halsbury's Laws of England (4th ed. 1974), p.497 (para. 925).

Colonial Offices Act 1830 (Imp.) (29) which provided that an appointment to a civil or military office became vacant only after the expiration of eighteen months after the demise of the Crown. In colonial Australia the demise of the Crown still had the consequence that a public officer had to take the oath of allegiance to the successor to the Crown. (30)

The law relating to the demise of the Crown in Queensland is now stated by The Demise of the Crown Act of 1910. (31) Section 2 of the Demise of the Crown Act provides that the holding of any office under the Crown shall not be affected by the demise of the Crown, nor shall it be necessary for the holder of any office who has taken an oath prescribed by statute to again take an oath to the successor to the Crown. This section renders nugatory the last paragraph of s.4 of the Constitution Act which requires members of the Legislative Assembly to take an oath of allegiance to the successor to the Crown, in the event of the demise of the Crown. This section also applies where a person is permitted by law to take an affirmation instead of taking an oath. (32) The Commission considers that The Demise of the Crown Act is an important constitutional statute which should be retained. This is because the statute does not merely refer to oaths taken by public officers, but also provides for the continuation of the appointment of public officers.

ANGLICAN CHURCH OF AUSTRALIA

Bishops, priests, and deacons of the Anglican Church of Australia customarily take the oath of allegiance and other oaths upon their appointment to office. (33) In England, statutory

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(29) 1 Will.IV c.4 (Imp.).

(30) See, e.g., Constitution Act 1855 (18 & 19 Vict. c.54) (Imp.), Sch. s.2; Order in Council Empowering the Governor of Queensland to make Laws and to provide for the Administration of Justice (June 6, 1859), c1.11. (No.3, Queensland Government Gazette (December 24, 1859)).

(31) 1 Geo.V No.21 (Qld.). See Demise of the Crown Act 1901 (1 Edw.VII c.5) (Imp.).

(32) See, Acts Interpretation Act 1954-1977 (Qld.), s.36 (definition of "oath").

(33) See, "The Anglicans", The Australian, February 6-7, 1988, Weekend Magazine (p.1).

authority for this practice is provided by the Appointment of Bishops Act 1533 (Imp.) in respect of bishops, (34) and by the Clerical Subscription 1865 (Imp.) (35) in respect of priests and deacons. In Queensland s.7 of The Anglican Church of Australia Constitution Act of 1961 (36) provides statutory authority for the administration of the customary oaths of ecclesiastical office. The draft Bill does not affect the customary practice of the Anglican Church in the administration of oaths of ecclesiastical office: see, cl.5(3).

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(34) 25 Hen.VIII c.20 (Imp.).

(35) 28 & 29 Vict. c.122 (Imp.).

(36) The Church of England in Australia Constitution Act of 1961 (10 Eliz.II No.17) as amended by the Anglican Church of Australia Act 1977 (Qld.).

CHAPTER FOUR

EXECUTIVE OATHS AND AFFIRMATIONS OF OFFICE

In Queensland the subject of executive oaths of office has never been comprehensively examined. It was earlier suggested that this was because the Oaths Act of 1867 (1) was enacted prior to the enactment of the Promissory Oaths Act 1868 (Imp.). (2) Soon after the enactment of the Promissory Oaths Act in England similar legislation was enacted in New South Wales, (3) South Australia, (4) and Tasmania. (5) However, no similar legislation has ever been enacted in Queensland. The Commission therefore considered that a general examination of the executive oaths of office that are taken in Queensland was warranted.

GOVERNOR

Letters Patent of June 10, 1925 which constituted the office of Governor of the State of Queensland provided that the Governor was required to take:

> "the Oath of Allegiance in the form provided by an Act passed in the Session holden in the Thirty-first and Thirty-second years of the Reign of Her Majesty Queen Victoria, intituled an Act to amend the Law relating to Promissory Oaths; and likewise the usual Oath for the due execution of the Office of Governor, and for the due and impartial administration of justice...". (6)

The requirement to take the abovementioned oaths appears, in identical terms, in earlier Letters Patent which constituted the office of Governor of the State of New South Wales. (7) It would

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(1) 31 Vict. No.12 (Qld.).

(2) 31 & 32 Vict. c.72 (Imp.).

(3) Promissory Oaths Act 1870 (33 Vict. No.14) (N.S.W.).

(4) Promissory Oaths Act 1869 (No.6 of 1869-70) (S.A.).

(5) Promissory Oaths Act 1869 (33 Vict. No.25) (Tas.).

(6) See, Letters Patent Constituting the Office of Governor of the State of Queensland (June 10, 1925), cl.XII (Vol.2, Queensland Statutes 1962 ed., p.810).

(7) See, Letters Patent constituting the office of Governor of the State of New South Wales (October 29, 1900), cl.IV.

appear that the oath that was prescribed for the "due and impartial administration of justice" may have been derived from an era when Governors, as holders of the great seal in colonies, exercised the jurisdiction of the Lord Chancellor. (8)

The Letters Patent of 1925 was revoked by Letters Patent of February 14, 1986 which also constitute the office of Governor. Clause IV (b) of those Letters Patent require the Governor to take "the Oath of Allegiance and the Oath of Office subject to and in accordance with the law and practice of the State". (9) This clause was later restated in s.5(1)(b) of the Constitution (Office of Governor) Act 1987. (10) It would seem that the oath of allegiance to be taken by the Governor is that which is prescribed by s.31(1) of the Acts Interpretation Act 1954-1977, (11) instead of the oath of allegiance prescribed by the Promissory Oaths Act. The form of the oath of office of the Governor is not prescribed under the Letters Patent, or the Constitution (Office of Governor) Act.

The oaths for the due execution of the office of a Governor of a colony have, from early times, been traditionally prescribed by statute. (12) In some other Australian States legislation prescribes the oaths that a Governor takes upon appointment to office. For example, in South Australia s.5(1) of the Oaths Act 1936 (S.A.) (13) provides that the Governor, as soon as may be after his acceptance of office, shall take the oath of allegiance

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(8) See, e.g., J. Chitty, Prerogatives of the Crown (1820), p.36; F. MacKinnon, The Government of Prince Edward Island (1951), p.27.

(9) See, Letters Patent constituting the office of the Governor of the State of Queensland cl.IV(b) (February 14, 1986) (Vol.CCLXXXI, Queensland Government Gazette, p.904 (March 8, 1986)).

(10) No.73 of 1987 (Qld.).

(11) 3 Eliz.II No.3, as amended (Qld.).

(12) See, A. Stokes, Constitutions of the British Colonies, (1788), pp. 180-184 citing 12 Car.II c.18 (1660), 15 Car.II c.7 (1663), 7 & 8 Will.III c.22 (1696), 8 & 9 Will.III c.20 f.39, 4 Geo.III c.15 (1763).

(13) No.2278 of 1936 (S.A.).

and the official oath in the presence of the Chief Justice or the Acting Chief Justice of the State. The official oath, which is derived from the Promissory Oaths Act, is prescribed by s.9 of the South Australian Oaths Act.

More recently, in New South Wales the Constitution Act 1902 (N.S.W.) (14) has been amended as a consequence of the enactment at Westminster of the Australia Act 1986. (15) The Constitution Amendment Act 1987 (16) inserted Part IIA into the Act which relates to the office of the Governor of the State of New South Wales. Section 9E, which is contained in that Part, prescribes the form of the oath or affirmation of allegiance, and the oath or affirmation of office of the Governor. Section 9E provides:

> "Oaths or Affirmation of Allegiance and of Office
>
> 9E. For the purposes of this Part -
>
> (a) a reference to the Oath or Affirmation of Allegiance is a reference to an Oath or Affirmation swearing or affirming to be faithful and bear true allegiance to Her Majesty and Her Majesty's heirs and successors according to law;
>
> and
>
> (b) a reference to the Oath or Affirmation of Office is a reference to an Oath or Affirmation swearing or affirming well and truly to serve Her Majesty and Her Majesty's heirs and successors in the particular office and to do right to all manner of people after the laws and usages of the State, without fear or favour, affection or ill-will."

The Commission considers that it is appropriate for similar legislation to be enacted in Queensland in view of the fact that the form of oath of office is not prescribed under s.5(1)(b) of the Constitution (Office of Governor) Act.. The oath of office which is prescribed by s.9E of the New South Wales Constitution Act more appropriately reflects the constitutional obligation of the Governor.

The Letters Patent of February 14, 1986, and s.5 of the Constitution (Office of Governor) Act appear to be drafted on the

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(14) No.32 of 1902 (N.S.W.).

(15) 1986 c.2 (U.K.). See also, Australia Act 1986 (No.142 of 1985) (Cth.); Australia (Request andConsent) Act 1985 (No.143 of 1985) (Cth.).

(16) No.64 of 1987 (N.S.W.).

assumption that, at some later date, legislation will prescribe the oath of allegiance and the oath of office of the Governor. Clause 6 of the draft Bill provides a statutory requirement for the Governor to take the oath or affirmation of allegiance, and the oath or affirmation of office. Clause IV of the Letters Patent, and s.5(2) of the Constitution (Office of Governor) Act provides that the Chief Justice or next senior Judge shall administer the oaths, or, as "permitted by law", take affirmations in lieu of those oaths. The draft Bill provides express authority for the Governor to take an affirmation. The draft Bill also reflects existing practice by providing for the Chief Justice or next senior Judge to administer the requisite oaths or affirmations. The prescribed forms of the oath of office, and the affirmation of office are contained in the Third Schedule of the draft Bill.

EXECUTIVE COUNCIL

Clause 3 of the Letters Patent of June 6, 1859 constituting the colony of Queensland, which were confirmed by s.3 of the Australian Colonies Act 1861 (Imp.), (17) made provision for there to be an Executive Council for the colony. (18) These Letters Patent did not require a member of the Executive Council to take any oaths. In contrast clause 11 of the Letters Patent of June 6, 1859, which provides for the administration of justice in the colony, makes express provision, similar to s.33 of the Constitution Act 1855 (N.S.W.), (19) for a member of the Legislative Council or Assembly to take an oath of allegiance. (20)

The Executive Council of Queensland was later constituted under clause V of the Letters Patent of February 14, 1986 that constituted the office of Governor of the State of Queensland.

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(17) 24 & 25 Vict. c.44 (Imp.).

(18) See, Letters Patent constituting the Colony of Queensland (June 6, 1859) (Vol.2 Queensland Statutes 1962 ed., pp. 802-803).

(19) 18 & 19 Vict. c.54 (N.S.W.).

(20) See, No.3 Queensland Government Gazette (December 24, 1859).

(21) This clause was later restated as s.6 of the Constitution (Office of Governor) Act. The Letters Patent and the Act, which require the Governor to take the oath of allegiance and office, do not require a member of the Executive Council to take any oaths of allegiance and office. In contrast, Letters Patent issued on February 14, 1986 which constitute the office of Governor in the States of Western Australia and Tasmania expressly require a member of the Executive Council of those States to take an oath or affirmation of allegiance, and an oath or affirmation of office. (22)

In R. v. Davenport (23) Lutwyche J. emphasised that the Executive Council is a body having legal status, and in this respect is to be distinguished from the Cabinet. In actual practice the members of the Executive Council also hold their appointment concurrently with an appointment of a Minister of the Crown. Although it has been pointed out that theoretically this need necessarily not be so. (24) Ministers of the Crown are empowered to sit in the Legislative Assembly by virtue of proclamations made under s.3 of the Officials in Parliament Act 1896-1975. (25)

A member of the Executive Council upon appointment to office takes the following oaths: the oath of allegiance, the oath of office and secrecy as a member of the Executive Council, (26) and

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(21) See, Letters Patent constituting the office of Governor of the State of Queensland (February 14, 1986) (see n.9, ante).

(22) See, Letters Patent constituting the office of Governor of the State of Western Australia (February 14, 1986), cl.XIX; Letters Patent constituting the office of Governor of the State of Tasmania (February 14, 1986), cl.VII.

(23) (1874) 4 Q.S.C.R. 99.

(24) See, Guide to Public Financial Administration in Queensland (1982), p.22.

(25) 60 Vict. No.3, as amended (Qld.).

(26) Historically the oath of office as a Privy Counsellor included the duty "to keep the Sovereign's counsel secret": see, Dickson v. Viscount Combermere (1862) 3 F. & F. 527, 534-535n. (176 E.R. 236, 241n.).

an oath of office as a Minister of the Crown. The requirement of a member of the Executive Council to take the oath of allegiance is derived from s.1 of the Oaths Act (now s.31 of the Acts Interpretation Act 1954-1977) which superseded the requirement for an office holder under the Crown to take the oaths prescribed by the statute 1 Geo.I stat.2 c.13 (1714) (Imp.).

There is no statutory basis for a member of the Executive Council of Queensland to take the oaths or affirmations of office either as a member of the Executive Council or as a Minister. This position has not been affected by the passage of the Constitution (Office of Governor) Act 1987. A statutory basis for the taking of these oaths exists in other States. In New South Wales, (27) South Australia, (28) and Tasmania (29) the oath of office and of secrecy as a member of the Executive Council is prescribed by statute. It has been earlier mentioned that Letters Patent expressly require a member of the Executive Council of the States of Western Australia and Tasmania to take the appropriate oaths or affirmations. (30)

The Commission considers that there should be an express statutory requirement for a member of the Executive Council to take the oath or affirmation of allegiance, the oath or affirmation of office and of secrecy as a member of the Executive Council, and the oath or affirmation of office as a Minister: vide Oaths Act 1900 (N.S.W.), s.10(1). The draft Bill requires a member of the Executive Council to take these oaths, or make appropriate affirmations: see cl. 7(1).

The oath of office and of secrecy with suitable modifications is also administered to the Clerk of the Executive Council and

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(27) See, Oaths Act 1900 (Act No.10, 1900) (N.S.W.), s.10(1). Cf. Promissory Oaths Act 1870 (33 Vict. No.14) (N.S.W.), S.5.

(28) See, Oaths Act 1936 (No.2278 of 1936) (S.A.), ss.6, 10. Cf. Promissory Oaths Act 1869 (No.6 of 1869-70) (S.A.), ss.5, 7.

(29) See, Promissory Oaths Act 1869 (33 Vict. No.25) (Tas.), s.5. Cf. R. v. Turnbull [1958] Tas. S.R. 80.

(30) See, n.22 (ante).

officers of the Executive Council. The draft Bill also requires the Clerk or an officer of the Executive Council to take the oath of allegiance and the oath of office, or make appropriate affirmations instead of swearing those oaths. The oath or affirmation of office that an officer is required to take under the draft Bill is the same oath or affirmation that a member is required to take with such modifications that the Governor may authorise: see cl.7(2). The present practice is that the requisite oaths of a member or officer of the Executive Council are administered by the Governor. The clause provides for the oaths or affirmations to be administered by the Governor or some person authorised by the Governor: see cl.7(3).

PUBLIC OFFICERS

Public officers were formerly under an obligation to take certain official oaths whenever they were so directed by the Governor. Clause II of the Royal Instructions to the Governor that were issued on June 10, 1925 (31) provided:

> II. "Oaths to be administered. The Governor may, whenever he thinks fit, require any person in the public service to take the Oath of Allegiance, together with such Oath or Oaths as may from time to time be prescribed by any Law in force in the State. The Governor is to administer such Oaths or cause them to be administered by some Public Officers of the State."

The expression "public service" in clause II of the Royal Instructions is not defined and would include offices to which appointments are made by the Crown. The expression would presumably not be limited to persons appointed under the Public Service Act 1922-1978. (32) The expression appears to be used in a wider sense in the Constitution (Legislative Assembly) Act of 1933. (33) Prior to the enactment of the Oaths Acts Amendment Act 1981 (34) the Governor issued a direction under clause II of the Royal Instructions for the oaths of allegiance and office to be __

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(31) See, Vol. 2 Queensland Statutes (1962 ed.), p.813.

(32) 13 Geo.V No.31, as amended (Qld.).

(33) 24 Geo.V No. 1 (Qld.).

(34) No.61 of 1981 (Qld.).

administered to the Masters of the Supreme Court of Queensland. (35)

It is also not clear what oath of allegiance would have been taken under a direction issued by the Governor under this clause. The footnote to this clause that is contained in the 1962 edition of the Queensland Statutes refers to ss.1 to 5 of the Oaths Act. (36) However, at the time of that edition the oath of allegiance under the Oaths Act was superseded by the oath of allegiance prescribed by s.31(2) of the Acts Interpretation Act 1954-1977. It cannot, in any event, be assumed that the Royal Instructions required the taking of an oath of allegiance which was prescribed by State law. Clause II of the Royal Instructions referred to "the Oath of Allegiance, together with such Oath or Oaths as may from time to time be prescribed by any Law in force in the State". The Instructions to the Governor were issued contemporaneously with the Letters Patent that constituted the office of the Governor. (37) It has already been mentioned that under those Letters Patent the Governor was required to take the oath of allegiance prescribed by the Promissory Oaths Act.

The Royal Instructions would appear to have required the taking of the oath of allegiance under the Promissory Oaths Act together with any oaths that may have been prescribed by State law. The only legislation of relevance which was enacted after those Instructions were issued, which prescribed an oath of allegiance, was the Acts Interpretation Act. The Public Service Act was amended by the Public Service Act Amendment Act 1950 (38) to insert paragraph (xxiib) into s.51 of the Act. That paragraph provides that the Public Service Board, with the approval of the Governor in Council, may make regulations to require persons engaged or about to engage in the service of the Crown to make and subscribe an oath of allegiance. However, it appears that no

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(35) See, Vol.283 Queensland Parliamentary Debates, p.72 per Hon. S.S. Doumany M.L.A., Minister for Justice and Attorney-General (March 5, 1981).

(36) See, n.30, ante.

(37) See, n.6 ante.

(38) 15 Geo.VI No.3 (Qld.).

regulations have been made which requires public servants to take the oath of allegiance.

The Royal Instructions to the Governor of 1925 were revoked by the Letters Patent of 1986 constituting the office of Governor of the State of Queensland. (39) Accordingly there is no legal basis to require any public officer to take the oath of allegiance. The Commission recommends the adoption of s.7(1) of the Oaths Act 1900 (N.S.W.) which provides that the oath of allegiance and the official oath shall be tendered to and taken by all public officers required by order by the Governor to take the same.

Clause 8 of the draft Bill enables the Governor to require public officers to take the oath or affirmation of allegiance and the official oath or official affirmation. This clause is in similar terms to s.7(1) of the New South Wales Oaths Act. The expression "public officer" is defined in cl.8(2) of the Bill to include a person appointed to a public office (not being a judicial office) by the Governor in Council, or a person appointed under the Public Service Act. The draft Bill also provides that the oaths or affirmations may be administered by the Governor or some person authorised by the Governor: see cl.8(3).

The Commission does not propose to recommend which public officers may be required to take these prescribed oaths or affirmations. Last century the Oaths Commissioners commented that "it is difficult to fix the exact point in the gradation of offices where such oaths ought to cease". (40) The Commission considers that the decision as to whether a public officer should be required to comply with the provision is a policy decision which should properly be left to the discretion of the Governor.

OFFICIAL OATH

A form of official oath was prescribed by s.3 of the Promissory Oaths Act 1868 (Imp.) under which a deponent swears to

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(39) See, Letters Patent constituting the office of Governor of the State of Queensland (February 14, 1986), cl.I (see n.9, ante).

(40) See, "Report of the Oaths Commission" (Command 3885, 1867), p.x.

well and truly serve the Sovereign in a particular office. This form of official oath has been adopted in some jurisdictions in Australia. This is the case in New South Wales, (41) and South Australia, (42) and Tasmania. (43) The Commission considers that there should be legislation which prescribes a form of official oath or official affirmation for use in Queensland. Clause 9 of the draft Bill prescribes the forms of the official oath or official affirmation, which are in the Fifth Schedule of the draft Bill. The draft Bill provides that a reference in any Act to the official oath or official affirmation shall be taken to refer to the form of such oath or affirmation prescribed by the Oath Act: see cl.9(2).

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(41) Oaths Act 1900 (1900, No.20) (N.S.W.), s.5. Cf. Promissory Oaths Act 1870 (33 Vict. No.14) (N.S.W.), s.3.

(42) Oaths Act 1936 (No.2278 of 1936) (S.A.), s.9. Cf. Promissory Oaths Act 1869 (No.6 of 1869-70) (S.A.), s.3.

(43) Promissory Oaths Act 1869 (33 Vict. No.25) (Tas.), s.3.

CHAPTER FIVE

PARLIAMENTARY OATHS AND AFFIRMATIONS

The appointment of the Clerk of Parliament is made by Commission under Letters Patent. The appointment of the Clerk of Parliament by Letters Patent ensures the independence of that office. Where an office held during good behaviour is conferred by letters patent, procedure by criminal information, scire facias, (1) or impeachment may be necessary in order to vacate the office. (2)

The Clerk of Parliament upon presenting to the Speaker of the Legislative Assembly a Commission of appointment takes the oath of allegiance and the oath of office. The obligation to take the oath of allegiance is derived from the Oaths Act of 1867 (3) which superseded the statute 1 Geo.I stat.2, c.13 (1714) (Imp.). The oath of office requires the Clerk of Parliament to swear to "make true Entries, Remembrances, and Journals of the things done and passed in the Legislative Assembly of Queensland". These oaths are traditionally administered by the Speaker before the Legislative Assembly. (4)

The Commission considers that the proposed Oaths Act should make provision for parliamentary oaths and affirmations. The draft Bill provides for the Clerk of Parliament to take either an oath or affirmation of allegiance, and an oath or affirmation of office. See, cl.10. The prescribed forms of oath and affirmation of office are in the Sixth Schedule of the draft Bill.

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(1) The jurisdiction of the Supreme Court of Queensland to entertain a scire facias is derived from s.22 of the Supreme Court Act 1867 (31 Vic. No. 23) which confers upon the Supreme Court the common law jurisdiction of the Lord Chancellor. See, R. v. McIntosh (1851) Legge (N.S.W.) 680.

(2) See, Vol.8 Halsbury's Laws of England (4th ed., 1974), p.679.

(3) 31 Vict. No.12 (Qld.).

(4) See, e.g., Vol.279 Queensland Parliamentary Debates, p.36 (August 9, 1979).

The Commission considers that the Clerk of Parliament should be empowered to issue a direction to an officer of Parliament to take the oath or affirmation of allegiance, and the oath or affirmation of office. See, draft Bill, cl.11. The draft Bill enables the Clerk of Parliament to issue an appropriate direction to an officer who is required to assist the Clerk of Parliament in the recording of the proceedings of the Legislative Assembly. The Clerk of Parliament is also empowered to administer the requisite oath or affirmation to an officer, cl.11(2). (5)

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(5) Cf., Parliamentary Commissioner Act 1971-1976, s.10(4).

CHAPTER SIX

ADMINISTRATION OF JUSTICE - OATHS AND AFFIRMATIONS OF OFFICE

In Queensland the oaths that persons involved in the administration of justice have to take upon their appointment to an office have not been subject to any comprehensive analysis. This may have been because the Oaths Act of 1867 (1) was enacted prior to the enactment of the Promissory Oaths Act 1868 (Imp.). (2) A form of judicial oath is prescribed by s.4 of that Act. This Chapter contains an examination of the oaths of allegiance and office of Her Majesty's Judges and Judicial Officers, Her Majesty's Counsel, barristers, solicitors, and notaries public.

JUDGES AND JUDICIAL OFFICIALS

Section 3 of the Oaths Act prescribes the oath of office of Judges of the Supreme Court and justices of the peace. This provision did not contain an express requirement for Judges of the Supreme Court or justices of the peace to take the oath of allegiance. It may be assumed that this was because the requirement to take the oath of allegiance in early colonial times in New South Wales was imposed by the statute 1 Geo.I stat.2, c.13 (1714) (Imp.). The oath of allegiance under this Imperial Act was superseded by the oath of allegiance which was prescribed by s.1 of the Oaths Act 1857 (N.S.W.). (3) This is essentially the oath of allegiance which is prescribed by s.1 of the Queensland Oaths Act. The Imperial Act no longer has any operation in Queensland since the enactment of the Imperial Laws Application Act 1984. (4)

Section 3 of the Oaths Act was amended by The Oaths Acts Amendment Act of 1959 (5) by the insertion of a paragraph to provide for District Court judges, and members of the Industrial Court and the Land Court to take the oath of allegiance and oath

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(1) 31 Vict. No.12 (Qld.).

(2) 31 & 32 Vict. c.72 (Imp.).

(3) 20 Vict. No.9 (N.S.W.).

(4) No.70 of 1984 (Qld.).

(5) 8 Eliz.II No.5 (Qld.).

of office prescribed in s.1 of the Oaths Act with the necessary adaptations. In actual practice these oaths are also taken by Industrial Commissioners upon their appointment. The paragraph was later amended by the Oaths Acts Amendment Act 1981 (6) to require Masters of the Supreme Court to take the oath of allegiance and the oath of office. Composite forms of oath and affirmation of allegiance and office for justices of the peace are prescribed by s.10 of the Justice of the Peace Act 1975. (7) That provision prescribes a composite form of oath and affirmation of allegiance and of office to be taken or made before a judge, stipendiary magistrate, or person authorised in that behalf by a writ of dedimus potestatem. (8)

The Commission proposes the retention of the existing practice that a person appointed as a judge or judicial official should be required to take the oath or affirmation of allegiance and the oath or affirmation of judicial office. A person appointed to judicial office is presently required to swear the oaths of allegiance and of office, affirmations in lieu of those oaths may be taken by virtue of s.5 of the Oaths Act. The Commission considers that there should be an express statutory requirement for a Judge of the Supreme Court, as presently exists in respect of other judges, to take the oath or affirmation of allegiance as well as the oath or affirmation of judicial office. (9)

The Chief Stipendiary Magistrate has pointed out that no provision has been made for a stipendiary magistrate to take an oath of judicial office as a magistrate. The Commission has accordingly made provision in the draft Bill for a stipendiary magistrate, upon appointment to that office, to take the oath or

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(6) No.4 of 1981 (Qld.).

(7) No.51 of 1975 (Qld.). See formerly Justices Act of 1886 (50 Vict. No.17), s.15 (Qld.).

(8) See The Writs of Dedimus Act of 1871 (34 Vict. No.25) (Qld.). As to the form of a writ: see K.A. Allen, The Justices Acts of Queensland (3rd ed., 1956), p. 627.

(9) Cf. Oaths Act 1900 s.8(1) (N.S.W.); Oaths Act 1936-1969, s.7(1) (S.A.).

affirmation of judicial office. (10) A magistrate would have previously taken the requisite oath or affirmation under the Justices of the Peace Act, or Justices Act upon appointment as a justice of the peace.

Clause 12 of the draft Bill provides that Judges and Masters of the Supreme Court of Queensland, District Court Judges, stipendiary magistrates, members of the Industrial Court, members of the Land Court, justices of the peace, and all judicial officers directed by the Governor shall be required to take the oath or affirmation of allegiance, and the oath or affirmation of judicial office. The Commission envisages that the Governor would make an appropriate direction where a judicial official is not required by any statute to take the oath or affirmation of allegiance and the oath or affirmation of office. Formerly, the Governor could issue such a direction under clause II of the Royal Instructions of 1925 (11) which were repealed in 1986. The Governor issued a direction under this clause, prior to the enactment of the Oaths Acts Amendment Act 1981, to require the present Masters of the Supreme Court upon their appointment to take the oath of allegiance and the oath of office. (12)

The Commission proposes that the form of oath or affirmation that is prescribed by s.10 of the Justices of the Peace Act should be repealed: see cl.4(4) of the draft Bill. The Commission considers that justices of the peace should be required to take the oath or affirmation of allegiance that it is proposed should be uniformly adopted. It is also considered that the oath or affirmation of judicial office should be the same form of oath or affirmation of office that judges are required to take upon their appointment to office.

The Commission considers that there are deficiencies in the form of the oath of judicial office that is prescribed by s.3 of

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(10) Cf., Oaths Act 1900 s.9(1) (N.S.W.); Oaths Act 1936-1969, s.7(1) (S.A.).

(11) See, Vol.2 Queensland Statutes (1962 ed.), p.813.

(12) See, Vol.283, Queensland Parliamentary Debates, p.72 per Hon. S.S. Doumany M.L.A., Minister for Justice and Attorney-General (March 5, 1981).

the Oaths Act, and the composite form of oath and affirmation of allegiance and office that are prescribed by the Justices of the Peace Act. This is because the forms of oath or affirmation do not require a deponent to swear or affirm to serve the Sovereign in the particular judicial office. The requirement of a Judge to serve the Sovereign is of constitutional significance and ancient origin. (13) This requirement is evident in the forms of oath of judicial office that were in use in England before the enactment of the Promissory Oaths Act. (14) The form of judicial oath of office prescribed by s.4 of the Promissory Oaths Act, and the various forms of oath and affirmation of judicial office derived from that provision which are prescribed in Australia, (15) all contain an appropriate acknowledgement of service to the Sovereign. The judicial oath of office prescribed by the Promissory Oaths Act also recites that a judge will administer his office without "ill-will". No such undertaking is to be found in the judicial oath of office prescribed by the Oaths Act, and the composite forms of oath and affirmation of allegiance and office that are prescribed by the Justices of the Peace Act.

The Commission recommends that the form of the oath of judicial office that should be adopted in Queensland should be based upon s.4 of the Promissory Oaths Act. The recommended form of oath of judicial office is as follows:

> "I, (name), do swear that I will well and truly serve Her Majesty Queen Elizabeth the Second, Her Heirs and Successors, in the office of (title of office, e.g., Chief Justice of Queensland, or Judge of the Supreme Court of Queensland) and I will do right to all manner of people

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(13) See, 20 Ed. III c.1 (1346) (Imp.). For the form of oath under this ancient statute: see, The Hon. Mr Justice J.B. Thomas, Judicial Ethics in Australia (1988), Appendix (p.101).

(14) See the forms of oath of judicial office reproduced in the "Report of the Oaths Commissioners" (Command 3885, 1867), pp. 42-45.

(15) See, e.g., High Court of Australia Act 1979 (No.137 of 1979), s.11 and Schedule (Cth.); Oaths Act 1900 (No.20 of 1900), s.5 and Fourth Schedule (N.S.W.); Oaths Act 1936 (No.2278 of 1936), s.11 (S.A.).

according to law without fear or favour, affection or ill-will.

So help me God."

The recommended form of oath of judicial office, differs from that prescribed by the Promissory Oaths Act, by including a reference to the Heirs and Successors to the Sovereign. The Promissory Oaths Act was enacted before the enactment of legislation relating to the demise of the Crown. A similar form of affirmation of judicial office is also proposed. The proposed forms of oath and affirmation of judicial office are to be found in the Seventh Schedule of the draft Bill.

The draft Bill confers authority upon the Chief Justice of Queensland, or a Judge of the Supreme Court of Queensland to administer the requisite oaths and affirmations to those judges and judicial officials specified in cl.12(1), i.e. Judges and Masters of the Supreme Court, District Court Judges, members of the Land Court, members of the Industrial Court, stipendiary magistrates, justices of the peace, and judicial officers directed by the Governor: see cl.12(2). The draft Bill also provides for stipendiary magistrates and justices of the peace to take the requisite oaths or affirmations before a Judge of the District Courts, stipendiary magistrates, or person authorised in that behalf by a writ of dedimum potestatem: see cl.12(3). The classes of person who are authorised to administer the oaths or affirmations to stipendiary magistrates or justices of the peace are more extensive than the classes enumerated in cl.12(2). This is because stipendiary magistrates, including persons appointed to act in that office, serve in relatively remote areas of the State. Also a large number of justices of the peace, in excess of 2,500, are appointed every year in Queensland.

QUEEN'S (OR KING'S) COUNSEL

Queen's (or King's) Counsel have traditionally taken the oath of allegiance and the oath of office. Section 2 of the statute 1 Geo.I stat.2 c.13 (1714) (Imp.) required persons who acted as a "Sergeant at Law, Counsellor at Law, Barrister, Advocate, Attorney, Solicitor, Proctor, Clerk or Notary" to take the oaths of allegiance, supremacy and abjuration. In addition, Queen's counsel were required to take

an oath of office. (16) In Queensland, Queen's Counsel have upon their appointment taken the oaths of allegiance and of office before the Full Court. The requirement to take these oaths is not imposed by any Queensland statute, or under the Regulations to be observed on the appointment of Queen's Counsel. (17)

The Commission considers that the requirement to take the oath or affirmation of allegiance, and the oath or affirmation of office (and the form of that oath or affirmation) should be provided by statute. Clause 13 of the draft Bill requires Queen's (or King's) Counsel, upon their appointment, to take the oaths or affirmations of allegiance and office. The form of the oath or affirmation of office is to be found in the Eighth Schedule of the Bill. The clause enables the Registrar or a Deputy Registrar of the Supreme Court, upon the direction of the court, to administer the oaths or affirmations that are required to be taken: see cl.13(2) of the draft Bill.

BARRISTERS AND SOLICITORS

It was earlier mentioned out that the statute 1 Geo.I stat.2 c.13 (1714) (Imp.) required barristers, attorneys, and solicitors to take the oaths of allegiance, supremacy and abjuration. An earlier statute 7 & 8 Will.III c.24 (1695) (Imp.) also required barristers and attorneys to take certain oaths, including the oath of allegiance. (18) This statute would have been received into the law of New South Wales as the preamble to the Oaths Act 1857 (N.S.W.) recites that oaths are taken "on the admission of barristers and attorneys". (19) This statute was repealed in Queensland by The Repealing Act of 1867 which was passed after The Oaths Act of 1867

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(16) See, "Report of the Oaths Commission" (Command 3885, 1867) p.66. The modern declaration of a Queen's Counsel in England is reproduced in W. Holdsworth, Vol. VI A History of English Law (2nd ed., 1973), p.682.

(17) See, Vol.IV Queensland Government Gazette, No.128 (Supp.) (November 24, 1865).

(18) See also, W.C. Bolland, "The Barristers' Roll", (1907) 23 Law Quarterly Review 438.

(19) See, Kahn v. Board of Examiners (Vict.) (1939) 62 C.L.R. 422, 432-433 per Rich J.

was enacted. The Oaths Act prescribed a form of oath of allegiance to be taken whenever any person was required to take the oath of allegiance. The oath of allegiance prescribed by the Oaths Act, therefore, superseded the requirement of a barrister or solicitor to take the oath of allegiance which may have been imposed by the New South Wales statute, or any Imperial statute.

The New South Wales or Queensland Oaths Act did not impose any requirement upon a barrister or solicitor to take the oath of office upon admission to these offices. The requirement that a barrister and solicitor must take the oath or affirmation of allegiance and the appropriate oath or affirmation of office is prescribed by Rules of Court made under s.11 of the Supreme Court Act of 1921 (20) which has long been considered to be a grant of ample power to modify the operation of existing legislation. (21) The Rules displace the statutory requirement under the Oaths Act to take the oath or affirmation of allegiance. The Rules of Court enable the court to excuse barristers and solicitors from taking the oath or affirmation of allegiance, and in the case of barristers also the oath or affirmation of office. (22) The Rules of Court do not prescribe the form of the oath and affirmation of office to be taken upon the admission of barristers and solicitors. The Commission considers that the form of the oath or affirmation of office of barristers and solicitors should be prescribed by statute.

Clauses 14 and 15 of the draft Bill require the oath or affirmation of allegiance, and the appropriate oath or

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(20) 12 Geo.V No.15 (Qld.).

(21) See, Tylors (Australia) Ltd. v. Macgroarty [1928] St.R.Qd. 371, 374 per Blair C.J. cited by Connolly J. in Re M.J. Hogan (unreported, Sup.Ct. (Qld.) (Full Court) Motion No.149 of 1987, 30 April, 1987, noted Q.L.R. 11 July, 1987).

(22) See, Barristers' Admission Rules 1975, r.42, Vol.CCL, Queensland Government Gazette, 1283 (December 6, 1975); Solicitors' Admission Rules 1968, r.72 Vol.CCXXVII, Queensland Government Gazette, 1530 (April 11, 1968) (as amended). See also, Nicholls v. Board of Examiners for Barristers and Solicitors [1986] V.R. 719.

affirmation of office to be taken upon the admission of barristers and solicitors respectively: see cls.14(1), cl. 15(1). The form of the oaths and affirmations of office of barristers and solicitors is contained in the Ninth Schedule and the Tenth Schedule respectively of the draft Bill. The draft Bill expressly preserves the operation of Rules of Court relating to the admission of barristers and solicitors: see cls.14(2), 15(2). There may be an argument that, in the absence of such savings provisions, the power of the court conferred by the Rules of Court to dispense with the requirement to take the oath or affirmation of allegiance has been abrogated. The draft Bill provides authority for the Registrar or a Deputy Registrar of the Supreme Court, upon the direction of the court, to administer the oaths or affirmations that are required to be taken: see cls.14(3), 15(3).

NOTARIES PUBLIC

Notaries are appointed by the Court of Faculties of The Archbishop of Canterbury. In considering an application for appointment as a notary public the Master of the Faculties attaches great weight to the views of the society of notaries practising in a district in which an applicant seeks to practise. (23) Originally the Master of the Faculties derived authority to issue a faculty to a person to practise as a notary in the British dominions or colonies beyond the seas under s.2 of the former Ecclesiastical Licences Act 1533 (Imp.). (24) Appointments are now made under the Public Notaries Acts 1801 (Imp.), (25) 1833 (Imp.), (26) and 1843 (Imp.). (27)

Notaries upon their appointment were required under various

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(23) See, Bailleau v. Victorian Society of Notaries [1904] p.180; Fay v. Victorian Society of Notaries [1909] p.15. See also, "Notaries Public", (August, 1987), Vol.7, No.7, The Proctor, p. 1.

(24) 25 Hen.VIII c.21 (Imp.).

(25) 41 Geo.III c.79 (Imp.).

(26) 3 & 4 Will.IV c.70 (Imp.).

(27) 6 & 7 Vict. c.90 (Imp.).

statutes to take certain oaths. Section 2 of the statute 1 Geo.I stat.2 c.13 (1714) (Imp.) required persons who held any civil or military office to take the oaths of allegiance, supremacy and abjuration. A "notary" was one of the office holders enumerated in that section. (28) The requirement of a notary to be duly sworn and enrolled before a court was imposed by s.1 of the Public Notaries Act 1801 (Imp.) which provides that no person in England is permitted to act as a public notary, or to do any notarial act, unless he has been duly sworn, admitted, or enrolled in the court wherein notaries have been accustomarily sworn. These statutory provisions, which provided authority for the swearing and enrolment of notaries, would have been part of the body of English statute law that was received into Queensland by virtue of s.20 of the Supreme Court Act 1867. (29) The operation of these statutes in Queensland was terminated by the Imperial Laws Application Act 1984.

In England the abovementioned statutes which provided for notaries to be sworn were later superseded. The oaths to be taken on the admission of a notary are now prescribed by s.7 of the Public Notaries Act 1843 (Imp.). That section requires a notary, before a faculty is granted to him, to take the oaths of allegiance and supremacy, and the oath prescribed by that section to faithfully exercise the office of a public notary. The requisite oaths were required to be taken before the Master of the Faculties, his surrogate or other proper officer.

After the enactment of the Promissory Oaths Act 1868 (Imp.) (30) a notary upon appointment was required to take the oath of allegiance prescribed by s.2 of that Act. The enactment of the Promissory Oaths Act also had the consequence that the oath of office of a notary was no longer required. That is because s.12 of that Act provided for a declaration to be substituted for an oath required upon appointment to an office. The Oaths Commissioners had earlier recommended that oaths of fidelity

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(28) See, p.32, ante.

(29) 21 Vict. No.23 (Qld.).

(30) 31 & 32 Vict. c.72 (Imp.).

should be retained in the case of judges and jurymen, but that all other oaths of fidelity should be abolished or changed into declarations. (31)

It is the practice in Queensland for a notary public to swear the oath of allegiance and make the requisite declarations of office and intention to practice as a notary before a Commissioner appointed by the Master of Faculties. The Master of Faculties usually issues a Commission to the Anglican Archbishop of Brisbane, a Coadjutor Bishop, the Dean of Brisbane, or a Judge of the Supreme Court of Brisbane (32) which authorises those officials to administer the oath of allegiance under the Promissory Oaths Act and the declarations which are endorsed on a notarial faculty. The usual practice is that the required oath and declaration is made before the Chief Justice or a senior Judge in Chambers. (33) Clause 16 of the draft Bill confers authority upon a Judge of the Supreme Court or a Commissioner appointed by the Master of Faculties to administer the oath or affirmation of allegiance, and the requisite declarations which are endorsed on a notarial faculty.

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(31) See, "Report of the Oaths Commission" (Command 3885, 1867), p.x.

(32) These designated officials are enumerated on one of the Commissions that was issued by the Master of Faculties in respect of a notary intending to practice in Queensland. See also, "Notaries Public", (August, 1987) Vol.7 No.7 The Proctor, p.1.

(33) There is a similar practice in Victoria: see E.W. Lawn, Manual for Judges' Associates (1973), pp. 142-143 (Quaere, the authority of an associate of a judge, who has not been issued a Commission, to administer the required oath and declarations).

CHAPTER SEVEN

OFFICIAL OATHS AND AFFIRMATIONS - MISCELLANEOUS PROVISIONS

This Chapter contains a general discussion of miscellaneous aspects of the law of official oaths and affirmations. One matter that is considered is the question of the amendment of the form of any oath of affirmation that is prescribed under State law to refer to the successor of the Sovereign. It is also appropriate to consider the circumstances in which a public officer is entitled to make an affirmation in lieu of taking an oath that is prescribed under State law to be taken upon appointment to an office. Other matters that are considered are the requirement for the subscription of any oath or affirmation, and a clause to ensure that any reference to the Governor in Part II of the draft Bill shall also refer to any of those officials who are appointed to administer the Government during the absence of the Governor.

NAME OF THE SOVEREIGN

Some of the forms in the Schedule of the draft Bill in this working paper contain the name of Her Majesty. Clause 16 of the draft Bill provides for the name of the Sovereign for the time being to be substituted for the name of Her Majesty where that name appears in an oath or affirmation contained in any of the forms. This clause is based upon s.10 of the Promissory Oaths Act 1868 (Imp.), (1) which has been adopted in other jurisdictions in Australia. (2)

Section 10 of the Promissory Oaths Act only applies to the form of oath prescribed under that Act. Legislative counterparts to that provision in Australia similarly only apply to the form of oath that is prescribed under the general statute relating to oaths. Clause 17 of the draft Bill has a more extensive operation. The provision applies to the form of any oath or affirmation prescribed by any statute that contains the name of Her Majesty.

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(1) 31 & 32 Vict. c.72 (Imp.).

(2) See, e.g., Oaths Act 1900 (1900, Act No.20) (N.S.W.) s.6; Oaths Act 1936 (No.2278 of 1936) (S.A.), s.12.

Clause 17 would obviate the necessity to enact amending legislation to amend a form of oath contained in any Act that contains the name of the Sovereign. An instance of such amending legislation is to be found in The Police Acts Amendment Act of 1953 (3) which repealed references to our "Sovereign Lord King George the Sixth" and substituted appropriate references to Her Majesty in the forms of oath for members of the police force and special constables that are prescribed by ss. 14 and 26 respectively of the Police Act of 1937. (4) In respect of the oath or affirmation of allegiance and office for justices of the peace, authority is given by s.10(3) of the Justices of the Peace Act 1975 (5) to substitute the name of Her Majesty's successor for the reference to Her Majesty in a form of oath or affirmation. That subsection does not authorise the substitution in the form of any other successor to the Crown. No similar provision is contained in the Law Courts and State Buildings Protective Security Act 1983, (6) which appears to be derived from the Police Act, to authorise the substitution of the name of the successor to Her Majesty for the name of Her Majesty in the forms of oath prescribed by ss. 13 and 14 of the Act.

AFFIRMATION

It is the trend of modern legislation to enable a public officer to take either an oath or affirmation of office upon their appointment to an office. A justice of the peace may under s.10 of the Justices of the Peace Act 1975 take either an oath or an affirmation of allegiance and office. This legislative trend is evident in cases where a public officer is required to take an oath or affirmation of confidentiality. This is the case in respect of appointment to the office of the Parliamentary Commissioner for Administrative Investigations, or the Ombudsman. The Ombudsman is required to take an oath or affirmation of office

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(3) 2 Eliz.II No.12 (Qld.).

(4) 1 Geo.VI No.12 (Qld.).

(5) No.51 of 1975 (Qld.).

(6) No.22 of 1983 (Qld.)

and confidentiality. Section 9 of the Parliamentary Commissioner Act 1974-1976 (7) provides as follows:

> "9. Oath of Commissioner and Acting Commissioner. (1) Before entering upon the exercise of the duties of their respective offices the Commissioner and the Acting Commissioner shall each take an oath or affirmation that he will faithfully and impartially perform the duties of his office, and that he will not, except in accordance with this Act, divulge any information received by him under this Act.
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> (2) The oath or affirmation shall be administered by the Speaker of the Legislative Assembly."

An officer of the Commissioner is also required to take a similar oath or affirmation before the Commissioner pursuant to s.10(4) of the Parliamentary Commissioner Act. Legislation relating to the Police Complaints Tribunal, (8) adoptions, (9) and racing and betting, (10) simply requires a public officer to take an oath or make an affirmation of confidentiality.

Some statutes which require a public officer to take an oath upon appointment to an office do not make express provision for an officer to make an affirmation in lieu of taking an oath. This is so in respect of a number of statutes. For instance, the Registrar of Titles and Deputy Registrar of Titles are required to take an oath of office before a Judge of the Supreme Court pursuant to s.6 of the Real Property Act 1861-1986. (11) Constables and special constables are required to take the oath of office prescribed by ss.14 and 26 respectively of the Police Act

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(7) No.19 of 1974, as amended (Qld.)

(8) See, Police Complaints Tribunal Act 1982 (No.8 of 1982), s.4(3), (Qld.).

(9) See, The Adoption of Children Regulations 1965 (as amended), First Schedule, Forms 17 and 18 (Vol.CCLXXXIV, Queensland Government Gazette, p.1147 (March 14, 1987)).

(10) See Racing and Betting Act 1980-1983 (No.43 of 1980), s.10(2)(Qld.).

(11) 25 Vict. No.14, as amended (Qld.).

1937-1985. (12) A shorthand reporter and recorder must take an oath under s.7 of the Recording of Evidence Act 1962-1978 (13) to faithfully transcribe or cause to be transcribed all legal proceedings recorded. (14) Protective security officers are upon appointment required to take the oaths of office prescribed by ss. 13 and 14 of the Law Courts and State Buildings Protective Security Act. (15)

It has been seen that a number of statutes enable a public officer to either swear an oath of office or make an affirmation of office. However, the fact that a statute in a particular instance requires an officer to swear an "oath" does not preclude an officer from making an affirmation in lieu of an oath. This is because s.36 of the Acts Interpretation Act 1954-1977 (16) provides, in the absence of a contrary intention, that the words "oath" and "swear" when used in a statute include an affirmation in cases where a person is entitled to affirm.

There seems to be a view that a public officer is not permitted to affirm in cases where a statute provides that an oath must be taken upon appointment to an office. This matter did not directly arise for consideration in R. v. Commissioner of Police, ex parte Boe. (17) The media gave considerable publicity to the commitment of the police probationary in that case to Buddhism, and to statements that the probationary was precluded

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(12) 1 Geo.VI No.12, as amended (Qld.). The obligation imposed upon a constable under the oath of office under the Police Act was recently considered in Thomas v. Lewis & Gunn (unreported, Sup. Ct. (Qld.), Kelly S.P.J., October 5, 1987).

(13) No.33 of 1962, as amended (Qld.).

(14) See, R. v. Willmot; ex parte Attorney-General [1987] 1 Qd.R. 53, 57 per Williams J.

(15) No.22 of 1983 (Qld.).

(16) 3 Eliz.II No.3, as amended (Qld.).

(17) [1987] 2 Qd.R. 76.

from taking the oath prescribed by the Police Act. (18) However, this case was concerned with the applicability of the rules of natural justice. The case was not decided on the question as to whether the probationary could take the oath prescribed by law.

In examining the question of whether a public officer may make an affirmation in lieu of taking an oath which is prescribed by statute it is necessary to examine a number of provisions in the Oaths Act. Section 5 of the Oaths Act provides:

> "5. Affirmation in lieu of oath. Every person who now is or shall hereafter be by law entitled to make affirmation in lieu of an oath may make affirmation in the form hereinbefore prescribed with the words "solemnly and sincerely promise and affirm" substituted for the words "sincerely promise and swear"."

Section 5 of the Oaths Act refers to a person who "now is or shall hereafter be by law entitled to make affirmation in lieu of an oath". The entitlement of a person to affirm under s.5 refers to a person whose entitlement to affirm is derived from ss. 17 to 19 of the Oaths Act. (19) However, s.5 in referring to the "form hereinbefore prescribed" is clearly limited in operation to the forms of oaths of allegiance and oath of judicial office prescribed in the preceding sections of the Oaths Act. Section 5, therefore, does not have any application to any form of oath prescribed under any statute. It might be mentioned that s.5 of the Oaths Act is similar to s.5 of the Constitution Act which permits a member of the Legislative Assembly to make an affirmation only when he is "authorised by law to make an affirmation". The authority of a member of the Legislative Assembly to make an affirmation must be derived from ss. 17 to 19 of the Oaths Act. The Oaths Act was assented to on the same date as assent was given to the Constitution Act.

The general entitlement of a person to make an affirmation instead of swearing an oath prescribed by statute can only be derived from s.17 of the Oaths Act which provides:

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(18) See, Courier-Mail, May 8, 1986; Courier-Mail May 9, 1986; Courier-Mail, May 12, 1986; Telegraph, May 13, 1986; Telegraph, August 5, 1986; Courier-Mail, August 6, 1986; Courier-Mail, October 7, 1986; Telegraph, November 7, 1986; Courier-Mail, November 8, 1986.

(19) See, R.F. Carter, Criminal Law of Queensland (5th ed., 1979), p.873.

"17. Affirmation instead of oath in certain cases. If any person called as a witness or required or desired to make an oath affidavit or deposition objects to being sworn it shall be lawful for the court or judge or other presiding officer or person qualified to administer oaths or to take affidavits or depositions upon being satisfied of the sincerity of such objection to permit such person instead of being sworn to make his or her solemn affirmation in the words following videlicet -

"I A.B. do solemnly sincerely and truly affirm and declare that the taking of any oath is objectionable to me and I do also solemnly sincerely and truly affirm and declare, etc." -

which solemn affirmation shall be of the same force and effect as if such person had taken an oath in the usual form and the like provisions shall apply also to every person required to be sworn as a juror.

The objection of being sworn may be based on -
(a) an absence of religious beliefs;
(b) conscientious grounds;
(c) such other grounds as are considered reasonable by the court or judge or other presiding officer or person qualified to administer oaths or to take affidavits or depositions". (20)

Section 17 of the Oaths Act originated from s.20 of the Common Law Practice Act 1854 (Imp.) (21) which enabled an affirmation to be taken "if any person called as a witness or required or desired to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn". It will be seen that s.20 of the Common Law Practice Act is not as extensive in operation as s.17 of the Oaths Act which also enables a person who is required to take an "oath" to make an affirmation. Section 17 of the Oaths Act also includes a reference to persons who are qualified to "administer oaths".

The operation of s.17 of the Oaths Act ex facie enables a person to affirm where he is required to take an oath upon an appointment. It is clear that s.17 of the Oaths Act is not confined in operation to curial proceedings, the form of affirmation prescribed by that provision is not exclusively referable to such proceedings. The provision appears in a statute that contains other provisions which relate to the oath of allegiance, and judicial oaths of office. Indeed it is clear that

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(20) As amended by the Oaths Act and Another Act Amendment Act 1981 (No.6 of 1981) (Qld.), s.5.

(21) 17 & 18 Vict. c.125 (Imp.).

s.17 of the Oaths Act originally enabled a person to make an affirmation instead of taking those oaths. (22) The Oaths Act is, as indicated by the long title of the statute, "An Act to Consolidate and Amend the Laws Relating to Oaths". The statute, unlike other statutes relating to oaths, (23) is not confined to the administration of oaths in courts of justice. The presence in the Oaths Act of ss. 18 and 19 does not limit the operation of s.17 of that Act. Those provisions merely reflect legislative developments at Westminister whereby dissenting religious groups were given the right to affirm on all occasions. (24)

It would appear that a public officer may make an affirmation, upon appointment to an office, where he is required to take an oath of office that is prescribed by statute. His entitlement to make an affirmation in lieu of taking an oath prescribed by law is derived from s.17 of the Oaths Act. The law, however, requires that the person who administers an oath must be satisfied of the sincerity of the objection of a person swearing on oath upon the grounds enumerated in s.17 of the Act before he permits an affirmation to be made. It is noted that an academic board and senior police officers considered the religion of the police probationary in Boe's case and his capacity to take the oath prescribed by the Police Act. (25) However, any opinions held by his superior officers as to his ability to swear an oath would have been of no relevance. This is because s.17 makes it quite clear that it is the person who is qualified to administer the oath who must be satisfied as to the sincerity of a person objecting to being sworn before permitting an affirmation to be

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(22) See, R.F. Carter, Criminal Law of Queensland (5th ed. 1979), p.873.

(23) Cf. The Oaths Act Amendment Act of 1884 (48 Vict. No.19) (Qld.); The Oaths Act Amendment Act of 1891 (55 Vict. No.14) (Qld.).

(24) See, M. Weinberg, "The Law of Testimonial Oaths and Affirmations", (1976) 3 Monash Law Review 25, pp.34-35. See also, Clarke v. Bradlaugh (1881) 7 Q.B.D. 38, 58-59 per Lush J.

(25) See, R. v. Commissioner of Police, ex.p. Boe [1987] 2 Qd.R.76, 94 per Macrossan J., 110 per Carter J.

made. As Lush J. in Clarke v. Bradlaugh (26), in discussing the operation of s.20 of the Common Law Practice Act, which was confined to court proceedings, remarked:

> "a person called as a witness...no matter what his religious creed might be, if he satisfied the judge that he had a conscientious objection to take an oath, was permitted to give his evidence upon the sanction of an affirmation only". (27)

The Queensland Oaths Act was enacted prior to the decision in Clarke v. Bradlaugh (28) where an informer sought to recover a pecuniary penalty from the defendant for voting and sitting as a member in the House of Commons without taking the oath of allegiance. The Court of Appeal held that the defendant was a person who, for want of religious belief, was not entitled by the Parliamentary Oaths Act 1866 (Imp.), (29) or the Promissory Oaths Act 1868 (Imp.), to make and subscribe a solemn declaration. The House of Lords later held that the pecuniary penalty could be sued for only by the Crown. (30)

The Commissioners who drafted the Queensland Oaths Act appear to have anticipated, to some extent, the problems that arose from the decision in Clarke v. Bradlaugh (31) in which it was held that the Westminster Parliament did not adopt, for the purpose of parliamentary oaths, the relevant provision of the Common Law Practice Act. There does not appear to have been any report by the Commissioners upon the draft Bill that was prepared by them. The only official comments are those of the Hon. C. Lilley, M.L.A., Attorney-General, who remarked during the passage of the Acts Shortening Act: "The Oaths Bill contains two new alterations merely for the ease of the consciences of persons who have

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(26) (1881) 7 Q.B.D. 38

(27) Id., 60.

(28) (1881) 7 Q.B.D. 38.

(29) 29 Vict. c.19 (Imp.).

(30) (1883) 8 App.Cas. 354.

(31) Supra.

scruples". (32) It has been seen that one of those alterations would have been the form of s.17 of the Oaths Act which departed in a number of respects from the form of s.20 of the Common Law Practice Act. Section 17 of the Oaths Act is not limited in its operation to oaths which are made under that Act.

The decision in the Bradlaugh case caused such a popular demand for reform to enable persons who possessed no religious belief to sit in the House of Commons. After that decision members of the House of Commons who objected to being sworn could avail themselves of s.1 of the Oaths Act 1888 (Imp.) (33) which provided that a solemn declaration may be made in lieu of an oath by every person who states, on the ground of such objection, either that he has no religious belief or that the taking of an oath is contrary to his religious belief. (34) No corresponding legislation was at the time of that decision enacted in Queensland. The provisions of s.2 of The Oaths Act Amendment Act of 1884 (35) refer only to legal proceedings.

Some forms of affirmation that are taken in lieu of an official oath contain the words "So help me God". For example, the Clerk of Parliament has advised the Commission that the forms of affirmation that are in use for the purpose of compliance with s.5 of the Constitution Act 1867 (36) end with the words "So help me God". This form of affirmation has been in use in the Legislative Assembly since the late nineteenth century. The reason why those quoted words are included in many forms of affirmation is because s.17 of the Oaths Act could only originally be invoked by a person who possessed some religious belief. (37) This was evident from the form of affirmation that

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(32) Vol.5 Queensland Parliamentary Debates, p.544 (October 22, 1867).

(33) 51 & 52 Vict. c.46 (Imp.).

(34) See, Sir T. Erskine May's Parliamentary Practice (13th ed., 1924), pp.160-161.

(35) 48 Vict. No.19 (Qld.).

(36) 31 Vict. No.38 (Qld.).

(37) See, R. v. Craine (1898) 9 Q.L.J. 47; Narne v. Brisbane Tramways Co. [1914] Q.W.N. 6. See also, Maden v. Catenach (1861) 7 H. & N. 360 (158 E.R. 512).

was originally prescribed by s.17 which required a person who desired to affirm to "declare that the taking of any oath is according to my religious belief unlawful". As Chubb J. remarked in R. v. Craine (38):

> "The form of jurors' oath "So help you God", given in The Oaths Act, s.22, and of affirmations (ss.17, 18, 19), clearly apply only to persons having a religious belief". (39)

An amendment to s.17 of the Oaths Act by the Oaths Act and Another Act Amendment Act 1981 (40) permitted an affirmation to be made under that section by a person who has no religious beliefs. The Hon. S.S. Doumany, M.L.A., Minister for Justice and Attorney-General, remarked during the passage of this Act:

> "It has been brought to my notice that the form of affirmation provided in the Act does not allow for a person without religious beliefs to take an affirmation. ... The Bill provides for a slight amendment to the form of affirmation to be administered where a person objects to being sworn by removing reference to religious beliefs in the form". (41)

Since 1981 the provisions of s.17 of the Oaths Act have enabled a public officer who is required by statute to swear an oath upon appointment to an office to make an affirmation in lieu of an oath where that person objects to swearing an oath upon the ground enumerated in that section. However, that provision still requires that a person who administers an oath must be satisfied of the sincerity of the objection that a person has to swear an oath. A person may have a religious or philosophical objection to swearing an oath. These matters are personal to the officer concerned. There can be no possible benefit in requiring an inquiry to be made into these matters.

The Commission considers that a public officer who is required by statute to take an oath of office upon an appointment to an office should be permitted as of right to make an

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(38) (1898) 9 Q.L.J. 47.

(39) Id.

(40) No.61 of 1981 (Qld.).

(41) See, Vol.284 Queensland Parliamentary Debates, p.1436 per Hon. S.S. Doumany M.L.A., Minister for Justice and Attorney-General (August 4, 1982).

affirmation instead of taking an oath. (42) Clause 18 of the draft Bill provides the necessary authority to enable an affirmation to be made instead of taking an oath. The clause does not, unlike s.17 of the Oaths Act, require a person who desires to make an affirmation to recite the grounds of his objection to swearing an oath.

GOVERNOR

Clause 19 of the draft Bill defines the term "Governor" to include any of the persons who are appointed to administer the Government in the absence of the Governor. The clause ensures that the Lieutenant-Governor, the Deputy Governor, or Administrator of the Government can exercise the authority that is vested in the Governor under Part II of the Bill.

Clause IX of the Letters Patent of February 14, 1986 that constitutes the office of Governor of the State of Queensland empowers the Governor to appoint a Lieutenant-Governor. (43) This clause is now restated as s.9 of the Constitution (Office of Governor) Act 1987. (45) The clause accordingly includes reference to the Lieutenant-Governor in the event that an appointment is made to that office. (44) In the event that the Governor is to be absent from the seat of Government for a short period, it is the usual practice for the Chief Justice or a senior Judge to assume the administration of the Government pursuant to s.9 of the Constitution (Office of Governor) Act 1987 (formerly under a Dormant Commission issued under clause VIII of the Letters Patent), (46) or be appointed Deputy Governor pursuant to s.10

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(42) Cf., Oaths Act 1936 (No.2278 of 1936), s.13 (S.A.); Evidence Act 1910 (1 Geo.V No.20), s.126 (Tas.).

(43) See, Letters Patent constituting the office of the Governor of the State of Queensland, cl.IX (February 14, 1986) Vol.CCLXXXI, Queensland Government Gazette, p.906 (March 8, 1986).

(44) The last Lieutenant-Governor to hold office in Queensland was the Hon. F.A. Cooper, a former Premier of Queensland, who held office until his death on 30 November 30, 1949: see C. Lack, Three Decades of Queensland Political History (1960), p.13 (n.13).

(45) No.73 of 1987 (Qld.).

of that Act (formerly clause IX of the Letters Patent). (46)

SUBSCRIPTION OF OATH OR AFFIRMATION

The existing practice where an oath or affirmation is taken upon appointment to an office is for the appointed public officer to also subscribe the form of any oath or affirmation. There is no general statutory requirement, apart from s.4 of the Constitution Act, for an officer to subscribe the form of any oath or affirmation. Clause 20 of the draft Bill provides authority for the existing practice to be continued. In some cases it might be desirable to have, as a matter of record, some document which evidences that a public officer has made the requisite oath or affirmation upon appointment to an office. The clause provides that any oath or affirmation administered before a Judge may be certified and recorded by the associate or clerk of the Judge. (48)

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(46) See, Vol.CCLXXXVI, Queensland Government Gazette, pp.459-460 (October 5, 1987).

(47) See, Vol.CCLXXXIV, Queensland Government Gazette, pp.1399-1400 (March 30, 1987).

(48) See, Oaths Act 1867-1981, s.32.

CHAPTER EIGHT

STATUTORY DECLARATIONS

Prior to the enactment of the Statutory Declarations Act 1835 (Imp.) (1) commerce was impeded by a frequent requirement to swear various oaths, which were mainly required to secure the revenue, during the course of transactions. In 1776 Adam Smith observed that import duties, which were imposed on most imported goods, were assessed upon the value of the goods as declared upon the oath of an importer. (2) It was not uncommon for affidavits to be sworn before a chest of tea could be unloaded from a ship in the Port of London, and transported to a warehouse. The requirement to take an oath was, at that time, not only lightly regarded, but also unnecessary inconvenience was caused through having to undergo the various formalities. (3)

From the outset the Statutory Declarations Act provided for the admissibility of statutory declarations in legal proceedings. The Statutory Declarations Act provided for the unqualified reception in courts of Her Majesty's colonies of statutory declarations made before justices of the peace. (4) Prior to the enactment of the Statutory Declarations Act statutes had been enacted to facilitate the recovery of debts in British colonies. The statute 5 Geo.II c.7 (1731) (Imp.) provided for the recovery of debts in the North American plantations. (5) A similar statute 54 Geo.III c.15 (1813) (Imp.) facilitated the recovery of debts in the colony of New South Wales. Each statute made provision for debts to be proved by affidavits which were admissible in the courts of the respective colonies. Section 15 of the Statutory Declarations Act provided for declarations to be substituted for the oaths and affidavits required under these statutes.

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(1) 5 & 6 Will.IV c.62 (Imp.).

(2) See, Adam Smith, The Wealth of Nations (1952 ed.), Uni. of Chicago, p.389 (Book Five, Art.IV).

(3) See, Vol.17 Halsbury's Statutes (4th ed., 1986), p.73.

(4) See, Vol.17 Halsbury's Statutes (4th ed., 1986), p.76.

(5) See, W. Holdsworth, Vol.XI A History of English Law (1938), p.88.

The Colonial Affidavits Act 1859 (Imp.) (6) later provided that s.15 of the Statutory Declarations Act would no longer apply to the then colony of Victoria, and that colonial legislation could modify the operation of the section.

The Statutory Declarations Act provided for a solemn declaration to be made in lieu of an oath in certain instances. The Act did not extend to the oath of allegiance (s.6), nor to oaths required to be taken in any domestic judicial proceeding (s.17). This statute was not an Imperial statute that was directly received into the law of the colonies of New South Wales, or Queensland. This was because the statute was enacted after the Australian Courts Act 1828 (Imp.). (7) The use of statutory declarations was sanctioned in New South Wales by the Oaths Act 1854 (N.S.W.). (8) This colonial statute was indistinguishable from the Statutory Declarations Act. Essential provisions of the New South Wales statute are to be found in the Queensland Oaths Act 1867-1981. (9) Some of those provisions are now outmoded, see, e.g., ss. 6, 9, 10 and 15. Authority to make a statutory declaration and the form of that declaration are prescribed by ss.13 and 14 respectively of the Oaths Act. These provisions essentially reproduce s.19 and the Schedule to the Statutory Declarations Act. The term "statutory declaration" is to be found in various Queensland statutes. Section 36 of the Acts Interpretation Act 1954-1977 (10) provides that the terms "statutory declaration" or "solemn declaration" means a declaration made under the authority of any Act. Section 104 of the Evidence Act 1977 (11) provides that the term "affidavit" includes a statutory declaration. That provision is contained in Part VII of the Evidence Act which relates to the reproduction

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(6) 22 and 23 Vict. c.12 (Imp.).

(7) 9 Geo. IV c.83 (Imp.).

(8) 9 Vict. No.9 (N.S.W.).

(9) 31 Vict. No.12, as amended (Qld.).

(10) 3 Eliz.II No.3 (Qld.).

(11) No.47 of 1977 (Qld.).

of documents. These definitions from the Acts Interpretation Act, and the Evidence Act do not directly refer to a statutory declaration made under the Oaths Act.

Various statutes enable a public officer or authority to require an applicant to complete a statutory declaration to verify the accuracy or truthfulness of information that he provides, or has provided to that officer or authority. Some statutes merely enable a statutory authority to require a statutory declaration. (12) However, it is modern legislative practice in Queensland to enable an authority to require a declaration under the Oaths Act. (13) This practice clarifies the source of authority to make a declaration. An example of this modern legislative practice is to be found in s.14 of the Psychologists Act 1977 (14) which provides:

> "37. Statutory declarations. (1) For the purposes of this Act, the Board may-
> (a) demand and accept a declaration under The Oaths Acts 1867 to 1960 from any person for the purpose of this Act;
> (b) require an applicant to verify by way of declaration under The Oaths Acts 1867 to 1960 (the taking of which being hereby authorised) information furnished to the Board in respect of his application for registration.
> (2) A prescribed form may be, in whole or in part, in the form of a statutory declaration."

Clause 21 of the draft Bill provides authority for an attesting witness to take a statutory declaration and the form of that declaration: see cl.21(1). The clause authorises a justice

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(12) Medical Act 1939-1981 (3 Geo.VI No.10) as amended, s.12 (Qld.); Industrial Conciliation and Arbitration Act 1961-1983 (10 Eliz.II No.25), as amended ss. 74(3), 76(2)(d), 137 (Qld.).

(13) Stamp Act 1894-1986 (58 Vict. No.8) as amended, s.16(1)(c)(Qld.); Trusts Act 1973-1986 (No.4 of 1973), s.163 (Qld.); Psychologists Act 1977 (No.15 of 1977), s.14 (Qld.); Builders Registration and Home-Owners' Protection Act 1979-1982 (No.69 of 1979), s.91(1)(c) (Qld.).; Such a provision was formerly contained in the Real Property Act 1861-1986 (25 Vict. No.14), s.48. Section 48 was inserted in the Real Property Act by the Real Property Act Amendment Act 1980 (No.38 of 1980). This section was later repealed by the Stamp Act and Another Act Amendment Act 1985 (No.90 of 1985).

(14) No.15 of 1977 (Qld.).

of the peace, notary public, barrister or solicitor to be attesting witnesses. These classes of person are presently authorised to take and receive a statutory declaration under s.13 of the Oaths Act. Some other States have adopted the practice that has prevailed in England since 1889 of appointing special commissioners for oaths. (15) This development has never been adopted in Queensland. More than 44,000 justices of the peace reside in Queensland. These officials have essentially been appointed as justices so that they may be attesting witnesses. The Commission does not propose any change to the existing practice. Whether or not this existing infrastructure should be dismantled and replaced is really a policy question.

The Commission has continued the practice of requiring that a statutory declaration be attested. In 1978 the Law Reform Commission of Western Australia in the Report on Official Attestation of Forms and Documents (16) recommended that provision be made for a unattested statutory declaration. The Commission stated that the principal arguments against the requirement that information in forms and documents be provided by an attested statutory declaration are those of delay and convenience. A person in a remote area may not have ready access to a person before whom a statutory declaration may be made. (17) These difficulties do not appear to be present in Queensland which has a large number of justices of the peace. The Department of Justice periodically publishes the names and addresses of justices of the peace. The Standing Committee of Attorneys-General did not recommend the implementation of the report. The Government of Western Australia has decided not to implement the recommendations of the Commission "on the basis that there remains a point in the case of a number of documents to stress the need for special

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(15) See, Commissioners for Oaths Act 1889 (52 & 53 Vict. c.10) (Imp.).

(16) Project No.28 (November 28, 1978). A similar recommendation had earlier been made by the Law Reform Commission of British Columbia: See, Extra-judicial Use of Sworn Statements (L.R.C. 27, 1976).

(17) Id., p.9, para. 1.19.

care". (18)

Attestation of a statutory declaration is generally required in all Australian jurisdictions which have adopted this requirement of the Statutory Declarations Act. (19) The Commission does not recommend any departure from that practice. It appears that the Standing Committee, in order to preserve uniform practice, have appeared to accept the view that benefits that flow from attestation outweigh the occasional practical inconvenience that sometimes results from a person having to find an attesting witness. Attestation could be regarded as facilitating proof of the prosecution case of the making of a false declaration in a prosecution. There may also be an argument that a declarant may be less likely to make an untrue statement before an attesting witness.

The Commission considers that wherever any statute requires a declaration to be made it should be evident that the declaration is required under the Oaths Act. Accordingly, the draft Bill provides that whenever the terms "declaration", "solemn declaration" or "statutory declaration" are used in any Act those terms should, in the absence of any contrary intention, be construed as referring to a declaration under the Oaths Act: see cl.21(2).

REGULATIONS

Some regulations contain prescribed forms which are in the form of a statutory declaration. An express provision contained in s.37(2) of the Psychologists Act, which has already been referred to, enables a prescribed form to be in the form of a statutory declaration. (20) Such a provision is necessary in

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(18) See, Parliamentary Debates (Leg.Cl.) (W.A.), p.65 (April, 1 1987) per Hon. J.M. Berinson, Attorney-General.

(19) See, e.g., Oaths Act 1900 (No.20 of 1900), s.21(1) (N.S.W.); Evidence Act 1958 (No.6246), s.107 (Vict.); Oaths Act 1867-1981 (31 Vic. No.12), s.13 (Qld.); Oaths Act 1936 (No.2278 of 1936), s.25 (S.A.); Evidence Act 1906 (28 of 1906), s.106 (W.A.); Evidence Act 1910 (1 Geo.V No.20), s.132 (Tas.); Statutory Declaration Act 1959 (No.52 of 1959), s.8 (Cth.).

(20) No such provision is contained in s.10 of the Real Property Acts and Other Acts Amendment Act 1986 (No.26 of 1986) (Qld.) which was enacted prior to the proclamation of the Real Property Regulations 1986 which prescribe forms which contain solemn declarations under the Oaths Act.

view of the decision in the High Court in Grech v. Bird (21) in which it was held that an express enabling power is necessary to enable a prescribed form to be in the form of a statutory declaration. In that case regulations which required returns to be accompanied by a statutory declaration were declared to be invalid. The use of a statutory declaration under the New South Wales Oaths Act made a person liable for a greater penalty than that permitted by the relevant Act for a breach of the regulations. (22)

AFFIDAVITS

The Commission has given consideration to the practice of requiring affidavits to be sworn by deponents. It is common for Rules of Court to provide for evidence in support of motions and summonses to be given on affidavit. In Queensland, the Rules of the Supreme Court provide that the jurat of an affidavit must state that it is sworn by the deponent: see R.S.C. 0.41 r. 6. Provision is also made by those rules for a solemn affirmation or declaration to be made: see R.S.C. 0.41 r. 10. The District Court Rules and Magistrates Court Rules make similar provision for evidence to be given by affidavit: see D.C.R., r. 214; M.C.R., r. 200(1). Section 3 of the Oaths Act Amendment Act 1891-1974 (23) provides that an affidavit may be sworn before a justice of the peace, or a barrister or solicitor of the Supreme Court. (24)

There are instances in the community where affidavits are taken without administering the requisite oath to a deponent. The failure of a deponent to properly swear an affidavit has recently been discussed in South Australia. In English v. Legal Practitioners Complaints Committee (25) a process server attended before a legal practitioner to swear an affidavit of service by him of a summons. The process server, who was well known to the

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(21) (1936) 56 C.L.R. 228.

(22) See, D.C. Pearce, Delegated Legislation (1977), p.124.

(23) 55 Vict. No.1891, as amended (Qld.).

(24) Section 3 was inserted in the Oaths Act Amendment Act 1891-1974 by the Oaths Act Amendment Act 1974 (No.23 of 1974) (Qld.).

(25) (1986) 31 S.A.S.R. 217.

practitioner, signed his name and acknowledged his signature inthe presence of the practitioner. The practitioner then signed his name, as a commissioner for taking affidavits, in the jurat clause which purported to state that the affidavit had been sworn before him although no oath was administered. In these circumstances Johnston J. dismissed an appeal from the Legal Practitioners Complaints Committee that found the practitioner to have been guilty of unprofessional conduct, and reprimanded the practitioner. The Queensland Law Society Inc. has publicised this decision through its continuing legal education service. (26)

In English v. Legal Practitioners Committee (27) Johnston J. discussed the consequences of an affidavit that has been purportedly made without administering the necessary oath to a deponent. His Honour remarked:

> "In order to make out a case of perjury in relation to an affidavit, the prosecution must establish as one of the elements of the charge that the oath was properly administered. If this is not done, the charge fails no matter how deliberately false the statement may have been, no matter that it was used and relied upon by others, and no matter how much harm may have been caused to some third party by reason of reliance on an apparently sworn document". (28)

The Commission has been advised of an instance where a prosecution for perjury failed in a case where it was shown that no oath was in fact administered to a deponent. An essential element of the crime of perjury under 123 of The Criminal Code is that an oath, or other sanction was administered by a competent authority. (29) Maintaining the present practice would enable those who make false statements in a unsworn affidavit to evade prosecution.

In November, 1977 the Senate Standing Committee on Constitutional and Legal Affairs in their report on The Evidence (Australian Capital Territory) Bill 1972 (30) adverted to the fact that affidavits are rarely properly sworn. The Committee

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(26) See, (August, 1987) Vol.3 No.8 C.L.E. Bulletin.

(27) Supra.

(28) (1986) 41 S.A.S.R. 217, 225.

(29) See, R. v. Shaw (1911) 6 Cr. App. R. 103.

(30) The Parliament of the Commonwealth of Australia, Parliamentary Paper No.237/1977.

commented:

> "22. Statutory declarations and affidavits (affidavits are written declarations made under oath), are usually made before an official such as a Justice of the Peace or a Commissioner for Affidavits. In the experience of the Committee this practice is rarely undertaken with the required formality, with the result that all the requirement seems to achieve is inconvenience to the person who wishes to make the affidavit or statutory declaration in finding an appropriate qualified person to witness the document.
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> 23. The Committee considers that in the case of all written documents where an undertaking to tell the truth is required, (including documents used in court proceedings), a simple and clearly worded solemn undertaking to tell the truth, which is backed by legal sanction for telling untruths, would be the most effective means of ensuring that the truth is told. (This would mean, of course, that the distinction between statutory declarations and affidavits would disappear). The Committee believes that it would be sufficient that such written declarations should be witnessed by any adult person." (31)

The Commission invites comment on the question of whether there should be a requirement that affidavits should be continued to be sworn. One alternative is that affidavits should be verified upon solemn declaration. It may be argued that the present practice brings the law into contempt, and detracts from the solemnity of the administration of an oath. Last century, the Oaths Commissioners observed: "We believe that every requirement of an unnecessary oath tends to detract from the solemnity of necessary oaths". (32)

This suggestion is not without precedent. It has already been seen that the Statutory Declarations Act 1835 (Imp.) originally provided for the reception in colonial courts of declarations instead of affidavits. There is no compelling reason why there should be a requirement for an affidavit to be made upon oath. Providing for an affidavit to be made under solemn declaration would not present any difficulties for prosecuting a person for perjury. Section 123 of The Criminal Code provides that a statement must be made "on oath or under some sanction

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(31) Id., p.6

(32) "Report of the Oaths Commission" (Command 3885, 1867), p.ix.

authorised by law". See also, s.193 of The Criminal Code which relates to false statements required to be on oath or solemn declaration.

Parliament has already sanctioned the use of a declaration under the Oaths Act to verify a statement tendered in committal proceedings under s.110A of the Justices Act 1886-1979. (33) This practice of verifying these statements has occurred without any difficulty or criticism for more than a decade. There could, therefore, be no objection to the use of a declaration to verify an affidavit or any deposition in civil proceedings. It is pointed out that all persons, irrespective of their religious beliefs, would use the same form of statutory declaration. At present a person making an affidavit who objects to being sworn is required under s.17 of the Oaths Act to declare that the taking of an oath is objectionable. Clause 23 of the draft Bill provides for an affidavit to be verified upon solemn declaration made under the Oaths Act.

Federal Jurisdiction. The Commission has given consideration as to whether the proposed repeal of s.3 of the Oaths Act Amendment Act 1891-1974 would have implications in respect of affidavits that are presently taken for the purpose of proceedings in courts exercising federal jurisdiction. Section 12 of the Evidence Act 1905 (Cth.) (34) provides that affidavits for use in the High Court or any court exercising federal jurisdiction may be sworn before any justice of the peace without the issue of any commission for taking affidavits. Therefore the repeal of s.3 would not abrogate the authority of a justice of the peace to administer an oath to a person who swears an affidavit for the purpose of proceedings in a court exercising federal jurisdiction. If the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs are implemented then the practice of swearing affidavits, for the purpose of such proceedings, would cease in any event.

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(33) 50 Vict. No.17 as amended (Qld.). Section 110A was inserted in the Justices Act by the Justices Act and Another Act Amendment Act 1974 (No.25 of 1974) (Qld.).

(34) No.4 of 1905, as amended (Cth.).

FALSE DECLARATION

Clause 24 of the draft Bill provides for a summary offence of making a declaration knowing that declaration to be false in a material particular. This provision is derived from s.27(1) of the Oaths Act 1936 (S.A). (35) In R. v. Davies (36) Wells J. discussed the meaning of the words "material particular". His Honour remarked:

> "it seems to me that a material particular is one that goes to the subject matter of the declaration in the sense that it is of such significance and importance that, if stated incorrectly to the degree proved by the evidence in the case under consideration, it directly alters the essential meaning and character, if not of the whole declaration, then at least, of the portion of the declaration of which that particular forms a part". (37)

There are a number of matters which must be proved at present before a crime under s.193 of The Criminal Code can be established. The presence of a declarant before an attesting witness is an essential prerequisite of a valid declaration. In R. v. Schultz (38) the appellant was charged with wilfully making a false declaration. The evidence taken at the trial disclosed that the declaration was filled in and signed by the accused and then left by him on the desk of the commissioner for oaths, who was not present at the time. The appellant later met the commissioner outside his office, and requested him to complete the declaration. The statement was accordingly neither subscribed, nor declared in the presence of the commissioner. The Saskatchewan Court of Appeal allowed the appeal of the appellant for his conviction for making a false declaration. Haultain C.J.S. remarked:

> "In view of the evidence in this case, I do not think that the document in question is a solemn declaration within the meaning of the Act. It cannot be said that it was made before the commissioner. The mere fact that it was signed by the accused does not make it a solemn declaration. The written statement by the commissioner that it was "declared before him," is not true. The

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(35) No.2278 of 1936 (S.A.).

(36) (1974) 7 S.A.S.R. 375.

(37) Id., 395 per Wells J.

(38) (1922) 69 D.L.R. 267.

> essential requirement of the Act is not the signature of the declarant but his solemn declaration made before the commissioner. It will be noted that the statutory form does not provide for the signature of the declarant. There is no prescribed form for the taking of a statutory declaration that I am aware of: but, on the analogy of an oath, there should be some form, such as making it in the first person, or having it administered by the commissioner in the second person. See R. v. Phillips; (39) R. v. Nier. (40) In any event, the declaration however made, must be made before the commissioner. Reg. v. Lloyd. (41)". (42)

A person who makes a statutory declaration should not therefore merely sign a form of declaration before an attesting witness. It is also essential that a declaration is actually made, vide s.194 of The Criminal Code. It would appear that either the document must be actually read before an attesting witness, unless the declarant states that he is aware of the contents of the form and that he solemnly declares that the matters contained in the form are true. This appears from the decision in R. v. Whynot (43) where the Nova Scotia Supreme Court held that an accused could not be convicted of making a false statement where a commissioner had no authority to administer the oath that he purported to administer. In that case there was a discussion of what acts constitute the making of a solemn declaration. MacDonald J. observed "The whole mechanism of permitting statutory declaration is in substitution for the normal procedure of verifying facts by affidavit, the essence of which is verification by oath". (44) MacDonald J. later remarked that a solemn declaration can only be made where the "whole of the document (including the statutory formula at the end)" (45) having been read to a declarant, or "upon the declarant advising the commissioner in some form of words that he had previously read

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(39) (1908) 14 Can. Cr. Cas. 239.

(40) (1915) 28 D.L.R. 373.

(41) (1887) 19 Q.B.D. 213.

(42) (1922) 69 D.L.R. 267, 269.

(43) (1954) 34 M.P.R. 302.

(44) Id., 309.

(45) Ibid.

it". (46) The other members of the Supreme Court did not find it necessary to express a conclusion on this question.

The failure of a declarant to make the requisite declaration, or state that he is aware of the contents in a form of declaration, would therefore result in the declarant not committing an offence of making a false declaration. It may also be essential that the proper form of declaration be substantially used, although s.40 of the Acts Interpretation Act permits a variation of a form prescribed by an Act. In R. v. Haynes and Haynes (47) the failure to advert to the statutory authority for making a statutory declaration resulted in a declaration being regarded as invalidly made.

The Commission does not believe that the technical defences which have been discussed in the preceding paragraphs should be available in the prosecution of the proposed summary offence under the Oaths Act. Accordingly, the draft Bill contains a clause providing that it is not a defence to a summary prosecution that the declaration was not duly made, or that the declaration was not in a form prescribed by s.20(1) of the Act: See cl.24(2). This proposed provision, which negates the availability of these technical offences, can only operate where the court is satisfied that the defendant knew that he was required to declare his belief in the truth of a declaration. This provision is derived from s.27(2) of the Oaths Act 1936 (S.A.), which was inserted by the Oaths Act Amendment Act 1969 (S.A.). (48)

The clause also provides that the proposed section is not in derogation of The Criminal Code so that any serious offences can be prosecuted under ss. 193 and 194 of The Criminal Code. It is not necessary to expressly provide that a person cannot be prosecuted in respect of the same statement under both the proposed Oaths Act and The Criminal Code as s.16 of The Criminal Code provides such a safeguard. The proposed s.24(2), which limits the availability of the technical defences which have been

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(46) Id., 309 - 310.

(47) (1916) 35 N.Z.L.R. 407, See also R. v. Smith (1904) 29 N.Z.L.R. 244.

(48) No.41 of 1969 (S.A.). See "Second Report of the Law Reform Committee of South Australia" (Oaths Act 1936) (1969), p.4.

discussed, does not apply to a prosecution under The Criminal Code. This is because a defendant convicted of an indictable offence under the Code is liable for what MacDonald J. in R. v. Whynot (49) referred to as "a serious sentence". (50)

INTERSTATE DECLARATIONS

It is a common practice for a resident in one State to make a statutory declaration for the purposes of some Government Department in another State. In these circumstances it seems desirable that there be co-operation between the States to provide a legislative basis for this practice. This matter would appear to be suitable for consideration by the Standing Committee of Attorneys-General. There are some difficulties in that there is a principle that crime is local so that a person who makes a false declaration can generally only be prosecuted under the law of a State in which a declaration is made. (51) The Registrar of Titles has recently issued a practice direction requiring that a statutory declaration that is made in another State is made according to the laws of that State. (52)

The Commission has made provision in the draft Bill for a statutory declaration which is made in another State to be received in Queensland: see cl.21(3). Provision already exists for instruments that are executed interstate to be received for some purposes in Queensland. Instruments under the Real Property Act that are executed by residents of other States and Territories are validly attested if executed before the persons enumerated in section 115 of the Real Property Act 1861-1986. (53)

It is also proposed that a declaration can be made in Queensland under the Oaths Act for the purposes of a law of another State: see cl.21(2). Despite the passage of the Australia Act 1986 (U.K.), there may still be constitutional difficulties in

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(49) Supra.

(50) (1954) 34 M.P.R. 302, 309.

(51) See, Mynott v. Bernard (1939) 62 C.L.R. 68, 76 per Latham C.J.

(52) Direction of Practice and Procedure No. 145 of the Registrar of Titles (September 7, 1987). See (October, 1987) Vol.7 No.9 The Proctor, p.6.

(53) 25 Vict. No.14, as amended (Qld.).

purporting to enable declarations to be made under the proposed Oaths Act in another jurisdiction. (54) Even if such legislation could be enacted there would be practical difficulties in ascertaining the proper form to be adopted, and in prosecuting a person who makes a false declaration. It would be convenient if a declaration could be validly made under Queensland law for the purpose of the law of another State so that a person residing in Queensland could readily ascertain the requirements for executing a statutory declaration that will be valid under Victorian, Tasmanian or Western Australian law. Consideration should be given to the enactment of legislation similar to cl.21 in other States. Whether or not a declaration would be received in another State is a matter for the proper authorities in that State. The draft Bill does not apply to declarations which may be required for the purposes of any law of the Commonwealth or a Territory. This is because such declarations are subject to the Statutory Declarations Act 1959 (Cth.). (55)

ILLEGIBLE SIGNATURE OF ATTESTING WITNESS

The Commission has given consideration as to whether an attesting witness to a statutory declaration should, in addition to their signature, be required to clearly print their name. From time to time judges have commented that it is desirable to identify the person who witnessed an affidavit. (56) The Institute of Law Research and Reform of Alberta in their report on Small Projects (57) gave preliminary consideration to this question, but declined to make any firm recommendations. The several classes of persons in that Province who are ex officio Commissioners for oaths precluded any consideration of suspending a Commissioner who failed to comply with any requirement to print their name on a document. (58)

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(54) See, D.P. O'Connell, "The Doctrine of Colonial Legislative Incompetence" (1959) 75 Law Quarterly Review 318.

(55) No.52 of 1959 as amended (Cth.).

(56) See, (1947) 91 So. Jo. 340.

(57) Report No.17 (June, 1975).

(58) Id., 12.

The Commission does not consider that there should be an express requirement in the Oaths Act for an attesting witness to legibly print his signature. The failure of a witness to comply with such a provision could, in the absence of any savings clause, be regarded as vitiating any declaration. The Commission considers that it would be more appropriate if it was evident from the perusal of a prescribed form that an attesting witness was required to print his name. A case in point is that some of the forms prescribed under the Real Property Regulations 1986 (59) expressly require the full name of an attesting witness to be printed. (60) The Commission considers that this practice should be uniformly adopted. It is also pointed out that some statutory statutory forms that are in use in other States also require an attesting witness to print their address on the form.

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(59) See, Vol.CCLXXXI Queensland Government Gazette, pp.1475-1531 (April 12, 1986).

(60) See, e.g., Form 17 (Request to record change of name), Form 21 (Request to register writ of execution), Form 29 (Request to dispense with production of instrument).

CHAPTER NINE

TESTIMONIAL OATHS AND AFFIRMATIONS - INTRODUCTION

EARLY DEVELOPMENTS

Originally testimony could only be given by a witness upon oath. (1) At one time, because of the writings of Coke, it was thought that only Christians could give evidence. (2) This limitation was not practical as increasing trade and intercourse resulted in the frequent appearance in the courts of persons who did not profess the Christian faith. During the seventeenth century the courts began to receive the testimony of witnesses, such as Jews (3) or Moors, (4) who could not be sworn on a Christian Bible, but who nevertheless possessed belief in a Supreme Being.

In the leading case of Omychund v. Barker (5) it was held that only those who believe in a God who punishes those who do ill could give sworn testimony. In that case persons resident in the "East Indies" were examined under a commission issued by the Court of Chancery. The oaths of the witnesses were administered according to the rites of the Gentoo religion (presumably the Hindu religion). The objection was made that the depositions could not be read in evidence as they were not taken on oath upon the Evangelists. Lord Hardwicke L.C. sought the assistance of the

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(1) The origin and theory of the oath is exhaustively considered by J.H. Wigmore, III Evidence (1904), para. 1815-1816.

(2) See, W. Holdsworth, Vol. IX A History of English (3rd ed., 1944), p.191. See also, "A Reconsideration of the Sworn Testimony Requirement" (1977) 75 Michigan Law Review 1681.

(3) See, e.g., Robeley v. Langston (1667) 2 Keb. 314 (84 E.R. 196), Anon. (1684) 1 Vern. 263 (case 258) (23 E.R. 495); Gomez Serra v. Munez (1729) 2 Stra. 821 (93 E.R. 872). Jews could be sworn on the New Testament: see, e.g., R. v. Gilham (1795) 1 Esp. 284; Sells v. Hoare (1822) 3 Brod. & Brig. 232 (129 E.R. 1272); R. v. Simons (1893) 117 C.C. Ct. Cas. 556.

(4) Fachina v. Sabine (1738) 2 Str. 1104 (93 E.R. 1061); Morgan's Case (1794) 1 Leach 54. Cf. R. v. Koghie (1887) 2 Q.L.J. 187.

(5) (1744) 1 Atk. 21 (26 E.R. 15), sub. nom. Omichund v. Barker (1744) Willes 538 (125 E.R. 1310).

common law judges on this question. (6) The common law judges, after considering biblical and other authority, unanimously considered that the depositions could be read in evidence. Parker C.B. remarked "it is plain that by the policy of all countries, oaths are to be administered to all persons according to their own opinion, and as it most affects their conscience" (7) Willes C.J. remarked "I found my opinion upon the certificate which says, the Gentoos believe in a God as the Creator of the universe, and that he is a rewarder of those who do well, and an avenger of those who do ill". (8)

The statement of Willes C.J. in Omychund v. Barker (9) was influential so that the evidence of a witness could be received only if the witness believed in a future state of rewards and punishments. In R. v. Taylor (10) Buller J. ruled that the proper question to be asked to a witness in order to ground an objection to his competency is not whether he believes in Jesus Christ or the Holy Gospels, but rather whether he believes in God and a future state of rewards and punishments. A person who did not possess any religious belief was incompetent as a witness. (11) In R. v. Brown (12) Wanstall A.C.J. (as he then was) referred to "the ancient and unquestioned test" (13) laid down in Omychund v. Barker. (14) His Honour remarked: "The test is belief in a God and expectation that He will reward or punish in this world or

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(6) It was earlier held in Ramkissenseat v. Barker (1739) 1 Atk. 19 (26 E.R. 13) that the opinion of the judges might be taken.

(7) (1739) 1 Atk. 21, 42 (26 E.R. 31).

(8) Id., 46 (E.R. 31).

(9) Supra.

(10) (1790) Peake 14 (170 E.R. 62).

(11) See, R. v. White (1786) 1 Leach 430 (168 E.R. 317). See also, A.-G. v. Bradlaugh (1885) 14 Q.B.D. 667.

(12) [1977] Qd. R. 220.

(13) Id., 221.

(14) Supra.

the next". (15)

AFFIRMATION - English Legislation

Legislative concessions were made to persons whose religious tenets forbade the swearing of an oath. Initially legislation was passed after the ascent of William and Mary to the throne to enable Protestant dissenters to give evidence. Members of the Society of Friends (or Quakers), and Moravians were permitted to affirm in civil cases in 1695, (16) and in criminal cases in 1714. (17) Later, in 1833 a form of affirmation for Quakers and Moravians was prescribed. (18) Similar legislation was also enacted for Separatists. (19) As a consequence of the decision in R. v. Doran (20) legislation was passed in 1838 to enable persons who had been Quakers or Moravians to affirm where such persons retained a conscientious objection to swearing an oath. (21) In Re Laurence (22) it was held that a witness, who was not a Quaker or Separatist, could not object to be sworn on conscientious or religious grounds. The court held that upon the objection being persisted in, the witness was liable to be committed to prison for contempt.

Despite legislative developments the limitation remained that a person who possessed no religious belief, and therefore could not give evidence under the sanction of an oath, was incompetent as a witness. In respect of civil provisions s.20 of the Common Law Practice Act 1854 (23) provided that any person who may, from

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(15) [1977] Qd. R. 220, 221-222.

(16) See, Quakers Act 1695 (7 & 8 Wm. III, c.34) (Imp.).

(17) See, 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.

(18) See, Quakers and Moravians Act 1833 (3 & 4 Wm. IV c.42) (Imp.).

(19) See, Separatists Act 1833 (3 & 4 Wm. IV c.82) (Imp.).

(20) (1838) 2 Mood C.C. 37.

(21) See, Quakers and Moravians Act 1838 (1 & 2 Vict. c.77) (Imp.). s.1.

(22) (1852) 20 L.T.O.S. 16.

(23) 17 & 18 Vict. c. 125 (Imp.).

conscientious motives, be unwilling to be sworn, may make a solemn affirmation or declaration, which has the same force and effect as if he had taken an oath in the usual form. (24) The enactment of this provision may have been influenced by the decision in Re Laurence. (25) In Maden v. Catanach (26) it was held that s.20 only enabled testimony to be given where a witness objects on religious grounds to being sworn, and that the provision did not enable evidence to be received from a witness who did not possess any religious belief.

Persons on whose conscience an oath had no binding effect were permitted to give evidence under the Evidence Further Amendment Act 1869. (27) This legislation was superseded by the Oaths Act 1888 (28) which provided that every person who objects to be sworn on the grounds either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, was entitled to affirm instead of taking an oath. Under the Oaths Act an affirmation was not permissible where a witness had a religious belief that does not prohibit the taking of oaths, (29) nor where a witness declined to state the form of oath binding on him. (30)

An unsatisfactory consequence of R. v. Moore (31) was that a trial judge had to undertake an inquiry into the religious beliefs of a witness. The requirement of the trial judge to undertake an inquiry had unsatisfactory consequences. In R. v. Clark (32) a judge required a witness to take an oath although he stated that

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(24) The provision was extended to criminal proceedings by the Affirmation Act 1861 (24 & 25 Vict. c.66) (Imp.).

(25) Supra.

(26) (1861) 7 H. & N. 360 (158 E.R. 512).

(27) 32 & 33 Vict. c.68), s.4 (Imp). See also Evidence Amendment Act 1870 (33 & 34 Vict. c.49), s.1 (Imp.).

(28) 51 & 52 Vict. c.46 (Imp.).

(29) R. v. Moore (1892) 8 T.L.R. 287.

(30) Nash v. Ali Khan (1892) 8 T.L.R. 444.

(31) Supra.

(32) [1962] 1 W.L.R. 180.

he was an agnostic. The Court of Criminal Appeal held that the trial judge was in error in ruling that the witness could not be an agnostic if he accepted parts of the New Testament as being based on fact. The decision of the trial judge to require the witness to take an oath was controversial. One commentator in the Law Quarterly Review, remarked:

> "This case raises the question whether a judge should ever be entitled to require a witness to take an oath if he desires to affirm. There is something absurd in allowing a judge to find that a witness has no religious belief when the witness himself strenuously denies that he holds it". (33)

Since R. v. Clark (34) was decided the Oaths Act 1978 (35) was passed. Section 5 of that Act provides that a person who objects to being sworn shall be permitted to make his solemn affirmation instead of being sworn (subsection (1)). That provision enables a witness to affirm without stating the grounds for his objection to swearing an oath. It would appear that the provision was drafted in the light of the decision in R. v. Clark (36) and other decisions.

Difficulties can sometimes arise where a person cannot be sworn in accordance with his religious beliefs. In R. v. Pritam Singh (37) the defendant, a Sikh, was charged with committing perjury in proceedings in a magistrates court. The defendant had made an affirmation instead of swearing an oath before giving evidence. It had been discovered that no copy of the Granth, the Holy Book of the Sikhs, was available on which he could be sworn. Apparently only three copies of the Granth were then known to exist in the country. Mr Commissioner Wrangham (later Wrangham J.) held that there was no case to go to the jury on the charge of perjury as the defendant was not lawfully sworn. This was because under s.1 of the Oaths Act 1888 a person was permitted to make a

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(33) (1962) 78 Law Quarterly Review 164.

(34) Supra.

(35) 1978 c.19 (Eng.).

(36) Supra.

(37) [1958] 1 W.L.R. 143.

solemn affirmation instead of taking an oath only if he objected to taking an oath on one of the two grounds provided by that section.

After the decision in R. v. Pritam Singh (38) a correspondent to the Law Quarterly Review pointed out that provisions in legislation relating to the armed forces in the United Kingdom (39) enabled a witness to affirm if it was not practicable to administer an oath to that person in the manner appropriate to his religious beliefs. (40) Section 1 of the Oaths Act 1961 (41) later enabled a witness to make an affirmation where it was not reasonably practicable to administer an oath in the manner appropriate to his religious belief. That section also modified the legislation relating to the armed forces by providing that "reasonably practicable" means reasonably practicable without reason or delay. Later s.5(2) of the Oaths Act 1978 (42) similarly extended the operation of s.5(1) of the Act which permitted a witness to affirm where that witness objected to be sworn. Subsection (2) extends the operation of subsection (1) to a person to whom it is not reasonably practicable without inconvenience or delay to administer an oath in the manner appropriate to his religious belief as it applies to a person objecting to be sworn.

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(38) Ibid.

(39) See, Air Force Act 1955 (3 & 4 Eliz. II c. 19) (Eng.), s. 102; Army Act 1955 (3 & 4 Eliz. II c. 18) (Eng.), s. 102; Naval Discipline Act 1957 (5 & 6 Eliz. II c.53)(Eng.), s.60.

(40) See, (1958) 74 Law Quarterly Review 481. Last century, the Queensland Parliament had enabled an affirmation to be taken in these circumstances: see Oaths Act Amendment Act 1889-1974 (55 Vict. No. 14) as amended, s.1 (Qld.).

(41) 9 & 10 Eliz.II c.21 (Eng.).

(42) 1978 c.19 (Eng.).

CHAPTER TEN

TESTIMONIAL OATHS AND AFFIRMATIONS - COLONIAL DEVELOPMENTS

The requirement of the common law that a witness could give evidence only upon the sanction of an oath caused difficulties in admitting the testimony of indigenous peoples of British colonies. In 1839 the Legislative Council of New South Wales passed a statute "To allow Aboriginal Natives of New South Wales to be received as Competent Witnesses in Criminal Cases". (1) The statute provided "that every Aboriginal Native or any half-caste native brought up and abiding with any tribe of Aboriginal Natives ... should be permitted to make an affirmation or declaration, to tell the truth, the whole truth, and nothing but the truth, or in such other form as may be approved by the court, instead of taking an oath, in any criminal proceeding that shall be instituted in said Colony; and that the evidence so given shall be of such weight only as corroborating circumstances may entitle it to,". (2) At the request of the Chief Justice a clause was added which provided that the measure would only come into operation upon Her Majesty's pleasure being known. (3)

This colonial statute of 1839 was disallowed by the Crown on the advice of the Law Officers. J. Campbell, Attorney-General, and T. Wilde, Solicitor-General, advised Lord John Russell on July 27, 1840 that "to admit in a criminal case the evidence of a witness acknowledged to be ignorant of the existence of a God or a future state would be contrary to the principles of British jurisprudence". (4) However, despite the disallowance of this statute legislation was subsequently enacted in Western Australia

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(1) 3 Vict., No.16 (N.S.W.). (Vol. 1, Callaghan's Acts (1844), pp. 1-2).

(2) Id.

(3) See, Vol.20 Historical Records of Australia (Series I) (1924), p.368. The legislation, to which there was some judicial opposition, was proposed by the Aborigines' Protection Society: see, Id., pp.303-305.

(4) Id., p.756.

in 1841 (5) which provided for the unsworn testimony of aboriginals to be admitted as evidence. Although this necessary legislation was not disallowed, doubts as to the legality of this legislation obviously existed.

Two years after the enactment of the Western Australian statute legislation of the British Parliament enabled the legislatures of British colonies to enable unsworn evidence to be given. The Colonies Evidence Act 1843 (6) declared that no law or ordinance made by the legislatures of British colonies for the admission of the evidence of people destitute of the knowledge of God and of any religious belief shall be deemed null and void by reason of any repugnancy to the law of England. The Colonies Evidence Act, therefore, confirmed the earlier legislation which had been enacted in Western Australia. (7) The Colonies Evidence Act also enabled similar legislation to be enacted in other Australian colonies. Legislation was enacted in South Australia in 1848, (8) and Victoria in 1851 (9) which permitted aboriginals to give evidence. In DaCosta v. R. (10) Windeyer J. referred to this early colonial legislation.

Legislation that was initially enacted in New South Wales which enabled a witness to make an affirmation reflected to earlier Imperial legislation which only applied to members of various religious groups. A colonial statute of 1837 provided for the Quakers Act 1833 (Imp.) (11) to be applied in the courts of New South Wales. (12) This colonial statute, which was part of

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(5) 4 & 5 Vict. No.22 (1841) (W.A.). See, E. Russell, A History of the Law in Western Australia (1980), p.319.

(6) 6 & 7 Vict. c.22 (Imp.).

(7) See, E. Russell, A History of the Law in Western Australia (1980), pp.319-320.

(8) No.3 of 1848 (S.A.).

(9) 7 Vict. No.11, s.7 (Vic.).

(10) (1968) 118 C.L.R. 186, 199.

(11) 3 & 4 Will.IV c.49 (Imp.).

(12) See, 8 Will.IV No.2 (N.S.W.) (Vol.1 Callaghan's Acts (1844), pp.2-4).

the law of Queensland upon the creation of the colony, was repealed by The Repealing Act of 1867 (Qld.). (13) Sections 18 and 19 of the Queensland Oaths Act of 1867 (14), in a manner similar to corresponding Imperial legislation, made express provision for an affirmation to be made by Quakers, Moravians, and Separatists.

The Queensland Oaths Act enabled persons, other than members of those religious groups which have been mentioned, to make an affirmation in lieu of swearing an oath. This development occurred before similar legislation was enacted in New South Wales. Section 17 of the Queensland Oaths Act enabled a person who was unwilling from conscientious motives to be sworn to make an affirmation instead of swearing an oath. That provision was based upon s.20 of the Common Law Practice Act 1854 (Imp.) (15), but originally could only be invoked by a person who possessed some religious belief. (16) It was only after the enactment of the Oaths Acts and Another Act Amendment Act 1981 (17) that an affirmation under s.17 of the Oaths Act could be made by a person who possessed no religious belief. (18)

It can be seen that s.17 of the Queensland Oaths Act of 1867 could be invoked only to facilitate the admission of evidence from persons who possessed some religious belief. This had the consequence that the unsworn testimony of aboriginal natives could not be admitted in evidence in Queensland courts as no special legislation, such as existed in other colonies, provided for the admission of such evidence. The problem of taking evidence from native peoples was recognised by the British Parliament which enacted the Kidnapping Act 1872. (19) That statute was enacted

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(13) 31 Vict. No.39 (Qld.).

(14) 31 Vict. No.12 (Qld.).

(15) 17 & 18 Vict. c.125 (Imp.).

(16) See, Narne v. Brisbane Tramways Co. [1914] Q.W.N. 6.

(17) No.61 of 1981 (Qld.).

(18) See, p.47 (n.37), ante.

(19) 34 & 35 Vict. c.19 (Imp.). (Vol. 2 Statutes of Queensland (ed. F.A. Cooper) (1881), pp.1656-1662). See also, Vol.IX Halsbury's Laws of England (2nd ed. 1933), p.383 (para. 646).

to prevent the kidnapping of natives of islands in the Pacific Ocean. The statute, which conferred jurisdiction upon the Supreme Courts of Australasian colonies, would have been unenforceable unless the evidence of Pacific Islanders was admissible in any inquiry under the Kidnapping Act. Section 14 of the Kidnapping Act enabled the Supreme Court of a colony to declare in what manner evidence shall be taken of witnesses or deponents who were ignorant of the nature of an oath. In Queensland, in R. v. The Crishna (20) Cockle C.J., pursuant to this provision, admitted in evidence the unsworn testimony of a number of Pacific Islanders. (21)

In 1875 the Hon. S.W. Griffith M.L.A., Attorney-General, introduced the Oaths Act Amendment Bill which was derived from s.14 of the Imperial Kidnapping Act. This Bill amended the Oaths Act to enable aboriginal natives to give unsworn testimony. The Attorney-General pointed out that the Imperial Act only enabled testimony to be given by Polynesians and not aboriginal natives. He commented: "If the persons outraged had been Polynesians, the offenders could have been convicted under the Imperial Statute; but, as they did not fall within the letter of the statute, the law was powerless". (22) The Legislative Assembly passed the Bill. However, the Bill was rejected by the Legislative Council. (23) The courts had up to this time experienced no difficulties in admitting the sworn testimony of Chinese witnesses. (24)

It was not until 1876 that unsworn evidence from aboriginals could be admitted in evidence in New South Wales and Queensland. In Cheers v. Porter (25) Dixon J. observed that after the enactment of the Imperial Colonial Evidence Act no statute was passed in New South Wales which provided for the admission of

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(20) (1873) 3 Q.S.C.R. 131, 137.

(21) See also, R.B. Joyce, Samuel Walker Griffith (1984), p.52.

(22) See, Vol.18 Queensland Parliamentary Debates, pp.128-129 (May 6, 1875).

(23) Id. p.340 (June 2, 1875).

(24) See, R. v. McIlree (1866) 3 W.W. & A.B. (Law) 32; R. v. Ah Foo (1869) 8 S.C.R. (N.S.W.) 343.

(25) (1931) 46 C.L.R. 521, 533.

evidence from aboriginals. His Honour also commented that no statute appears to have been needed. This may be because in 1876 legislation derived from s.4 of the Evidence Further Amendment Act 1869 (Imp.) (26) was enacted in New South Wales, (27) similar legislation was in that year also enacted in Queensland. (28)

The Imperial Evidence Further Amendment Act enabled evidence to be given by persons who were ignorant of the nature of an oath, or who were incompetent to take an oath. The statute prescribed a a form of declaration to be taken by a witness who was unable to swear an oath. The form of this declaration was reproduced in s.1 of The Oaths Act Amendment Act of 1876. (29) This provision also applied to interpreters by virtue of s.2 of the Act. Before a declaration could be administered to a witness the trial judge had to be satisfied at the trial that the witness understood the nature of the declaration. (30) Unsworn testimony from aboriginals (31) and Polynesian Islanders or Kanakas (32) was admitted as evidence in the courts of New South Wales and Queensland under these colonial statutes. However, the procedure to be followed under these statutes was not entirely satisfactory. This was because indigenous peoples could not correctly pronounce the words of the declaration. In R. v. Hopkins and Eaton (33) Harding J. remarked that the administration of the declaration "is one of the most unsolemn proceedings that the dignity of the court

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(26) 32 & 33 Vict. c.68 (Imp.).

(27) See, Evidence Further Amendment Act 1876 (40 Vict. No.8) (N.S.W.), s.3 (Vol.2 Oliver's Statutes 1879, p.956).

(28) The Oaths Act Amendment Act of 1876 (40 Vict. No.10) (Qld.), s.1 (Vol.2 Statutes of Queensland (ed. F.A. Cooper) (1881), p.1986).

(29) 40 Vict. No.10 (Qld.).

(30) See, R. v. Hopkins and Eaton (1884) 2 Q.L.J. 47.

(31) See, e.g. R. v. Paddy (1876) 14 S.C.R. (N.S.W.) 440; R. v. Hopkins and Eaton (1884) 2 Q.L.J. 47.

(32) See, e.g., R. v. Lewis (1877) Knox (N.S.W.) 8; R. v. Tommy and George (1877), Q.L.R. (Boer) 14.

(33) (1884) 2 Q.L.J. 47.

has to submit to". (34) Soon after Harding J. made these remarks ss. 1 and 2 of the 1876 statute were repealed by The Oaths Act Amendment Act 1884. (35)

The Oaths Act Amendment Act 1884 made provision for the unsworn testimony of persons to be received. Section 2 of this Act applies to persons who by reason of any defect of religious knowledge or belief were incompetent to take an oath. The trial judge may under this provision declare in what manner the evidence of a person will be taken. Section 3 of the Act applies, mutatis mutandis, to interpreters called to interpret in any civil or criminal proceeding. In R. v. Koghie (36) a Mahommedan witness in a criminal case tried at Mackay had stated that he would be sworn on the Koran, a copy of which could not be obtained. The trial judge allowed the witness to affirm under s. 2 of the 1884 Act. The Full Court held that the witness should have been sworn on the Koran. This decision is undoubtedly correct as section 2 could only apply to witnesses who possessed no religious belief. (37) It was not until the enactment of The Oaths Act Amendment Act of 1891 (38) that a witness was permitted to affirm where he could not be sworn in the manner permitted by his religion. (39) This legislation was innovative. In this respect Queensland foreshadowed legislation which was later enacted in England in 1961. (40)

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(34) Id. 48.

(35) 48 Vict. No.19 (Qld.).

(36) (1887) 2 Q.L.J. 187.

(37) Cf. R. v. Moore (1892) 8 T.L.R. 287; R. v. Pritam Singh [1958] 1 W.L.R. 143.

(38) 55 Vict. No.14 (Qld.).

(39) See, e.g., Duncalfe v. Duncalfe and Khan [1907] Q.W.N. 37.

(40) See, M. Weinberg, "The Law of Testimonial Oaths and Affirmations" (1976) 3 Monash Law Review 25, p.38 (n.49).

CHAPTER ELEVEN

TESTIMONIAL OATHS AND AFFIRMATIONS - Modern Developments

PRESENT PRACTICE

Most of the statute law of Queensland that relates to oaths was enacted when Queensland was still a colony. The only recent legislation of any consequence was the amendment to s.17 of the Oaths Act 1867-1981 (1) which was effected by the Oaths Acts and Another Act Amendment Act 1981. (2) That amendment enabled a person without any religious belief to make an affirmation in the form prescribed by s.17 of the Oaths Act. That amendment was required because, in actual practice, persons possessing no religious belief were making affirmations in a form which was sanctioned by the Oaths Act 1888 (Eng.). (3) This was done without regard to the fact that there was no similar legislation in Queensland. (4)

Where a person called as a witness objects to swearing an oath, whether on religious or philosophical grounds, the court may permit that person to give evidence under any of the following statutory provisions:-

(i) s.17 of the Oaths Act 1867-1981 (as amended by the Oaths Acts and Another Act Amendment Act 1981);

(ii) s.2 of The Oaths Act Amendment Act of 1884; (5) or

(iii) s.1 of the Oaths Act Amendment Act 1891-1974. (6)

Each of the abovementioned statutory provisions requires the trial judge to be satisfied of the various grounds of objection to swearing an oath that are enumerated in those provisions. The only exception to this principle is where a witness is a member of

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(1) 31 Vict. No.12, as amended (Qld.).

(2) No.61 of 1981 (Qld.).

(3) 51 & 52 Vict. c.46 (Imp.).

(4) See, Vol.284 Queensland Parliamentary Debates, p.1436 per Hon. S.S. Doumany M.L.A., Minister for Justice and Attorney-General (August 4, 1981).

(5) 48 Vict. No.19, as amended (Qld.).

(6) 55 Vict. No.14, as amended (Qld.).

one of the religious groups referred to in ss. 18 and 19 of the Oaths Act, e.g. Quakers. It is only in this respect that a witness may make an affirmation as of right without having to satisfy the court of the basis of his objection to swearing an oath. (7)

It has been held that a trial judge is required to undertake an inquiry as to the sincerity of the objection of a witness to swear an oath before deciding to dispense with the requirement that a witness must swear an oath. (8) Witnesses are generally permitted to affirm upon stating that they desire to make an affirmation, or that they object to being sworn, without any further inquiry.Weinberg remarks: "In actual practice the judge simply asks the witness his reason for desiring to affirm, and generally accepts his answer without question". (9) It may be asked what useful purpose is served by undertaking such an inquiry. All that this practice achieves is the public disclosure of the private religious beliefs of a witness. (10)

In cases where s.2 of The Oaths Act Amendment Act of 1884 is invoked the trial judge is required to prescribe a satisfactory manner of taking evidence where he is satisfied that a person is lacking in religious beliefs, and the taking of an oath "would have no binding effect on the conscience of such a person". The Court of Criminal Appeal in R. v. Brown (11) observed that evidence could be given under s.2 by young children who could not be sworn. However, the provision appears to be infrequently invoked.

There are anomalous aspects of the present practice. The form of affirmation prescribed by s.17 of the Oaths Act requires a

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(7) See, M. Weinberg, "Testimonial Oaths and Affirmations", (1976) 3 Monash Law Review 25, p.35.

(8) See, e.g., R. v. Moore (1892) 66 L.T. 125; Nash v. Ali Khan (1892) 8 T.L.R. 444; R. v. Smith (1906) 6 S.R. (N.S.W.) 85; R. v. Clark [1962] 1 W.L.R. 180.

(9) See, M. Weinberg, loc cit (n. 7).

(10) See, Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (Prepared for the Uniform Law Conference of Canada) (1982), p.240.

(11) [1977] Qd.R. 220.

witness to "declare that the taking of any oath is objectionable to me". This form of affirmation was originally intended to enable an affirmation to be made by members of various Christian denominations who objected to being sworn for conscientious reasons. (12) The form of affirmation may, since the Oaths Acts and Another Act Amendment Act 1981, be also used by a witness who objects to being sworn on philosophical grounds. The form of affirmation may improperly influence a tribunal of fact. It may also, in some cases, be offensive to a witness who does not desire the basis of his objection to being sworn to be disclosed in open court. The Commission does not consider that it should be necessary for a witness to disclose the basis of his religious or philosophical objection to swearing an oath.

RETENTION OF TESTIMONIAL OATHS

Case for abolition of the oath

The requirement that a witness must swear an oath has not been uncritically accepted. In 1817 Jeremy Bentham in a pamphlet entitled "Swear Not At All" (13) attacked what he considered to be the unChristian practice of swearing oaths in the courts, upon appointment to various offices, and upon graduation in the universities. Later in the century the Oaths Commissioners examined promissory oaths that were taken in the United Kingdom, but the subject of judicial oaths was outside the terms of reference of the Commissioners. (14) The recommendations of the Commissioners were followed by the enactment of the Promissory Oaths Act 1868 (Imp.). (15) The consequence of this statute was that a large number of unnecessary promissory oaths were no longer taken.

The law reform agencies which have examined testimonial oaths are divided on the question as to whether the existing practice of swearing witnesses should be retained. Law reform agencies which have recommended the abolition of the oath include the Scottish

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(12) Cf.,St. Matthew 5:34; James 5:12 (K.J.V.).

(13) See, Part V Works of Jeremy Bentham (1838), pp.187-229. (The title of this work was taken from St. Matthew 5:34).

(14) See, "Report of the Oaths Commission" pp. iii, vi (Command 3885, 1867).

(15) 31 & 32 Vict. c.72 (Imp.).

Law Commission (although this Commission later recommended the retention of the existing practice), (16) the Criminal Law Revision Committee, (17) the Ontario Law Reform Commission, (18) the Canadian Law Reform Committee, (19) and the Northern Territory Law Reform Committee. (20)

One reason which prompted the Canadian Law Reform Commission, (21) and the Scottish Law Commission (22) to make their recommendation was that there was a danger that some courts and jurors might attach more significance to the evidence of a witness who swears an oath. Whether or not this would be so is, of course, a matter of conjecture. In some cases the question of "the sanctity of the oath" has been raised. The trial judge in Chamberlain v. R., (23) in his charge to the jury, remarked:

> "It's not the sanctity of the oath which in these days weighs heavily, it is the fact that they thereby exposed themselves in front of you, the jury, to cross-examination by the Crown Prosecutor." (24)

The Full Court of the Federal Court in Chamberlain v. R. concluded that it might have been more appropriate if these remarks were omitted from the charge to the jury. The value of this observation was generally discussed by the members of the Full Court. In particular, Jenkinson J. observed:

> "Such statements are sometimes made in charges, but ordinarily converted into an invitation to the jury to consider the significance of the oath by some such prefatory clause as "you [the jury] may think that". It is of course for the jury alone to determine what weight the oath adds to the testimony of each witness who takes

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(16) See, Draft Evidence Code, Memorandum No.8.

(17) See, Eleventh Report of the Criminal Law Revision Committee, "Evidence (General)", Cmnd.4991, (1972) (noted (1972) 35 Modern Law Review, p.621).

(18) Report on the Law of Evidence, (1976), p.130.

(19) Report on Evidence 1975, Evidence Code ss. 50-51.

(20) Report on the Oaths Act, Report No.10, 1983.

(21) See, n.18 at p.87.

(22) See, n.16 at p.67.

(23) (1983) 46 A.L.R. 493.

(24) Id., 599.

the oath." (25)

It would appear from these remarks that a jury may well give more weight to evidence which is given on oath. There may be a misconception that a witness does not believe in a diety, whereas it is clear that some witnesses may, for conscientious reasons, make an affirmation rather than swear an oath. In any event a Canadian Task Force has pointed out that it is clear that a person who wishes to affirm is in the "invidious position of asking for 'special treatment'". (26)

The Criminal Law Revision Committee did not consider the fact that a witness has taken an oath, in any way, increases the probability that a witness will tell the truth. The Committee commented:

> "There would be a good case for keeping the oath if there were a real probability that it increases the amount of truth told. The majority do not think that it does this very much. For a person who has a firm religious belief, it is unlikely that taking an oath will act as any additional incentive to tell the truth. For a person without any religious belief, by hypothesis, the oath can make no difference. There is value in having a witness 'solemnly and sincerely' promise that he will tell the truth, and from this point of view the words of the affirmation are to many at least more impressive than the customary oath." (27)

The report of this Committee also mentioned that in 1968 the Magistrates Association at their annual meeting voted by a narrow majority (140-130) that the oath should be replaced by a simple promise to tell the truth. (28)

Case for Retention of the Oath

A number of law reform agencies have recommended the retention of the oath. Such bodies include the Scottish Law

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(25) Ibid.

(26) See, Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (Prepared for the Uniform Law Conference of Canada), (1982), p.240.

(27) See, Eleventh Report of the Criminal Law Revision Committee, "Evidence (General)", (Cmnd.4991, 1972), p.165.

(28) Ibid. (citing "The Times", October 12, 1968).

Commission, (29) which had earlier made a contrary recommendation. (30); the New South Wales Law Reform Commission; (31) the Victorian Chief Justice's Law Reform Committee; (32) the Australian Law Reform Commission, (33) and the Canadian Federal/Provincial Task Force on Uniform Rules of Evidence. (34)

In 1977 the Senate Standing Committee on Constitutional and Legal Affairs in their report on The Evidence (Australian Capital Territory) Bill (35) recommended the retention of the oath. The Senate Standing Committee commented:

> "One of the objects of the law of evidence is to ensure that witnesses tell the truth. In the past when religious beliefs were strong, the oath was considered to be the appropriate and effective way to ensure that witnesses told the truth. It is clear that, if at the present time there was a real probability that making the oath increased the likelihood of the truth being told, then there would be a good case for retaining the oath. Although some commentators advocate the abolition of the oath the Committee is of the view that evidence should continue to be given on oath or by affirmation." (36)

A consultant to the Scottish Law Commission, Sheriff Macphail, has recognised the political implications which may follow from any attempt to abolish the present practice of swearing witnesses. The Sheriff, whose views do not necessarily represent the views of that Commission, has commented:

> "Depressing though it is hear the oath so frequently dishonoured, especially in criminal cases, it may well be that there are still many witnesses in the Scottish courts to whom the oath, administered with deliberation

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(29) See, Law of Evidence, No.46, (September 1980).

(30) See, n.16.

(31) See, Oaths and Affirmations, Discussion Paper, (1980).

(32) See, Report on Oaths and Affirmations (1981).

(33) See, Evidence (Report No.38) (1987).

(34) See, Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (Prepared for the Uniform Law Conference of Canada), (1982).

(35) See, The Parliament of the Commonwealth of Australia, Parliamentary Paper No.237/1977.

(36) Id. p.5, para.20.

> by the judge, serves to bring home most strongly the solemnity of their obligation to tell the truth and to give their evidence with care. It may be thought that any proposal to abolish the oath in Scottish proceedings would be likely to cause widespread misunderstanding and offence. In any event it would probably be difficult to secure general agreement on the working of any new declaration." (37)

The Australian Law Reform Commission commented that the credibility of the trial system depends in part on the courts making and appearing to make a serious attempt to find the facts. The Commission concluded that the swearing of witnesses has a direct bearing on that attempt. (38) The New South Wales Law Reform Commission was more equivocal on its support of the retention of the existing practice of swearing witnesses. That Commission concluded "that though the facility of testifying on oath may do little good in the case of many witnesses, it does increase the chance of some telling the truth; that the existence of the facility does no harm and that therefore it should not be abolished". (39)

The Victorian Chief Justices Law Reform Committee also recommended the retention of the oath. The Committee commented:

> "Whilst in general we favoured the retention of the religious oath, the sub-committee after much debate and very considerable reflection came ultimately to the unanimous conclusion that the administration of the religious oath leads generally to no greater likelihood of a witness telling the truth than would the making of a secular affirmation". (40)

In 1987 the Australian Law Reform Commission in their report on evidence recognised that the principal argument advanced for the abolition of the oath was that the evidence of a witness who affirms tends to be devalued. The Commission commented: "This has certainly been true in States like Victoria where a witness had to establish a basis for not swearing a religious oath". (41) It is

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(37) See, Research Paper on the Law of Evidence of Scotland, Sheriff I.D. Macphail, (1979), para.8.07.

(38) See, Evidence (Report No. 38), (1987), p.45 (para.86).

(39) See, Oaths and Affirmations, Discussion Paper, (1980), p.24 (para. 1.26).

(40) See, Report on Oaths and Affirmations (1981), p.5.

(41) See, Evidence (Report No.38) (1987), p.45 (para.86).

certainly the case in Queensland that a witness who desires to affirm must still establish a basis for not being sworn: see, e.g., Oaths Act 1867-1981, s.17. However, since 1984 this has no longer been the case in Victoria where a witness possesses a general entitlement to affirm.

The Victorian Chief Justice's Law Reform Committee had recommended in 1981 that a witness should be entitled to affirm upon objecting to being sworn. (42) The Committee commented:

> "The Sub-Committee recommends that a solemn affirmation should be available to a witness or deponent as of right. This should involve the potential witness or deponent in doing no more than objecting to being sworn, that is to say, stating that he wished not to be sworn, without being subjected to any interrogation as to any reason for that objection." (43)

Legislation was later enacted in Victoria in pursuance of these recommendations. Section 102 of the Evidence Act 1958 (Vict.) (44) was replaced by a provision which was substituted by the Evidence (Amendment) Act 1984 (Vict.). (45) Section 102 of the Evidence Act now enables a witness to make a solemn affirmation where that witness objects to being sworn. This Victorian development is also not averted to in the latest Australian edition of Cross on Evidence. (46)

The Australian Law Reform Commission concluded that the potential for irrational discrimination can only be avoided if an oaths or affirmations "are treated as equal options". The Commission recommended the adoption of legislation which treats the oath and the affirmation as equal options. In complying with this legislation the presiding judge or a court official would ask the witness which option he wishes to exercise thereby treating them as equal options. (47) A similar recommendation had earlier been made in the report of the Federal/Provincial Task Force on

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(42) See, Report on Oaths and Affirmations (1981).

(43) Id., p.6.

(44) 1958 No.6246.

(45) 1984 No.10074.

(46) See, Cross on Evidence, (3rd Aust. Ed., 1986), p.331, para. 7.54 (n.142).

(47) See, Evidence (Report No.38) (1987), p.45 (para.86).

Uniform Rules of Evidence which had been prepared for the Uniform Law Conference of Canada. (48) The Task Force commented:

> "As a matter of social policy, the oath and the affirmation should be equal. A witness need not have a religious belief to swear an oath if he understands the moral obligation to tell the truth. Why then should the Evidence Act require a witness to state a religious objection to the oath before being allowed to affirm? The implication is that the Legislature prefers the oath to the affirmation. The person who wishes to affirm is in the invidious position of asking for "special treatment".
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> For those reasons, a majority of the Task Force recommends that the Evidence Acts should be amended to provide that a prospective witness would have the choice of swearing an oath or making an affirmation without offering any reason for the choice. The witness's choice would be guided by his or her own conscience and by any instructions from the judge or from counsel that might become necessary." (49)

CONCLUSION

The Commission considers that the practice of swearing witnesses should continue while it appears of value in securing the truth at a trial. The Criminal Law Revision Committee considered that the question of retention or abolition of the oath was a social, rather than a legal, question. (50) The practice of swearing witnesses does not appear to have ceased in any common law jurisdiction. In other jurisdictions in Australia a witness possesses a general entitlement to make an affirmation instead of swearing an oath. This is the case in New South Wales, (51) Victoria, (52) South Australia, (53) Western Australia, (54)

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(48) See, Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (Prepared for the Uniform Law Conference of Canada) (1982).

(49) Id., p.240.

(50) See, Law Reform Commission (Aust.), (Sworn and Unsworn Evidence Research Paper No.8) (1982), p.27.

(51) See, Oaths Act 1900, ss. 12, 13 (N.S.W.).

(52) See, Evidence Act 1958, s.102 (Vict.).

(53) See, Evidence Act 1929, s.6(3) (S.A.).

(54) See, Evidence Act 1967, s.99 (W.A.).

Tasmania, (55) the Australian Capital Territory, (56) and the Northern Territory. (57) The Commission considers that a similar provision should also be enacted in Queensland. This recommendation of the Commission is made in the interests of uniformity of practice in Australia.

The Commission does not consider that it should be necessary for a witness to disclose the basis of his religious or philosophical objection to swearing an oath. These are personal matters which should not be disclosed in court. A jury may otherwise improperly rely upon such matters in evaluating the credit of witnesses. As Gibbs J. remarked in Demirok v. R. (58):

> "Evidence which is relevant solely to the question of competence should not be used by the jury for some other purpose, such as determining the credibility of the witness". (59)

The Commission recommends the adoption of a provision which confers an entitlement upon a witness to make an affirmation instead of swearing an oath. This is achieved by clause 25 which is contained in Part IV of the draft Bill. This clause is derived from s.7 of the Oaths and Affirmations Ordinance 1984 (A.C.T). (60) The clause prescribes a form of oath and affirmation to be taken by a witness in a proceeding. The term "proceeding" is defined in clause 24 of the draft Bill to include any proceeding taken before any court, tribunal, or officer in which evidence may be taken on oath or affirmation. Any provision in Part IV of the draft Bill will, therefore, not only have application to judicial proceedings. The Part will also apply to proceedings before a Tribunal or Board in which evidence may be given on oath or

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(55) See, Evidence Act 1910, s.126 (Tas.).

(56) See, Oaths and Affirmations Ordinance 1984 (No.79 of 1984) (A.C.T.).

(57) See, Oaths Act 1980, s.25 (N.T.).

(58) (1977) 137 C.L.R. 20.

(59) Id., 31.

(60) No.79 of 1984 (A.C.T.).

affirmation. (61)

The Commission has not recommended the adoption of the legislation proposed by the Australian Law Reform Commission in their recent report on evidence. This is because the scheme of that legislation does not accord with The Criminal Code which was drafted when testimony was ordinarily given on oath. This is evident from s.123 of the Code which constitutes the crime of perjury. That section provides: "It is immaterial whether the testimony is given on oath or under any sanction authorised by law".

The legislation proposed by the Australian Law Reform Commission enables the court to direct a person who is to give evidence to make an affirmation if the person refuses to choose whether to swear an oath or make an affirmation: see Evidence Bill 1987, cl.26(4). (62) A similar provision is contained in s.5(3) of the Oaths Act 1978 (Eng.). (63) It may be doubtful whether such an express provision empowering the court to direct a witness to affirm is necessary. This is because compellable witnesses who unjustifiably refuse to take the oath or affirm will be held guilty of contempt of court. (64) The Commission does not consider it necessary to empower the court to direct a witness to make an affirmation.

There may be also a difficulty if the court is expressly empowered to direct a witness to affirm. If a person gives false evidence after making an affirmation under direction there may be difficulty in prosecuting that person for perjury under s.123 of The Criminal Code. This is because that section provides:

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(61) See, e.g., Medical Act 1939-1984, s.12 (Medical Board); Industrial Conciliation and Arbitration Act 1961-1986, First Schedule, cl.6(h) (Industrial Court or Commission); Commissions of Inquiry Act, 1950-1987, s.6 (Commission of Inquiry); Mental Health Services Act 1974-1984, s.69A (Mental Health Tribunal), cf. R. v. House [1986] 2 Qd. R. 415, 419 per Connolly J.

(62) See, Evidence (Report No.38) (1987), p.153 (Appendix A).

(63) 1978 c.19 (Eng.).

(64) See, Borrie & Lowe's Contempt of Court (2nd ed., 1983), p.41. See also, Law Reform Commission (Aust.), Contempt: Disruption, Disobedience and Deliberate Interference (Discussion Paper No.27) (1986), p.17 (para.17).

> "The forms and ceremonies used in administering the oath or in otherwise binding the person giving the testimony to speak the truth are immaterial, if he assents to the forms and ceremonies actually used".

This provision appears to be derived from s.33 of The Oaths Act of 1867 which was considered in R. v. Whitehouse (65).

It may be arguable that a person who is directed to make an affirmation can be said to have assented to an affirmation within the meaning of s.123 of The Criminal Code. The proposed legislation of the Australian Law Reform Commission which treats an oath or affirmation as "equal options" can only be implemented in Queensland if The Criminal Code is revised. The proposed legislation would have been drafted with regard to s.35 of the Crimes Act 1914 (Cth.). (66) That provision creates an indictable offence of giving false testimony. The provision does not contain any requirement as is contained in s.123 of The Criminal Code for a person to assent to a ceremony which is not an oath binding a person to speak the truth.

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(65) (1900) 9 Q.L.J. 325.

(66) No.12 of 1914, as amended (Cth.).

CHAPTER TWELVE

EVIDENCE BY CHILDREN - EXISTING LAW

COMMON LAW

The limitation of the common law that testimony could only be received if given on oath also applied to testimony from children. This decided by the twelve common law judges who considered this question in R. v. Brasier. (1) The defendant in that case was convicted of assault with intent to commit the rape of a child under seven years of age. The child had not been sworn or produced as a witness at the trial. Evidence had been given at the trial by the mother of the child, and another woman who related statements made at the relevant time by the child. The judges determined that the evidence of the information which the child had given to her mother and the other woman ought not to have been received and the prisoner was given a pardon. The judges ruled:

> "That no testimony could be legally received except on oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the consequences of an oath". (2)

Evidence from young children has been admitted at common law only where a child appreciated the nature of an oath and the consequences of falsehood. In cases where the court was not satisfied as to these requirements such testimony could not be admitted. (3)

STATUTORY REFORMS

Statutory reforms have enabled the unsworn testimony of children of tender years to be admitted as evidence. At

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(1) (1779) 1 Leach 199 (168 E.R. 202).

(2) Id., 200 (E.R. 202). See also, R. v. Brown [1977] Qd. R. 220, 234.

(3) See, Phipson on Evidence (12th ed., 1976), p.601 (para. 1500). Trials could be adjourned so that counsel could instruct a child as to the oath: See, e.g., R v. Nicholas (1846) 2 Car & K. 249 (175 E.R. 102); R v. Cox (1898) 62 J.P. 89.

present the unsworn evidence of children is admissible in England under s.38 of the Children and Young Persons Act 1933 (Eng.). (4) Section 38 of that Act provides that in proceedings for any offence, when any child of tender years called as a witness does not understand the nature of an oath his unsworn testimony may be received, if he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. This provision originated from s.4 of the Criminal Law Amendment Act 1885. (5) Section 38 provides that a person cannot be convicted unless the unsworn testimony of a child was corroborated. (6)

Legislation which is derived from s.4 of the Criminal Law Amendment Act 1885 (Eng.) is in force in various jurisdictions in the British Commonwealth. This is the case in the Dominion of Canada, (7) and the Canadian Provinces. (8) Similar legislation in all States and Territories in Australia has made provision for the reception of unsworn evidence from children. (9) The relevant statutory provision in Queensland is s.9 of the Evidence Act 1977-1984. (10)

Prior to the enactment of the Evidence Act 1977-1984 (Qld.) the only statutory provision which enabled unsworn evidence of children to be admitted was s.146 of the Children's Services Act 1965. (11) That provision was, like s.30 of the Children Act 1908 (Eng.), (12) restricted to offences under that child protection

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(4) 23 & 24 Geo.V c.12 (Eng.).

(5) 48 & 49 Vict. c.69 (Eng.). See also, Children Act 1908 (8 Edw.VII c.69), s.30 (Eng.).

(6) See, J.A. Andrews, "The Evidence of Children", [1964] Criminal Law Review 769.

(7) Canadian Evidence Act R.S.C. 1970 c.E-10, s.16.

(8) See, e.g., Evidence Act R.S.O. 1980, c.145, s.18.

(9) See, Cross on Evidence (3rd Aust. ed., 1986), p.315, para 7.13 (n.41).

(10) No.47 of 1977 (Qld.).

(11) No.42 of 1965 (Qld.).

(12) 8 Edw.VII c.67 (Qld.).

statute. This had the consequence that the unsworn testimony of children could not be received in a prosecution under The Criminal Code. This was evident in R. v. Brown (13) where the Court of Criminal Appeal held that a child whose conscience was not bound by an oath should be permitted to affirm under s.2 of The Oaths Act Amendment Act of 1884. (14) Evidence could only be given by a child under s.2 of that Act where the court was satisfied that the child understood his liability to punishment if the evidence was untruthful. (15)

CORROBORATION

Most statutory provisions, which are based on English legislation, provide that corroboration of the unsworn testimony of a child is required before a person may be convicted. This is certainly the case in Canada under the Canada Evidence Act, and in legislation which is in force in most Canadian Provinces. (16) In most Australian jurisdictions, except New South Wales and Queensland, there is a strict requirement for the unsworn evidence of a child to be corroborated. (17) This was also the case under s.146 of the Childrens Services Act 1965 (Qld.).

The Evidence Act 1977-1984 (Qld.) does not per se require the unsworn testimony of children to be corroborated. This Commission in the report on the law relating to evidence made observations as to the corroboration of such evidence:

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(13) [1977] Qd. R. 220. See also, R v. Howarth [1967] Q.W.N. 11.

(14) 48 Vict. No.19 (Qld.). See also, R v. Hunter (1941) 59 W.N. (N.S.W.) 8.

(15) See, R v. Wilton [1946] Q.W.N. 19.

(16) See, Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (Prepared for the Uniform Law Conference of Canada) (1982), p.242.

(17) See, e.g. Evidence Act 1958 (No.6246), s.23(2) (Vict.); Evidence Act 1929 (No.1907 of 1929), s.12, as inserted by the Evidence Act Amendment Act 1972 (No.53 of 1972), cf. Andrews v. Armitt (1971), S.A.S.R. 178 (S.A.); Evidence Ordinance 1971, s.64(3) (A.C.T.). In New South Wales a similar provision (Crimes Act 1900 (No.40 of 1900), s.418), was repealed by the Crimes (Child Assault Amendment Act 1985 (No. 149 of 1985. This New South Wales development has not been noted in Cross on Evidence (3rd Aust. ed., 1986), p.337, para 8.7 (n.12).

> "In existing legislation in Queensland and elsewhere, there is a provision that a person shall not be convicted of an offence on the uncorroborated evidence of a child received pursuant to the provision. In our view, this rule draws too sharp a distinction between the sworn and unsworn testimony of children. Unless there is some special provision to the contrary, the sworn evidence of a child need not be corroborated as a matter of law although a jury should be warned of the dangers of acting on the uncorroborated evidence of young children: R. v. Kilbourne [1973] A.C. 729 at p.740. It seems to us that the same rule ought to apply to the unsworn evidence of a child." (18)

In pursuance of this recommendation, s.9(2) of the Evidence Act requires a jury to be warned of the dangers of acting on the uncorroborated, unsworn evidence of young children. The Evidence Act also provided that nothing in s.9 shall limit or affect any rule of law that prevents a person from being convicted of an offence upon uncorroborated evidence: see s.9(6). This subsection would apply in those cases where corroboration is by law required to establish certain offences under The Criminal Code: see, e.g., ss. 212, 215, 217, 218. The provision would also have had relevance in regard to s.632 of The Criminal Code which required the evidence of an accomplice to be corroborated. This section would have had application where a child was an accomplice to an offence. In 1986 s.632 of The Criminal Code was replaced by a provision which provides that a person may be convicted on the uncorroborated testimony of an accomplice but the court is required to warn the jury of acting on such testimony. (19) Therefore the position now in Queensland is that a person may be convicted upon the unsworn testimony of a child who is an accomplice.

DETERMINATION OF COMPETENCE OF A CHILD TO BE SWORN

The position in determining whether a child can be sworn is not entirely satisfactory. Under s.38 of the Children and Young Persons Act, and legislation derived from this provision, the

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(18) See, A Report of the Law Reform Commission on the Law Relating to Evidence (Q.L.R.C. 19, 1975), p.14.

(19) See, e.g. The Criminal Code Amendment Act 1986 (No.1 of 1986), s.84 (Qld.). This amendment only related to accomplices, it did not remove the requirement of corroboration involved by various provisions under The Criminal Code, see, e.g., s.212.

court is required to undertake inquiries into three matters. Initially the court is required to ascertain whether a child understands the "nature of the oath". It will be seen later that some recent cases in England and Canada suggest that the court, in determining this question, does not have to undertake a theological inquiry into the belief of a witness. Once it is established that a witness understands the nature of an oath then he can properly be sworn.

If a witness cannot be sworn the court is then required to consider whether the child is "possessed of sufficient intelligence to justify the reception of the evidence", and also "understands the duty of speaking the truth". The legislation would appear to impose a number of separate tests before a child will be permitted to give evidence. This was emphasised in Sankey v. R. (20) by Anglin C.J.C. as follows:

> "Now it is quite as much the duty of the presiding judge to ascertain by appropriate methods whether or not a child offered as a witness does, or does not, understand the nature of an oath, as it is to satisfy himself of the intelligence of such child and his appreciation of the duty of speaking the truth. On both points alike he is required by the statute to form an opinion; as to both he is entrusted with discretion, to be exercised judicially and upon reasonable grounds." (21)

These tests, however, appear to have coalesced into the question of whether the witness understands the obligation of speaking the truth.

The Court of Appeal in England in R. v. Hayes (22) has formulated the principles to be followed when considering whether a child may be properly sworn. Bridge L.J., in delivering the judgment of the court, remarked:

> "It is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised. The important consideration, we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is

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(20) [1927] S.C.R. 436.

(21) Id., 439.

(22) [1977] 1 W.L.R. 234.

> involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct". (23)

The child who had given evidence in Hayes had said that he was ignorant of the existence of a God, but appreciated the importance of telling the truth. The Court of Appeal held that the trial judge had properly exercised his discretion in allowing an oath to be administered despite an absence of an awareness of the divine sanction of an oath. The principles laid down by the Court of Appeal in the decision in R. v. Hayes, (24) have recently been affirmed by the Court of Appeal in R v. Bellamy. (25)

Professor J.C. Smith Q.C. has recently discussed the Hayes decision:

> "This was, with respect, a very sensible result, particularly in the light of the court's observation that the divine sanction of an oath is probably not generally recognised among the adult population. It is, however somewhat difficult to reconcile with the law as stated in section 38 [of the Children and Young Persons Act]. In substance, the child seems to have been allowed to give sworn evidence because it understood the duty of speaking the truth. But this is the statutory ground for allowing a child to give evidence unsworn. The "duty of speaking the truth" referred to in the section surely also refers to the solemnity of the occasion and the added responsibility of doing so in court as distinct from ordinary social discourse. Is a child to be allowed to give unsworn evidence when it does not appreciate the solemnity of the occasion and the special duty to take care in speaking the truth to which it gives rise? It seems clear from the section that an understanding of the nature of an oath requires something more than an understanding of the duty of speaking the truth. Moreover, it is difficult to see how a child who (as in Hayes) says that he has never heard of God can be said to understand the nature of an oath which begins "I swear by almighty God..." He cannot appreciate any "added responsibility... involved in taking an oath" if he does not know what an oath is." (26)

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(23) Id., 237.

(24) Supra.

(25) (1985) 82 Cr. App. R. 222.

(26) [1983] Crim. L.R. 174, p.175.

It may be thought that there is a logical inconsistency in permitting a child to take an oath where that child declares a lack of knowledge of a Supreme Being. In R v. Brown (27) two children were called as witnesses in a rape trial. Each child was questioned by the trial judge to determine her competence to take an oath. The answers of the children to the questions asked established that each child had a reasonably high standard of intelligence and an appreciation that she was required to tell the truth, and that, if she did not tell the truth, punishment would follow. Neither child was shown to have a belief in God or in the consequence of telling a falsehood in the presence of a Supreme Being. The trial judge permitted each child to be sworn.

The Court of Criminal Appeal of Queensland in R. v. Brown (28) held that an oath should not be administered to a child where it was clear that the witness did not have an expectation of divine punishment for telling falsehoods. Wanstall A.C.J. (as he then was) remarked:

> "The effect of what the learned trial judge did was to permit the evidence of the children to go before the jury with the appearance of the testimony sanctioned by oath, when in reality the conscience of neither witness was, or could have been, bound by the ceremony performed". (29)

Wanstall A.C.J. also recognised that there was a question whether the decision of the Court of Appeal in England in R. v. Hayes "could stand against the hitherto unquestioned principle of Omichund v. Barker." (30) The decision in R v. Hayes (31) may also be thought to be inconsistent with the decision in R. v. Brasier. (32)

The courts in some Canadian Provinces have also come to the conclusion that a child can be properly sworn only if a witness understood the consequences of divine punishment. R. v. Brasier

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(27) [1977] Qd. R. 220.

(28) lbid.

(29) Id., 222.

(30) Id., 225.

(31) Supra.

(32) (1779) 1 Leach 199 (168 E.R. 202).

(33) was applied by the Court of Appeal of British Columbia in R. v. Antrobus (34) where the court held that the admissibility of sworn evidence from children was dependent upon "the sense and reason they entertained of the danger and impiety of falsehood which was to be collected from their answers to questions propounded to them by the Court". (35) The Court of Appeal in Ontario followed the Androbus decision in R v. Lebrun. (36)

There is, however, modern Canadian authority that the words "understand the nature of an oath" in Canadian legislation, which is derived from s.38 of the Children and Young Persons Act 1933 (Eng.), do not require a witness to have any belief in divine retribution for telling falsehoods. The Court of Appeal in Manitoba in R v. Bannerman (37) declined to follow the decisions in R v. Antrobus, (38) and R v. Lebrun. (39) Dickson J.A. considered that the court was not required to consider whether a child understood the "consequences of an oath" as those words were not contained in s.16 of the Canadian Evidence Act. Dickson J.A. also remarked, "In my view neither case law nor statute required inquiry as to the child's capacity to know what befalls him if he tells a lie under oath". (40) Later, in R. v. Taylor (41) Dickson J.A. considered that child witnesses were properly sworn where they possessed "the moral obligation of speaking the truth". (42)

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(33) Ibid.

(34) [1947] 2 D.L.R. 55.

(35) Id., 157.

(36) [1951] O.R. 387.

(37) (1966) 48 C.R. 110, 55 W.W.R. 257.

(38) [1947] 2 D.L.R. 55.

(39) [1951] O.R. 387.

(40) (1966) 48 C.R. 100, 138; 55 W.W.R. 257, 285.

(41) (1970) 75 W.W.R. 45. See also, R. v. Dinsmore [1974] 5 W.W.R. 121.

(42) Id., 51.

The Supreme Court of Canada in R. v. Truscott (43) held that children could be permitted to be sworn if they "understood the moral obligation of telling the truth". (44)

It is established now in England that a trial judge does not have to undertake an inquiry into the theological understanding of a witness. In R. v. Bellamy (45) the Court of Criminal Appeal recently held that a mentally handicapped person who understood the importance of telling the truth could properly be sworn even though that person had no knowledge of God. Brown J. remarked:

> "Applying section 5 of the Oaths Act 1978, given that the judge concluded as he did that the complainant was a competent witness and given that she did not object to being sworn, it is our opinion that he should simply have allowed her to be sworn. Even however, if one took a different view as to that and concluded that the learned judge was entitled also to examine the complainant upon the extent of her belief in God, recent authorities regarding the proper application of section 38(1) of the Children and Young Persons Act 1933 indicate clearly that it is no longer necessary that a witness should have awareness of the divine sanction of the oath in order that that witness may properly be sworn." (46)

EXAMINATION OF CHILD WITNESS AS TO COMPETENCY IN ABSENCE OF JURY

One matter that remains to be considered is whether an examination by a trial judge of the competence of a child witness, who is otherwise compellable, to swear an oath should be conducted in the presence of a jury. (47) In R. v. Reynolds (48) the appellant was convicted on a charge of indecently assaulting a girl eleven years of age. At the trial a discussion took place between the Chairman of Quarter Sessions and Counsel as to the child's capacity to give evidence on oath. During this

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(43) [1967] S.C.R. 309.

(44) Id., 368. See also, Horsburg v. R. [1967] S.C.R. 746, 777 per Spence J.

(45) (1985) 82 Cr. App. R. 222.

(46) Id., 225.

(47) In England it has been held that this examination should be part of the record of the proceedings: See R. v. Khan [1981] Crim. L.R. 330.

(48) [1950] 1 K.B. 606.

discussion, by direction of the Chairman, the jury left the court. In the absence of the jury a school attendance officer gave evidence as to the educational and home environment of the child. After the examination of this witness the jury returned to the court, and the child was then sworn.

The Court of Criminal Appeal held that the examination of the school attendance officer constituted such an irregularity that the conviction could not stand. The court followed an earlier decision in which the trial judge had examined a child witness out of court and not in the presence of the accused to determine her competency to take an oath: See R. v. Dunne. (49) Lord Goddard L.C.J. considered that the jury should have remained in the court for the following reasons:

> "The jury would then have all the facts before them with regard to the child's truthfulness, and all the information which could be given on the question whether the child was one who would be likely to tell the truth and on whose evidence they could rely". (50)

These remarks of the Lord Chief Justice were criticised in the Law Quarterly Review by a commentator who wrote:

> "With all respect, there is something to be said for the view that the jury...have nothing to do with the competency of the witness, and that for them to use such evidence for other purposes is in conflict with the general principal that a jury is under the duty to decide the case on relevant evidence and on relevant evidence alone". (51)

The commentator pointed out that there were precedents where children were examined before a jury had been empanelled. (52) In Demirok v. R. (53) Gibbs J. (as he then was) agreed with these criticisms of R. v. Reynolds. (54) His Honour considered the question of competency of a witness is for the judge alone. His Honour remarked:

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(49) (1929) 21 Cr. App. R. 176.

(50) [1950] 1 K.B. 606, 611.

(51) See, (1950) 66 Law Quarterly Review p.159.

(52) Id., p.158, citing, R. v. Bayliss (1850) 4 Cox Cr. R. 23, Anon. 1 Leach Cr. L. (4th ed.) 430 n.

(53) (1977) 137 C.L.R. 20, 31.

(54) Supra.

> "Evidence which is relevant solely to the question of competence should not be needed by the jury for some other purpose, such as determining the credibility of the witness". (55)

The Commission considers that to preclude any argument there should be an express provision to ensure that any inquiry by a trial judge as to the competency of a child may be conducted in the absence of the jury: See draft Bill, cl.27(2). (56)

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(55) (1977) 137 C.L.R. 20, 31.

(56) Cf., Evidence Act 1977-1984, s.8(6) (Qld.).

CHAPTER THIRTEEN

EVIDENCE BY CHILDREN - PROPOSALS FOR REFORM

RETENTION OF PRACTICE OF CHILDREN GIVING UNSWORN EVIDENCE

There have been a number of proposals for reform to facilitate children giving unsworn evidence. In 1972 the English Criminal Law Revision Committee, which was established by the Home Secretary, examined this question. The Committee considered that the rules under s.38 of the Children and Young Persons Act 1933 were unsatisfactory. The Committee reported:

> "The inquiry whether the child understands the nature of the oath if carried out conscientiously, seems to us unrealistic; and the investigation sometimes made by the court as to whether the child believes in divine retribution for lying is really out of place when the question is whether he understands how important it is for the proceedings that he should tell the truth to the best of his ability about the events in question - in particular that he should not say anything against the accused which he does not really believe to be true and that he should say if he did not see something or does not remember it." (1)

The Criminal Law Revision Committee concluded "that it would be best to fix the age at and above which children should always give evidence on oath and below which they should always give it unsworn". (2)

The Criminal Law Revision Committee recognised that the age at which children should give sworn evidence is very much a matter of opinion. It was proposed that the age be fixed at fourteen years. Clause 22(2) of the draft Bill prepared by the Committee provides:

> "A child shall not be sworn as a witness in any proceedings; but a child may give evidence otherwise than on oath in any proceedings if in the opinion of the court he is possessed of sufficient intelligence to justify the reception of his evidence and understands the importance of telling the truth in those proceedings". (3)

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(1) See, Eleventh Report of the Criminal Law Revision Committee, "Evidence (General)", (Cmnd. 4991, 1972), p.122 (para.205).

(2) Id., p.122 (para.206).

(3) Id., p.185

Clause 22 of the draft Bill also repealed s.38 of the Children and Young Persons Act. The draft Bill defines the term "child" to mean a person under the age of fourteen. (4)

The approach suggested by the Criminal Law Revision of retaining the practice of enabling children to give unsworn evidence has been adopted by other law reform agencies. The Ontario Law Reform Commission in their examination of the law of evidence concluded that the competence of a child to make an affirmation as a witness should be related to the question as to whether that child has attained the age of criminal responsibility. The Commission considered that a child should not be permitted to make an affirmation unless that child could be prosecuted for perjury under the Canadian Criminal Code for giving untruthful evidence.

The Ontario Commission considered that it was "irrational to permit a child under seven, against whom sanctions of perjury cannot be invoked, to give evidence under oath". (5) The Commission considered that unsworn evidence should be able to be given by children under seven years of age, and those children aged between seven years and fourteen years who did not attain the age of criminal responsibility. Under this proposal, before a child would be permitted to give unsworn evidence the court would be required to be satisfied that the child is possessed of sufficient evidence to justify the reception of the evidence, and understands that he should tell the truth. (6)

The Law Reform Commission of New South Wales also recommended the continuation of the practice of young children being allowed to give unsworn evidence. The Commission cited the report of the Criminal Law Revision Committee which recognised that the age below which children should be permitted to give unsworn evidence is a matter of opinion. The Commission suggested the age of

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(4) Id., p.204.

(5) See, Ontario Law Reform Commission, Report on the Law of Evidence, (1976), p.128.

(6) Id., pp. 130-131. This approach was adopted in the Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (Prepared for the Uniform Law Conference of Canada) 1982, p.246. This is the approach taken by the Oaths (Children) Amendment Act 1985 (No 151 of 1985) (N.S.W).

twelve years is an appropriate age as that is the age when secondary education in New South Wales ordinarily begins. (7) The Commission considered that children under twelve years of age should be permitted to give evidence without oath or affirmation upon the court being satisfied that the child is sufficiently intelligent, understands the importance of telling the truth in the proceedings, promises to tell the truth, and there is sufficient reason in the interests of justice that the evidence be received. (8)

ABOLITION OF PRACTICE OF CHILDREN GIVING UNSWORN EVIDENCE

Some law reform agencies have not recommended any special legislative provision for taking evidence from children. In 1975 the Canadian Law Reform Commission proposed to replace the oath with an affirmation, and abolish unsworn evidence. The Commission also drafted an Evidence Code. The Commission commented: "There are no special rules of competency in the Code with respect to children. The frailties inherent in the testimony of immature witnesses should affect the weight of the evidence than its admissibility". (9)

This is also the approach of the Australian Law Reform Commission in a recent report on evidence. The Commission drafted a bill for an Act relating to evidence in proceedings in Federal Courts and in Courts of the Territories. In the Australian Capital Territory a child may presently give unsworn evidence by virtue of s.64 of the Evidence Ordinance 1971 (A.C.T.). That provision extends the application of s.418 of the Crimes Act 1900 (N.S.W.). Following the terms of s.23 of the Evidence Act 1958 (Vict.) the reference to a child of tender years had been replaced by a reference to a child who has not attained the age of fourteen years. The position in the Australian Capital Territory is, therefore, that a child under the age of fourteen years can give unsworn evidence.

Section 64 of the Evidence Ordinance 1971 (A.C.T.) will be

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(7) See, Law Reform Commission of New South Wales, Oaths and Affirmations (1980), p.39.

(8) Id., p.40.

(9) See, Law Reform Commission of Canada, Report on Evidence, (1975), p.87.

repealed under the legislation proposed by the Australian Law Reform Commission. See draft Evidence (Consequential Amendments) Act 1987, Part VIII (Amendments of the Evidence Ordinance 1971 (A.C.T.)), cl.22. (10) This repeal of a provision enabling a child to give unsworn evidence is not discussed in the report of the Commission. The Commission endorsed a recommendation that all witnesses be regarded as competent to give evidence until the contrary be shown. (11) It must be presumed that this recommendation also applies to evidence given by children.

The draft Evidence Act 1987 provides that a person who is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence is not competent to give evidence: See cl. 19(1). (12) This clause would appear to have relevance to all witnesses, including children. The Australian Law Reform Commission in the interim report on evidence, in discussing competence and compellability, commented:

> "Thus a young child could be permitted to answer simple factual questions but be ruled to be not competent to answer abstract or inferential questions. The court is given wide powers to investigate the issue in a manner similar to existing law. The practice would differ from the present in that it would not be necessary to explore the religious belief and knowledge of the witness. Otherwise it would be similar in that the judge or magistrate, for example, would question a young child about his schooling (if appropriate), his interests and test his ability to understand different types of questions, test whether he understands why he is giving evidence, what is expected of him and what will happen if he does not give accurate answers". (13)

The draft Evidence Act 1987 also provides that a witness may not give evidence unless that person has sworn an oath or made an affirmation in the prescribed form: see cl.26(1). (14) The position under this proposed legislation is that a child may only give evidence if the child not only understands the obligation to

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(10) See, Australian Law Reform Commission, Evidence (Report No. 38, 1987), p.210.

(11) Id., p.38, para.64.

(12) Id., p.150 (appendix A).

(13) See, Australian Law Reform Commission, Vol. 1 Evidence (Report No.26 - Interim) (1985), p.286, para.522.

(14) See, Evidence (Report No.38) (1987), p.153.

give truthful evidence, but has either sworn on oath or made an affirmation. The Australian Law Reform Commission has made no provision in the proposed legislation for a child to give unsworn evidence. It would seem that there would be little advantage in precluding children from giving unsworn testimony. The Canadian Federal/Provincial Task Force on Uniform Rules of Evidence concluded that the only advantage of abolishing unsworn testimony for children is simplicity. The loss of formerly admissible evidence outweighs any gain in simplicity. (15) The Task Force recommended that a young child should be allowed to testify upon that child making a promise to tell the truth and upon satisfying the criteria which have been discussed. The Task Force considered: "The advantage of a formal promise to tell the truth is that it would have an additional impact on the child's conscience and would constitute further motivation to give truthful testimony". (16)

CONCLUSION

The proposal of the Ontario Law Reform Commission that the capacity of a child to give unsworn evidence should be related to the criminal responsibility of the child has some merit. It would be incongruous if a child was required to take an oath or affirmation before giving evidence as a witness, yet that child could not be prosecuted for perjury for giving false testimony. In Queensland the criminal responsibility of children is regulated under s.29 of The Criminal Code (Qld.). (17) That section provides that a person under the age of ten years is not criminally responsible for any act or omission. The section also provides that a person under fifteen years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he possesses the requisite capacity. The Commission considers, in accordance with the recommendations of the Criminal Law Revision Committee, that

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(15) See, Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (prepared for the Uniform Law Conference of Canada) (1982), p.245.

(16) Id. p.246.

(17) As amended by s.19 of the Criminal Code Amendment Act 1976 (No.25 of 1976) (Qld.).

it is appropriate to enable children under fourteen years to give unsworn evidence. Provision should also be made to ensure that a child under that age who is criminally responsible may be prosecuted for perjury.

The draft Bill of this Commission provides that a child under the age of fourteen years may give evidence in any proceedings without being required to take an oath or make an affirmation providing that the court, presiding judge, or officer is satisfied after inquiry that the child understands the obligation to tell the truth in the proceedings and makes a promise to tell the truth: see, cl.27. Where a proceeding is being conducted before a jury the trial judge may undertake an inquiry in the absence of the jury: see cl.27(2). The Commission has not recommended the adoption of a separate "sufficient intelligence" test as proposed by the Criminal Law Revision Committee. The Commission considers that such a test is really related to the essential question of whether a child understands the obligation to tell the truth.

The draft Bill provides for the repeal of s.9 of the Evidence Act 1977-1979, and substituting a section that makes it evident that the court may permit unsworn evidence to be given by young children under the proposed Oaths Act: see cl.4(5). The draft Bill also provides that a child who knowingly gives false testimony in any material particular is guilty of perjury (vide s.123 of the Criminal Code): see cl.27(3). The Commission recognises that in many cases the evidence of children may be reliable. Dr. G.J. Nokes, who specialised in the law of evidence, commented:

> "The evidence of children, particularly when they describe acts of violence committed against themselves, is often accurate and reliable". (18)

The Commission has not adopted the approach taken in the report of the Director of Prosecutions in his report on sexual offences involving children. (19) In that report it was proposed

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(18) See, A Century of Family Law 1857-1957 (ed., R.H. Graveson & F.R. Crane) 1957, p.162. See also, D.P.H. Jones, "The Evidence of a Three-Year-Old Child" [1987] Crim. L.R. 677.

(19) See, An Inquiry into Sexual Offences involving Children Related Matters (November, 1985) (Government Printer, Brisbane).

that s. 9(1) of Evidence Act 1977-1984 should be replaced by the following subsection:-

> "(1) Where in any proceeding evidence of a child is tendered the child shall be competent to give that evidence unless it appears to the court he does not have the ability to give reliable evidence with respect to the matters to which his evidence relates and he shall not be required to take an oath or make a declaration unless he asks to do so and it appears to the court he understands the nature of an oath or a declaration." (20)

This recommendation differs from the approach taken by law reform agencies which have recommended that a witness can only give evidence where that witness possesses an understanding of the obligation to give truthful evidence. This is the basis of cl.19(1) of the Evidence Act 1987 which was drafted by the Australian Law Reform Commission. The Canadian Task Force which reported to the Uniform Law Conference of Canada also considered that children should only be permitted to testify where the court considers that the child understands the duty to tell the truth. It would not be in the interests of justice for a person to be convicted upon the evidence of a witness unless the court is satisfied that the witness understands the obligation to give truthful evidence.

The Commission has also not adopted the recommendation of the Director of Prosecutions that the Evidence Act 1977-1984 be amended to enable the court to receive expert evidence of the competence of children. The proposal is that "expert evidence is admissible relating to the powers of perception, memory and narrative of that child". (21) The law does not enable expert evidence of such matters to be required in respect of evidence of adult witnesses. (22) It is considered that the question as to the competency of a witness, whether an adult or a child, is best decided by a trial judge relying on his experience.

Corroboration. The Commission has also considered the question of whether the trial judge should be required to give the

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(20) Id., p.104 (para.7.114) (Quaere whether the reference in the proposed subsection to a "declaration" is intended to refer to an "affirmation").

(21) Id., p.106, para.7.114

(22) R. v. Turner [1975] 1 Q.B. 834.

jury a warning of the danger of convicting upon the unsworn evidence of children which is not corroborated. The House of Lords in R. v. Kilbourne (23) emphasised the rule of practice by which judges have in certain classes of case, including cases of sexual assault upon children, warned juries of the dangers of convicting on the uncorroborated evidence of a complainant. That rule of practice has, upon the recommendation of this Commission, (24) been given statutory force by s.9(2) of the Evidence Act 1977-1979 (Qld.).

There has been recent proposals, because of concern about child abuse cases, to repeal the requirement in s.9(2) of the Evidence Act for a trial judge to warn a jury of the danger of convicting a person on the uncorroborated evidence of a child. The Director of Prosecutions, in his report on sexual offences, recommended that s.9 of the Evidence Act 1979-1984 be amended by omitting from subsection (2) the words "but in a trial by jury of a person so charged the judge shall warn the jury of the danger of convicting on such evidence unless they find it is corroborated in some material particular by other evidence implicating that person." (25)

The Commission does not consider that s.9(2) of the Evidence Act be amended in this manner. If the statutory requirement for a judge to give a warning were repealed, there may well be an argument that the rule of practice emphasised in R v. Kilbourne (26) has not effectively been abrogated. The Commission proposes the insertion in the Evidence Act of a provision which is derived from s.3 of the Evidence (Children) Amendment Act 1985 (N.S.W.). (27) That provision enables a judge to give a warning to a jury

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(23) [1973] A.C. 729, 740 per Lord Hailsham of St. Marylebone L.C.

(24) See, A Report of the Law Reform Commission on the Law Relating to Evidence (Q.L.R.C. 19, 1975), p.14.

(25) See, n.18, ante, p.107 (para.7.117). See also, Dr. M.I. Hanger, A Dissertation on Child Abuse as it Presents in Psychiatric Practice (unpublished, D.P.M. thesis, Uni. of Qld.) 1987, p.99 (Queensland Supreme Court Library, Ref.L117, N, NEW).

(26) [1973] A.C. 729.

(27) No.152 of 1985 (N.S.W.).

of the dangers of convicting a person on the uncorroborated evidence of a child, but provides that a trial judge is not required by any rule of law or practice to give such a warning. Such an amendment would remove any argument that the rule of practice enunciated in R. v. Kilbourne (28) survives.

There is another matter that requires consideration. The amendment to The Criminal Code effected by The Criminal Code Amendment Act 1986 (29) ensured that a conviction could be grounded upon the unconvicted evidence of an accomplice. The amendment was enacted prior to the prosecution of a number of defendants for sexual offences with adolescents. The amendment, however, did not affect any of the provisions of The Criminal Code which impose a requirement of corroboration. To some extent this amendment places evidence of an accomplice in a preferred position to that of a young child who does not have the same incentive to perjury as an accomplice. For example, the 1986 Act amended s.212 of The Criminal Code by abolishing the punishment of whipping for the crime of defilement of young girls. This is a punishment which is never imposed, yet the amendment did not remove the requirement of corroboration imposed by that section. The Commission has proposed that a provision be substituted for s.9 of the Evidence Act which provides that notwithstanding any provision of The Criminal Code, a person may be convicted on the uncorroborated evidence of a child: see, draft Bill, cl.4(4); First Schedule (Part D). This is the effect of the recent legislation in New South Wales which has already been discussed. Similar legislation may also be introduced in the United Kingdom. (30)

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(28) [1973] A.C. 729.

(29) No.1 of 1986 (Qld.).

(30) See, J.R. Spencer, "Child Witnesses and the Criminal Justice Bill" (1987) 137 New Law Journal, 1031, 1033 (November 6, 1987).

CHAPTER FOURTEEN

OATHS AND AFFIRMATIONS TAKEN DURING PROCEEDINGS

This Chapter contains an examination of the oaths and affirmations that are taken during the course of proceedings in a court or tribunal. The draft Bill contains two Parts of relevance, viz.,

(i) Part IV, which relates to testimony given during proceedings; and

(ii) Part V, which relates to the oaths and affirmations of officials.

TESTIMONY

The Oaths Act 1867-1981 (1) prescribes the oaths that are taken by witnesses, interpreters, and on examination upon the voire dire, ss. 23-30. Part IV of the draft Bill makes similar provision for oaths and affirmations that relate to testimony that is given during proceedings. The Part has application not only to judicial proceedings, but also any proceedings before any tribunal or officer in which evidence may be given on oath or affirmation: see, cl.25. (2). Part IV contains provisions which have been recommended in earlier chapters of this paper.

Witnesses. In Chapter Eleven of the working paper the Commission recommended the inclusion of a provision which would enable a witness giving evidence in a proceeding to either take an oath or make an affirmation: see cl.26. At present under the Oaths Act different forms of oaths are prescribed for witnesses in civil and criminal cases: see, ss. 23 and 25. In criminal and civil cases a different form of oath is used depending on whether or not a jury has been sworn. The Commission considers that the forms of oath and affirmation prescribed under cl.26 will be uniformly adopted for all proceedings: see Eleventh Schedule.

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(1) 31 Vict. No.12.

(2) See, e.g., Medical Act 1939-1984, s.12 (Medical Board); Industrial Conciliation and Arbitration Act 1961-1986, First Schedule, cl.6(h) (Industrial Court or Commission); Commissions of Inquiry Act, 1950-1987, s.6 (Commission of Inquiry); Mental Health Services Act 1974-1984, s.69A (Mental Health Tribunal); cf. R. v. House [1986] 2 Qd. R. 415, 419 per Connolly J.

Children. The draft Bill also contains a provision that was discussed in Chapter Thirteen of this working paper which enables children under fourteen years of age to give unsworn evidence: see, cl.27.

Voire dire. The form of oath of a person to make a true answer on the voire dire is prescribed by s.24 of the Oaths Act. The form of oath or affirmation that a witness may take in a proceeding is not always appropriate for use upon the voire dire. This is because a prospective juror who is challenged may be examined upon the voire dire as to the matters alleged concerning him. (3) The form of oath to make true answer which is prescribed by the Oaths Act does not differ from the form of oath which is presently in use in England. (4) The draft Bill prescribes the form of oath or affirmation to be taken or made by a person who is examined upon the voire dire: see cl.28; Twelfth Schedule.

Interpreters. Provision is also made in Part IV of the draft Bill for interpreters of spoken language, and interpreters of signs to either take an oath, or make an affirmation: see cl.29 and cl.30; Thirteenth Schedule and Fourteenth Schedule. The Oaths Act at present enables interpreters of a language to be sworn as the form of oath requires an interpreter to swear to "understand the language" of a witness: see, e.g., ss. 26, 27, 28, 29 and 30. (5) The Oaths Act does not prescribe how an interpreter of signs is to be sworn. (6) The Oaths Act prescribes different forms of oath to be taken by interpreters in civil and criminal proceedings depending on whether or not a jury is empanelled. The Commission has prescribed a single form of oath and affirmation to be used by interpreters in all proceedings.

OATHS AND AFFIRMATIONS TAKEN BY OFFICIALS

Part V of the draft Bill prescribes the oaths and affirmations that are taken by officials in the course of legal

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(3) See, Vol.26 Halsbury's Laws of England (4th ed., 1979), p.327, para.628.

(4) Id., n.1.

(5) See also, The Oaths Act Amendment Act of 1876 (40 Vict. No.10), s.3 (Qld.).

(6) Cf., R. v. Ruston (1786) Leach 408 (168 E.R. 306).

and other proceedings. The Oaths Act prescribes the oaths that are taken by jurors and bailiffs. The draft Bill prescribes the oaths and affirmations to be taken by these officials, as well as enabling assessors to make an oath or affirmation.

Assessors. Assessors may be appointed to assist the court, or a tribunal in the hearing and determination of a matter. Assessors are traditionally appointed in admiralty or patent matters. (7) The Rules of the Supreme Court provide for assessors to be appointed and sworn: see R.S.C. 0.39, r. 40. Assessors are appointed under s.33(3) of the Medical Act 1939-84 (8) to advise the Medical Assessment Tribunal. There is no general statutory provision which enables an assessor to make an oath or affirmation to faithfully advise the court, or a tribunal in the hearing and determination of a matter.

In Michel v. Medical Board of Queensland (9) the Full Court held that medical assessors to the Medical Assessment Tribunal could not be sworn. This issue arose because a decision of the Tribunal was challenged on various grounds, including the ground that the assessors to the Tribunal was not sworn. Webb C.J. remarked:

> "There is no provision in The Medical Act of 1939 for the administration of an oath to the assessors; nor is there any provision in the Oaths Act of 1867 and the amendments thereto". (10)

The Chief Justice also held that assessors could not be lawfully sworn under the legislative ancestor to s.27 of the Acts Interpretation Act 1954-1977. (11)

There is no settled practice as to whether assessors are sworn. Assessors appointed by the Supreme Court must be sworn as the terms of O.39, r.40 are mandatory in that respect. In The Queen Mary (12) Scott L.J. observed that nautical assessors in the

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(7) See, Vol.1 Supreme Court Practice 1979 p.550, para.33/6/1.

(8) 3 Geo.VI No.10, as amended (Qld.).

(9) [1942] St.R.Qld. 1.

(10) Id., 11.

(11) 3 Eliz.11 No.3, as amended (Qld.). See The Acts Shortening Act of 1867 (31 Vict. No.6), s.21 (Qld.).

(12) (1949) 80 Lloyd's Rep. 609, 612.

admiralty jurisdiction of the English High Court are not sworn. The Commission proposes enabling assessors who are appointed to assist a court or tribunal to be sworn upon the direction of the court or tribunal. The draft Bill provides that where an assessor is appointed in any proceeding the assessor shall take an oath or affirmation upon the direction of the presiding judge or officer of a court or tribunal which shall be administered by the presiding judge or officer who may prescribe the form of any such oath or affirmation: see cl.31 (1). The form of any oath or affirmation that is prescribed by the court or tribunal shall require an assessor to faithfully assist the court or tribunal in the hearing and determination of the proceedings: see, cl.31(2). The draft Bill leaves it within the discretion of the court, or presiding judge or officer of a tribunal to determine whether to require an assessor to take an oath or make an affirmation.

Bailiffs. The oath that is taken by a bailiff who is appointed to take charge of a jury is antiquated. The form of oath which is prescribed by s.31 of the Oaths Act 1867-1981 states:

> "You swear that you will keep this jury in some safe and convenient place without meal, drink or fire candle-light excepted...".

This form of oath was drafted in an era when jurors were not permitted to have a meal before a verdict was reached.*

Since the Oaths Act 1867-1981 was enacted the Sheriff has been placed under a statutory duty to provide jurors with such accommodation, meals and refreshment as the court may allow: see, Jury Act 1929-1988, (13) s.44. The form of oath of a bailiff has been modified by usage as one of the duties of a bailiff is to accompany the jury to the room where they are served their meals. It is therefore appropriate that the forms of oath and affirmation to be taken by bailiffs not contain a provision which prevents jurors from being given meals and refreshment. The forms of oath and affirmation prescribed by the draft Bill for bailiffs and police officers also reflects the statutory requirement in s.621 of The Criminal Code that no person except the officer of the

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* A modern form of oath is contained in the Jury Act and Oaths Act Amendment Act 1988 (No.26 of 1988)(Qld.).

(13) 20 Geo.V No.19, as amended (Qld.).

court who has charge of the jury is to be allowed to speak to or communicate with the jury without the leave of the court until they are discharged. (14)

The draft Bill prescribes the forms of oath and affirmation to be taken by bailiffs who are appointed to take charge of a jury: see, cl.32(1)(2); Fifteenth Schedule. Members of the Police Force who are required under s.20 of the Police Act 1937-1984 (15) to attend upon the courts, may also be appointed to assist a bailiff in charge of a jury.* The draft Bill also prescribes the forms of oath and affirmation to be taken by police officers who are appointed to assist bailiffs: see, cl.32(3)(4); Sixteenth Schedule. In actual practice bailiffs are sworn by the associate or clerk of the trial judge. Upon appointment associates and clerks of judges are also appointed to the office of Deputy Sheriff. The draft Bill authorises the Sheriff or a Deputy Sheriff to administer the prescribed oath and affirmation to bailiffs and police officers: see cl.32(5).

The Chief Executive Officer of the Supreme Court has advised the Commission of the desirability of enabling police officers to be sworn to assist bailiffs at a time when the associate or clerk of a judge is absent. To ensure the security of the jury, which is a paramount consideration, provision should be made for an oath or affirmation to be administered to a police officer who takes up duty at a time when the Sheriff or Deputy Sheriff is not within the precincts of the court.** The draft Bill accordingly provides that, in the absence of the Sheriff or Deputy Sheriff, a bailiff who has been duly appointed to take charge of a jury may administer the requisite oath or affirmation to a police officer who will assist that bailiff in maintaining the security of the

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(14) See also, P. Devlin, Trial by Jury (3rd imp., 1966), p.43.

(15) 1 Geo.VI No.12, as amended (Qld.).

* Statutory sanction is given to the practice whereby police officers assist bailiffs by the Jury Act and Oaths Act Amendment Act 1988.

** Recent legislation enables an oath or affirmation to be administered to a police officer by a bailiff: see, Jury Act and Oaths Act Amendment Act 1988.

jury: see, cl.32(5). This provision does not empower a police officer to administer an oath or affirmation.

Jury. The forms of oath to be taken by jurors in civil causes and criminal trials are prescribed by ss. 21 and 22 of the Oaths Act. The form of oath to be taken by a juror in criminal trials requires a juror to "well and truly try and true deliverance make between Our Sovereign Lady The Queen and the prisoner at the bar". In recent years discussions have taken place as to the desirability of the practice of referring to the accused as the "prisoner at the bar". The use of the term "prisoner at the bar" is understood from an historical perspective as an accused person is in the custody of the court during the course of a trial.

The practice of referring to a defendant as the "prisoner at the bar" was considered at a meeting of Supreme Court Judges in 1983 which concluded that the Judges saw no objection to the Oaths Act being amended by substituting the word "accused" for the term "prisoner at the bar". The then Chief Justice of Queensland also pointed out that there would also have to be an alteration to the practice whereby the accused is referred to as the "prisoner" when the accused is placed in the charge of a jury: see, s.614 of The Criminal Code.

The form of oath by which jurors are sworn in New South Wales refers to a defendant as "the accused". (16) The Commission considers that it is appropriate that the forms of oath and affirmation prescribed for jurors in criminal trials should refer to the defendant as "the accused". Appropriate forms of oath and affirmation for jurors in criminal trials, in which the defendant is referred to as "the accused", are prescribed by the draft Bill: see, cl.33; Seventeenth Schedule. Section 22 of the Oaths Act prescribes different forms of oath in respect of crimes and misdemeanors, the draft Bill prescribes the same forms of oath and affirmation for all indictable offences. The draft Bill also prescribes forms of oath and affirmation for jurors in civil causes: see, cl.34; Eighteenth Schedule.

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(16) See, Supreme Court of New South Wales, Associates Handbook (Government Printer, Sydney), p.12.1.

The draft Bill enables a juror to elect whether to take an oath or make an affirmation. Until the enactment of the Oaths Acts and Another Act Amendment Act 1981 (17) the position in Queensland appeared to be that a juror who had no religious belief was not competent to service as a juror. Until the enactment of that Act jurors without any religious belief could not make an affirmation under s.17 of the Oaths Act. In R. v. Craine (18) Chubb J. observed that the provisions of The Oaths Act Amendment Act of 1876 (19) and The Oaths Act Amendment Act of 1884 (20) extended only to witnesses and interpreters, and not jurors.

Triers. The question of whether a juror is not indifferent between the Crown and the accused is under s.612 of The Criminal Code to be determined by triers who may be two or more jurors already sworn, or, if no juror has been sworn, by two indifferent persons chosen from the panel. The terms of s.612 of The Criminal Code require that a challenge for cause is to be determined by triers, and not the trial judge who has to pass upon the validity or prima facie sufficiency of the alleged cause for challenge. (21) The Criminal Code or the Oaths Act does not prescribe a form of oath to be taken by triers.

The terms of s.612 of The Criminal Code require triers to be sworn to ascertain the truth of any matter alleged as a cause for challenge stands indifferent to the accused, and their decision is final and conclusive. In R. v. Sills (22) triers were sworn upon a form of oath contained in a pamphlet entitled "Proclamations and Oaths for use in the District Courts of the Colony of Queensland and Instructions to Registrars and Bailiffs". That form of oath is as follows:

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(17) No.61 of 1981 (Qld.).

(18) (1898) 9 Q.L.J. 47.

(19) 40 Vict. No.10 (Qld.).

(20) 48 Vict. No.19 (Qld.).

(21) See, R. v. Smith [1954] Q.W.N. 49; 48 Q.J.P.R. 162. The history of the challenge for cause is discussed in R. v. Manson [1974] Qd.R. 191, 196-202 per Wanstall A.C.J.

(22) [1955] Q.W.N. 53.

> "You shall well and truly try whether (A.B. the name of the particular juror), one of the jurors stands indifferent to try the prisoner at the bar and a true verdict give according to the evidence. So help you God".

This form of oath is also contained in a court manual which is presently in use. The Commission has earlier recommended the removal of the terms "prisoner at the bar" from jurors' oaths. For reasons of consistency it would be necessary to make the same amendment to oaths and affirmations of triers. The oaths and affirmations of triers that are prescribed by the draft Bill refer to the defendant as "the accused": see, cl.35; Nineteenth Schedule.

CHAPTER FIFTEEN

ADMINISTRATION OF OATHS AND AFFIRMATIONS IN PROCEEDINGS

This Chapter examines the administrations of oaths and affirmations taken during proceedings. One important matter that needs to be considered is the authority of a court or tribunal to administer an oath or affirmation in a proceeding. Some statutes that create boards or commissions of inquiry expressly enable a statutory body to administer oaths and affirmations. (1) An arbitrator is, in the absence of a contrary intention in an agreement to arbitrate, conferred with express authority to examine witnesses on oath or affirmation. (2) A person appointed by a foreign authority to take or receive evidence in Queensland for that authority may for that purpose administer an oath. (3) Legislation which empowers a person to administer an oath, would also enable an affirmation to be administered where an affirmation is permitted at law. (4)

Legislation which constitutes courts of justice does not generally empower a court to administer an oath or administration. The general authority of a court and tribunal to administer oaths and affirmations is derived from s.27 of the Acts Interpretation Act 1954-1977 (5) which provides:

> "Power to hear and determine includes power to administer oath. Any court, judge, justice, officer, commissioner, arbitrator, or other person authorised by law, or by consent of parties, to hear and determine any matter or thing shall have authority to receive evidence and examine witnesses and to administer an oath

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(1) Medical Acts 1939-1984, s.12; Commission of Inquiry Act 1956-1987, s.6.

(2) See, Arbitration Act 1973, s.18(3). The authority of an arbitrator to administer oaths and affirmations to witnesses is conferred by s.27 of the Acts Interpretation Act 1954-1977 (Qld.).

(3) See, Evidence Act 1977-1979, s.24(1), (2). (The consent of the Attorney-General is required where the foreign authority is not a court or judge).

(4) See, Acts Interpretation Act 1954-1977, s.36.

(5) 3 Eliz.II No.3 (Qld.).

> to, or take an affirmation from, all witnesses lawfully called before them respectively."

The statutes which constitute the District Courts (6) and the Magistrates Court (7) expressly invests these courts with jurisdiction to "hear and determine" matters. The use in those statutes of the words "hear and determine" would enable those courts to administer oaths and affirmations to witnesses by virtue of s.27 of the Acts Interpretation Act.

The Commission does not consider that a provision as extensive as s.27 of the Acts Interpretation Act is necessary. It is evident from the statutes and rules of court that relate to the courts that witnesses will be called. A provision which enables an oath or affirmation to be administered to a witness should be contained in the proposed Oaths Act where an inquirer would reasonably expect to find it. The terms of the provision are expressed to apply to interpreters as well as witnesses: see, draft Bill, cl.36.

The draft Bill also provides that the court may administer the oaths and affirmations prescribed by the proposed Oaths Act for jurors, bailiffs and police officers, draft Bill, cl.37. The customary procedure of every court which has power to administer an oath is to leave it to be administered in the presence of the court by an officer of the court. (8) The draft Bill does not affect the practice whereby an oath or affirmation is administered by an officer who is subject to the direction of the court: see, cl.38.

Sections 32 and 33 of the Oaths Act presently provide for the administration of oaths. Section 32 of the Oaths Act provides that "nothing herein contained shall invalidate any oath taken in a sufficient or lawful form". It is apparent from s.32 that the Oaths Act does not exhaustively prescribe the mode of administration of oaths. This provision has been adopted in the draft Bill: see, cl.39(5)(a). The Oaths Act does not, therefore,

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(6) District Courts Act 1967-1982 (Qld.), s.66.

(7) Magistrates Courts Act 1921-1982 (Qld.), s.4(1).

(8) See, R. v. Hayes (1909) 12 G.L.R. 553.

abrogate the decision in Omychund v. Barker (9) which recognises that an oath must be administered in such a manner as to bind the conscience of a person taking an oath.

The Commission considers that the principle in Omychund v. Barker (10) should be reflected in the proposed Oaths Act. The relevant legislation in the United Kingdom expressly enables a person to take an oath in a form which a witness declares to be binding. (11) The Victorian Chief Justices' Law Reform Committee has recognised that it is "desirable to retain the right for a person to make an oath in a form binding on his conscience". (12) The draft Bill accordingly provides that every oath shall be binding for all purposes for which it is administered and may be taken in any form and in any manner which the person taking the oath declares to be binding: see cl. 39(5)(b). A similar provision was originally contained in s.33 of the Oaths Act of 1867 which provided that a form of oath which is declared to be binding by the person taking the oath is a sufficient form of oath.

Section 33 of the Oaths Act of 1867 was under consideration in R. v. Whitehouse (13) where a person who was charged with bigamy claimed his first marriage was invalid because in taking the oath required by s.10 of the Marriage Act of 1864 he had omitted to kiss the Bible. One principle that is established by this case is that a person is bound by an oath that is voluntarily taken. To some extent the decision was based upon s.33 of The Oaths Act of 1867. Griffith C.J. remarked:

> "When an oath is administered, and the person to whom it is administered accepts the mode of administration which is tendered by him and takes the oath in that form, he cannot, in my opinion, be afterwards allowed to say that he had it in his mind at the time that it was not

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(9) (1744) 1 Atk. 21 (26 E.R. 15).

(10) Ibid.

(11) See, e.g., Oaths Act 1978 (1978 c.19), s.4 (Eng.). See also, Oaths Act 1900 (1900, No.20), s.11A(6)(b) (N.S.W.).

(12) See, Report on Oaths and Affirmations (1981), p.5.

(13) (1900) 9 Q.L.J. 325.

binding on his conscience." (14)

The proposed cl.39(b) will ensure that an oath voluntarily taken by a person binds that person "for all purposes". The Court of Criminal Appeal in Re O'Sullivan & Stoker (15) emphasised that a similar provision in s.123 of The Criminal Code which bound a person who assented to a form of oath applied only to a charge of perjury, and not a charge of making a false statement under oath contrary to s.193 of the Criminal Code. Section 33 of The Oaths Act of 1867 contained a provision which bound a person for all purposes. However, that provision was repealed by s.3 of The Criminal Code Act of 1899. (16)

Another principle that is established by R. v. Whitehouse (17) is that it is not necessary for a person taking an oath to kiss the Bible or Testament. In R. v. Whitehouse (18) Real J. remarked:

> "Now, s.33 of the Oaths Act specially provides, as pointed out by the Chief Justice, that if any form is used, and the person declares it to be binding on him, that form is sufficient. It appears to me that if any form is tendered to a person, and the person adopts that form, he impliedly declares it to be binding upon him. He declares to the person administering the oath that it is sufficient, and in that event kissing the book is unnecessary". (19)

The decision in R. v. Whitehouse (20) also reflected the common law. In Omychund v. Barker (21) Willes L.C.J. remarked: "The kissing of the book here, and the touching of the Bramin's hand and foot in Calcutta, and many other different forms which are made use of in different countries, are no part of the oath,

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(14) Id., 326.

(15) Unreported, Court of Criminal Appeal, C.A. No.264 of 1987, December 16, 1987.

(16) 63 Vict. No.9 (Qld.).

(17) (1900) 9 Q.L.J. 325.

(18) lbid.

(19) Id., 327-328, cited by McPherson J. in Re O'Sullivan & Stoker (supra).

(20) (1900) 9 Q.L.J. 325.

(21) (1744) Willes 538 (125 E.R. 1310).

but are only ceremonies invented to add the great solemnity to the taking of it, and to express the assent of the party to the oath." (22)

In Queensland s.33 of the Oaths Act presently provides that it shall not be necessary to kiss the bible or Testament. That provision was inserted by the Oaths Act Amendment Act of 1924 (23) because of a ruling by a trial judge at a circuit court that it was necessary for a witness who was sworn to also kiss the Bible. (24) In making this ruling the trial judge was obviously not referred to R. v. Whitehouse. (25) A clause in the draft Bill provides that it is not necessary to kiss the Bible or the Testament: see, cl.39(1).

Section 33 of the Oaths Act prescribes a manner of administering an oath whereby a person taking an oath assents to the appropriate form of abjuration which is repeated by an official who administers an oath. The terms of s.33 provide for a person to assent to an oath by repeating the words "So help me, God". In Re O'Sullivan & Stoker (26) the defendants, instead of uttering these words, replied in the affirmative to an official before whom affidavits were made.

The defendants in Re O'Sullivan & Stoker (27) had been charged with perjury for having sworn in an affidavit of justification under the Bail Act that neither had been convicted of an indictable offence. The Court of Criminal Appeal, in a reference by the Attorney-General, held that the affidavits were validly sworn. McPherson J. pointed out that "it is the 'assent of the party' to the oath, when the oath-taker does not himself repeat the oath, that is critical".

The draft Bill makes provision for a person swearing an oath to indicate assent to the form of abjuration which is repeated by an official: see, s.39(2). The relevant provision provides for a

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(22) Id., 548 (E.R. 1315).

(23) 15 Geo.V No.7 (Qld.).

(24) See, Re O'Sullivan & Stoker (supra) per McPherson J.

(25) (1900) 9 Q.L.J. 325.

(26) Supra.

(27) Supra.

person swearing an oath to indicate assent to the oath by utteringthe words "So help me, God", any other words which may be prescribed by law, or "otherwise indicate assent to the oath". These last quoted words from the clause reflect the present law as clarified by the decision of the Court of Criminal Appeal in Re O'Sullivan & Stoker. (28)

It has been earlier mentioned that the Oaths Act does not exhaustively provide the circumstances in which an oath may be administered. For example, most jurisdictions have expressly enabled a person to be sworn with uplifted hand as in Scotland. (29) This legislation is derived from s.5 of The Oaths Act 1888 (Imp.). This provision was included in the 1888 statute in consequence of demands, usually by medical witnesses, to be allowed to "swear with uplifted hand" being refused. (30) Section 33 of the Oaths Act provides no authority for the taking of an oath in this manner. However, in Re O'Sullivan & Stoker (31) McPherson J. observed that it was impossible to suppose that s.33 deprived old Covenanters, Jews, and others of the right to take an oath in whichever form they regard as binding their conscience. To preclude any argument it is proposed that similar legislation should be enacted in Queensland which enables a person to be sworn as in Scotland: see cl.39(4).

At common law a person who had no religious belief was incapable of taking an oath: see, Attorney-General v. Bradlaugh. (32) The Commission considers it appropriate to provide that where an oath has been taken, the fact that the person taking the oath had no religious belief shall not affect the validity of the oath: see, cl.39(5)(c). A similar provision is contained in s.4 of the Oaths Act 1978 (Eng.).

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(28) Supra.

(29) See, e.g. Oaths Act 1978 (1978 c.19), s.3 (Eng.); Oaths Act 1900 (No.20 of 1900), s.11A (5) (N.S.W.); Evidence Act 1958 (No.6246), s.101 (Vict.); Evidence Act 1910 (1 Geo.V No.20), s.125 (Tas.).

(30) See, Vol.IX Chitty's Statutes (6th ed., 1912), p.223.

(31) Supra.

(32) (1885) 14 Q.B.D. 667. See also Re O'Sullivan & Stoker (supra), per Derrington J.

The Commission considers that it is appropriate for a person to choose whether to take an oath or make an affirmation. The scheme of the draft Bill enables a person to elect whether to swear an oath or make an affirmation. The draft Bill does not, therefore, enable a tribunal to undertake an inquiry into this matter. A commentator has recently pointed out that some Hindus and Buddists would consider themselves bound to truthfulness by taking an oath on the Bible, in preference to an affirmation. (33)

The Bill permits a person to affirm where he cannot be sworn in accordance with his religious beliefs: see, cl.40(1). A similar provision is to be found in s.5(2) of the Oaths Act 1978 (Eng.). The Bill does not enable a direction to be issued to a witness to make an affirmation in these circumstances, as in England, because of the legislative scheme of The Criminal Code. (34) The Bill provides that an affirmation is of the same force and effect as an oath: see, cl.40(1). Such a clause would make redundant a provision such as s.48 of the Acts Interpretation Act which is repealed under the draft Bill. The draft Bill permits an officer administering an affirmation to repeat the appropriate form of affirmation while permitting a person making an affirmation to state "I solemnly, sincerely, declare and affirm", see cl.40(3), any other words which may be prescribed by law, or otherwise indicate assent to the affirmation.

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(33) See, D.G. Peacocke, "Arbitration and the Arbitrator", (1987) Vol.5 The Arbitrator, 155, at p.120.

(34) See, p.88 of this paper.

DRAFT BILL

An Act to consolidate and amend the law relating to oaths.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows:-

PART I - PRELIMINARY

1. Short title. This Act may be cited as the Oaths Act 1988.

2. Commencement. This section and section 1 shall commence on the day on which this Act is assented to for and on behalf of Her Majesty.

(2) Except as provided by subsection (1), this Act shall commence on a day appointed by Proclamation.

3. Arrangement. This Act is arranged as follows:-

4. Repeals and amendment. (1) The Acts specified in Part A of the First Schedule are repealed to the extent indicated therein.

(2) The Roman Catholic Relief Act 1830 (10 Geo.IV No.9) of New South Wales, in so far as such Act applies in Queensland, shall cease to apply in and for Queensland.

(3) (a) The Constitution Act 1867-1987 (31 Vict. No.38) is amended to the extent indicated in Part B of the First Schedule.

(b) that Act as so amended may be cited as the Constitution Act 1867-1988.

(4) (a) The Justices of the Peace Act 1975 (No.51 of 1975) is amended to the extent indicated in Part C of the First Schedule.

(b) That Act as so amended may be cited as the Justices of the Peace Act 1975-1988.

(5) (a) The Evidence Act 1977-1984 (No.47 of 1977) is amended to the extent indicated in Part D of the First Schedule.

(b) That Act as so amended may be cited as the Evidence Act 1977-1988.

PART II - OFFICIAL OATHS AND AFFIRMATIONS

Division I - Oath and affirmation of allegiance

5. Oath and affirmation of allegiance. (1) Where by any law or practice a person is required to take the oath of allegiance, or make an affirmation of allegiance, that person shall take the oath of allegiance or make the affirmation of allegiance in the form of the Second Schedule.

(2) Except as provided by subsection (3), the forms of oath of allegiance and affirmation of allegiance prescribed under subsection (1) are in substitution for any form of oath of allegiance or affirmation of allegiance heretofore prescribed by law.

(3) Subsection (1) is not in derogation of section 7 of The Anglican Church of Australia Constitution Act of 1961 (10 Eliz.II No.7).

Division II - Executive oaths and affirmations

6. Governor. (1) The Governor upon appointment to office, and before entering upon the discharge of the duties of that office, shall:

(i) take the oath of allegiance, or make the affirmation of allegiance; and

(ii) take the oath of office, or make the affirmation of office in the form of the Third Schedule.

(2) The oaths and affirmations prescribed by subsection (1) shall be administered by the Chief Justice of Queensland or the next senior Judge of the State.

7. Executive Council. (1) A member of the Executive Council of Queensland upon appointment to office, and before entering upon the discharge of the duties of that office, shall:-

(i) take the oath of allegiance, or make the affirmation of allegiance;

(ii) take the oath of office and secrecy, or make the affirmation of office and secrecy as a member of the Executive Council of Queensland in the form of the Fourth Schedule; and

(iii) take the official oath, or make the official affirmation as a Minister of the Crown where an appointment is also made to that office.

(2) The Clerk of the Executive Council or any officer appointed to assist the Clerk of the Executive Council, upon appointment to that office, shall:-

(i) take the oath of allegiance, or make an affirmation or allegiance; and

(ii) take the oath of office and secrecy, or make the affirmation of office and secrecy in the form of the Fourth Schedule with such necessary adaptations as the Governor may authorise.

(3) The oaths and affirmations prescribed by subsections (1) and (2) shall be administered by the Governor, or some person authorised by the Governor.

8. Public officers. (1) All public officers required by direction of the Governor shall:-

(i) take the oath of allegiance, or make the affirmation of allegiance; and

(ii) take the official oath, or the official affirmation.

(2) In subsection (1) the expression "public officer" shall include a person appointed to a public office (not being a judicial office) by the Governor in Council, including a person appointed under the Public Service Act 1922-1978.

(3) The oaths and affirmations prescribed by subsection (1) shall be administered by the Governor, or some person authorised by the Governor.

9. Official oath and affirmation. (1) The forms of oath and affirmation that are in this Act referred to as the official oath and the official affirmation shall be in the form of the Fifth Schedule.

(2) A reference to the official oath and official affirmation in any Act shall be taken to refer to the forms of oath and affirmation referred to in subsection (1).

Division III - Parliamentary oaths and affirmations

10. Clerk of Parliament. (1) A person who is appointed to the office of the Clerk of Parliament shall, upon appointment to office, present the Speaker of the Legislative Assembly with a Commission of appointment to that office, and shall:-

(i) take the oath of allegiance, or make the affirmation of allegiance; and

(ii) take the oath of office, or make the affirmation of office in the form of the Sixth Schedule.

(2) The oaths and affirmation prescribed by subsection (1) shall be administered before the Legislative Assembly by the Speaker of the Legislative Assembly.

11. Parliamentary officers. (1) An officer appointed to assist the Clerk of Parliament in the recording of the proceedings of the Legislative Assembly, upon the direction of the Clerk of Parliament, shall:-

(i) take the oath of allegiance, or make the affirmation of allegiance, and

(ii) take the oath of office, or make the affirmation of office in the form of the Sixth Schedule.

(2) The oaths and affirmations prescribed by subsection (1) shall be administered by the Clerk of Parliament.

Division III - Administration of Justice - Oaths and affirmations of office

12. Judges and judicial officials. (1) Judges and Masters of the Supreme Court of Queensland, Judges of the District Courts of Queensland, members of the Industrial Court and the Industrial Conciliation and Arbitration Commission, members of the Land Court, stipendiary magistrates, justices of the peace, and all judicial officials directed by the Governor, upon appointment to office, shall:-

(i) take the oath of allegiance, or make the affirmation of allegiance; and

(ii) take the oath of judicial office or make the affirmation of judicial office in the form of the Seventh Schedule.

(2) The oaths and affirmations prescribed by subsection (1) shall be administered by the Chief Justice of Queensland, or a Judge of the Supreme Court of Queensland.

(3) Without prejudice to the operation of subsection (2), an oath and affirmation required to be taken upon appointment to the offices of stipendiary magistrate, and justice of the peace shall be taken before a Judge of the District Courts of Queensland, a stipendiary magistrate, or a person authorised in that behalf by a writ of dedimus potestatem who is hereby authorised to administer such oath and affirmation.

13. Queen's (or King's) Counsel. (1) A person upon presenting to the Supreme Court of Queensland a Commission of appointment to the office of Her (or His) Majesty's Counsel for the State of Queensland shall:-

(i) take the oath of allegiance, or make the affirmation of allegiance; and

(ii) take the oath of office, or make the affirmation of office in the form of the Eighth Schedule.

(2) The Registrar or a Deputy Registrar of the Supreme Court of Queensland is hereby authorised, upon the direction of the court, to administer the oaths, and affirmations prescribed by subsection (1).

14. Barristers. (1) A barrister upon admission before the Supreme Court of Queensland, shall:-

(i) take the oath of allegiance, or make the affirmation of allegiance; and

(ii) take the oath of office, or make the affirmation of office in the form of the Ninth Schedule.

(2) Subsection (1) shall not prejudice the operation of any Rule of Court relating to the admission of barristers.

(3) The Registrar or a Deputy Registrar of the Supreme Court of Queensland is hereby authorised, upon the direction of the court, to administer the oaths, and affirmations prescribed by subsection (1).

15. Solicitors. (1) A solicitor upon admission before the Supreme Court of Queensland, shall:-

(i) take the oath of allegiance or the affirmation of allegiance; and

(ii) take the oath of office, or make the affirmation of office in the form of the Tenth Schedule.

(2) Subsection (1) shall not prejudice the operation of any Rule of Court relating to the admission of solicitors.

(3) The Registrar or a Deputy Registrar of the Supreme Court of Queensland is hereby authorised, upon the direction of the

court, to administer the oaths, and receive the affirmations prescribed by subsection (1).

16. Notaries. A person who is appointed by the Court of Faculties of His Grace the Lord Archbishop of Canterbury to act as a Notary Public in Queensland shall take the oath of allegiance or make the affirmation of allegiance, and also make the declarations endorsed upon a notarial faculty of appointment before a Judge of the Supreme Court, or a Commissioner appointed by the Master of Faculties who is hereby authorised to administer such oath and affirmation, and receive such declarations.

Division V - Miscellaneous

17. Name of Sovereign. Where in the form of any oath and affirmation that is prescribed under this Act or any other Act the name of Her Majesty is expressed, the name of the Sovereign for the time being shall be substituted from time to time instead of the name of Her Majesty together with any appropriate amendment to any title that may be contained in that form of oath and affirmation.

18. Affirmation. (1) A person who under any Act is required to take an oath upon appointment to an office shall be entitled as of right to make a solemn affirmation instead of taking the oath, and every official authorised by law to administer the oath is hereby authorised to administer such affirmation.

(2) Every affirmation that is made under subsection (1) shall commence with the words "I, (name), do solemnly, sincerely, declare and affirm", and shall proceed with the words of the oath prescribed by law, omitting all words of imprecation or calling to witness including the words "So Help Me God".

(3) Where a person is required under this Part to take an oath or make an affirmation upon appointment to an office, that person may elect to take an oath or make an affirmation.

(4) An affirmation that is made under subsection (1) shall be of the same force and effect as an oath.

19. Governor. In this Part the term "Governor" includes the Lieutenant-Governor, Deputy Governor, or Administrator of the Government of Queensland.

20. Subscription. A requirement under this Part, or any other Act, for any officer to take an oath or make an affirmation upon appointment to an office shall include the requirement of that officer, and any person administering the oath or affirmation to subscribe the form of any such oath and affirmation provided that any oath or affirmation administered before a Judge may be certified or recorded by the associate or clerk of the Judge.

PART III - STATUTORY DECLARATIONS

21. Statutory declarations. (1) It shall be lawful for any justice of the peace, notary public, barrister or solicitor to receive the solemn declaration of any person voluntarily making the same before him in the following form:-

"I, (name), do solemnly and sincerely declare that:-

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the Oaths Act 1988.

Declared before me at in the State of Queensland on the day of ,19 .

Justice of the Peace.
(or as the case may be)"

(2) A declaration may be made under subsection (1) for the

purposes of any Act of the State of Queensland or any other State of the Commonwealth of Australia.

(3) A declaration that is required for the purposes of any Act of the State of Queensland may be received by a proper authority if the declaration is made outside the State in accordance with a corresponding law of a State of the Commonwealth of Australia.

(4) In subsection (3) the expression "corresponding law" means an Act of another State of the Commonwealth of Australia that corresponds to subsection (1), and which provides authority for the making of a voluntary declaration.

(5) A reference in any Act to a "declaration", "solemn declaration" or "statutory declaration" shall, in the absence of any contrary intention, be taken to refer to a solemn declaration made under subsection (1).

22. Subscription. A declarant and a person before whom a declaration under section 21 is made shall both subscribe the form of the declaration, and a document which is purportedly so subscribed shall, in the absence of evidence to the contrary, be evidence of the fact of such declaration.

23. Affidavits. (1) Notwithstanding any Act or Rule of Court, it shall be sufficient if any affidavit is verified by a declaration made under section 21, and no person shall hereafter be required to verify any affidavit upon oath.

(2) Any jurat endorsed on any affidavit shall be in the form prescribed by subsection (1) of section 21.

24. False declaration. (1) Any person who wilfully makes any declaration, knowing that declaration to be untrue in any material particular, shall be guilty of an offence, and shall be liable to a penalty of $2,000 or imprisonment for six months or both that penalty and imprisonment.

(2) In any proceedings in relation to an offence under subsection (1) it shall not be a defence that the declaration was not duly made or that the declaration was not in the form prescribed by section 21 provided that the court is satisfied that the defendant knew that he was required to declare his belief in the truth of the declaration.

(3) This section is not in derogation of The Criminal Code.

PART IV - TESTIMONY

25. Interpretation. In this Part the term "proceeding" includes any proceeding taken before any court, tribunal, or officer in which evidence may be given on oath or affirmation.

26. Witness. (1) A witness in a proceeding shall take an oath in the form of oath in the Eleventh Schedule.

(2) Where a person called as a witness in a proceeding elects to make an affirmation, instead of taking an oath, the affirmation shall be in the form of affirmation in the Eleventh Schedule.

27. Children. (1) A child under the age of fourteen years may give evidence in any proceedings without being required to take an oath or make an affirmation providing that the court, presiding judge, or officer is satisfied after inquiry that the child understands the obligation to tell the truth in the proceedings, and upon stating: "I promise to tell the truth".

(2) Where a proceeding is being conducted before a jury the trial judge may undertake an inquiry under subsection (1) in the absence of the jury.

(3) A child who under subsection (1) knowingly gives false testimony in any material particular is guilty of the crime of perjury under s.123 of the Criminal Code.

28. Voire dire. (1) A person who is to be examined upon the voire dire shall take an oath in the form of oath in the Twelfth Schedule.

(2) Where a person who is to be examined upon the voire dire elects to make an affirmation instead of taking an oath, the affirmation shall be in the form of affirmation in the Twelfth Schedule.

29. Interpreter of spoken language. (1) A person who is to interpret a spoken language in a proceeding shall take an oath in the form of oath in the Thirteenth Schedule.

(2) Where a person who is to interpret a spoken language in a proceeding elects to make an affirmation, instead of taking an oath, the affirmation shall be in the form of affirmation in the Thirteenth Schedule.

30. Interpreter of signs. (1) A person who is to interpret statements made by means of signs in a proceeding shall take an oath in the form of the Fourteenth Schedule.

(2) Where a person who is to interpret statements made by means of signs in a proceeding elects to make an affirmation, instead of taking an oath, the affirmation shall be in the form of affirmation in the Fourteenth Schedule.

PART V - OATHS AND AFFIRMATION OF OFFICE TAKEN DURING PROCEEDINGS

31. Assessor. (1) Where an assessor is appointed to assist a court or tribunal the assessor shall take an oath or make an affirmation upon the direction of the presiding judge or officer of a court or tribunal, which shall be administered by that official who is hereby authorised to administer the oath or affirmation, and also prescribe the form of any such oath or affirmation.

(2) The form of any oath or affirmation prescribed under subsection (1) shall require an assessor to faithfully assist the court or tribunal in the hearing and determination of the proceedings.

(3) Subsection (1) shall not prejudice the operation of any Rule of Court.

32. Bailiffs &c. (1) A bailiff appointed to take charge of a jury shall take the oath in the form of oath in the Fifteenth Schedule.

(2) Where a bailiff elects to make an affirmation, instead of taking an oath under subsection (1), the affirmation shall be in the form of affirmation in the Fifteenth Schedule.

(3) A member of the Police Force appointed to assist a bailiff pursuant to section 44A of the Jury Act 1929-1988 shall take the oath in the form of the Sixteenth Schedule.

(4) Where a member of the Police Force elects to make an affirmation, instead of taking an oath under subsection (3), the affirmation shall be in the form of affirmation in the Sixteenth Schedule.

(5) The Sheriff or a Deputy Sheriff is hereby authorised to administer an oath or affirmation prescribed by this section, provided that in the absence of the Sheriff or a Deputy Sheriff a bailiff who is in charge of a jury may administer an oath or affirmation under subsections (3) and (4) to a member of the Police Force who has been appointed to assist that bailiff.

33. Jurors in criminal trials. (1) A juror in a criminal trial shall take the oath in the form of oath in the Seventeenth Schedule.

(2) Where a juror in a criminal trial elects to make an

affirmation, instead of taking an oath, the affirmation shall be in the form of affirmation in the Seventeenth Schedule.

34. Jurors in civil causes. (1) A juror in a civil cause shall take the oath in the form of oath in the Eighteenth Schedule.

(2) Where a juror in a civil cause elects to make an affirmation, instead of taking an oath, the affirmation shall be in the form of affirmation in the Eighteenth Schedule.

35. Triers. (1) A trier appointed under s.612 of The Criminal Code shall take the oath in the form of oath in the Nineteenth Schedule.

(2) Where a trier appointed under s.612 of The Criminal Code elects to make an affirmation instead of taking an oath, the affirmation shall be in the form of affirmation in the Nineteenth Schedule.

PART VI

ADMINISTRATION OF OATHS AND AFFIRMATIONS TAKEN DURING PROCEEDINGS

36. Administration of oaths and affirmations to witnesses &c. All courts, judges, judicial officials, and officials authorised by law to receive evidence are hereby empowered to administer an oath or affirmation to all witnesses and interpreters.

37. Administration of oaths and affirmations. Any court or judge shall have authority to administer an oath or affirmation under sections 32 to 35 of this Act.

38. Practice. Nothing in this Act shall affect the authority of an officer of the court, subject to the direction of the court or a judge, to administer an oath and affirmation.

39. Administration of oath. (1) Any person taking any oath on the Bible or on the New Testament, or the Old Testament, for any purpose whatsoever, whether in judicial proceedings or otherwise, shall, if physically capable of doing so, hold a copy of the Bible or Testament in his hand but it shall not be necessary for him to kiss such copy by way of assent.

(2) Where the officer administering an oath is required to repeat the appropriate form of adjuration, the person taking the oath may thereupon, while holding in his hand a copy of the Bible, New Testament, or Old Testament, indicate his assent to the oath so administered by uttering the words "So help me, God.", any other words which may be prescribed by law, or otherwise indicate assent to the oath.

(3) The person taking the oath may, while holding in his hand a copy of the Bible, New Testament, or Old Testament, repeat the words of the oath as prescribed by law.

(4) Any witness in any judicial proceeding may swear, as in Scotland, with up-lifted hand in the following manner and form or in some similar manner and form:-

> The witness with uplifted hand says- "I swear by Almighty God as I shall answer to God at the Great Day of Judgement that I will speak the truth, the whole truth, and nothing but the truth."

(5) Provided that:-

> (a) nothing herein contained shall invalidate any oath taken in a sufficient or lawful form;
>
> (b) every oath which has been taken or which shall be taken shall be binding for all purposes for which it is administered and may be taken in any form and in any manner which the person taking the same declares to be binding; and

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

40. Affirmation. (1) An affirmation shall be of the same force and effect as an oath.

(2) A person may make an affirmation where it is not reasonably practicable without inconvenience or delay to administer an oath in the manner appropriate to his religious beliefs.

(3) Where an officer administering an oath is required to repeat the appropriate form of affirmation, the person making the affirmation may indicate his assent to the affirmation so administered by repeating the words: "I solemnly and, sincerely declare and affirm", any other words which may be prescribed by law, or otherwise indicate assent to the affirmation.

FIRST SCHEDULE

PART A

REPEALED ACTS
[s.4(1)]

Short Title	Year and No.	Extent of Repeal
The Oaths Act of 1867	31 Vic. No.12	The whole.
The Oaths Act Amendment Act of 1876	40 Vic. No. 10	The whole.
The Oaths Act Amendment Act of 1884	48 Vic. No. 19	The whole.
The Oaths Act Amendment Act of 1891	55 Vic. No. 14	The whole.
Criminal Code Act, 1899	63 Vic. No. 9	That part of the Third Schedule that amends the Oaths Act of 1867 (31 Vic. No. 12); The Oaths Act Amendment Act of 1884 (48 Vict. No.19); and The Oaths Act Amendment Act of 1891 (55 Vic. No. 14).
The Acts Citation Act of 1903	3 Edw. VII No.10	That part of the Second Schedule relating to The Oaths Acts, 1867

		to 1891, and that part of the Third Schedule that amends the Oaths Act of 1867 (31 Vic. No. 12); The Oaths Act Amendment Act of 1876 (40 Vict. No.10); The Oaths Act Amendment Act of 1884 (48 Vict. No.19); and The Oaths Act Amendment Act of 1891 (55 Vict. No.14).
The Statute Law Revision Act of 1908	8 Edw. VII No. 18	That part of the First Schedule that amends the Oaths Act of 1867 (31 Vic. No. 12); The Oaths Act Amendment Act of 1876 (40 Vic. No. 10); and The Oaths Act Amendment Act of 1884 (48 Vic. No. 19).
Oaths Act Amendment Act of 1924	15 Geo. V No. 7	The whole.
Acts Interpretation Act 1954-1977	2 & 3 Eliz. II No. 3, as amended	Sections 27, 31 and 48.
Oaths Acts Amendment Act of 1959	8 Eliz. II No. 5	The whole.
Oaths Acts Amendment Act of 1960	9 Eliz. II No. 16	The whole.
Oaths Act Amendment Act 1974	No. 23 of 1974	The whole.

Oaths Acts Amendment Act 1981	No. 4 of 1981	The whole.
Oaths Acts and Another Act Amendment Act 1981	No. 61 of 1981	The whole.
Jury Act and Oaths Act Amendment Act 1988	No. 26 of 1988	Part III.

PART B

Amendment of the Constitution Act 1867-1987.
[s.4(3)]

The Constitution Act 1867-1987 is amended by omitting section 4 and substituting the following section:-

"4. No member to sit and vote until he has taken the oath or affirmation of allegiance.

(1) No member of the Legislative Assembly shall be permitted to sit or vote therein until that member has taken and subscribed an oath of allegiance, or made the affirmation of allegiance under the Oaths Act 1988.

(2) The oath or affirmation prescribed by subsection (1) shall be administered by the Governor, or some person authorised by the Governor."

PART C

Amendment of the Justices of the Peace Act 1975
[s. 4(3)]

Section 10 of the Justices of the Peace Act is amended by:-

(i) omitting subsection (1) and substituting the following subsection:-

"(1) A justice other than a judge of the Supreme Court or a District Court shall not exercise any of the functions of that office until the justice has:-

(i) taken the oath of allegiance, or made the affirmation of allegiance under the Oaths Act 1988; and

(ii) taken the oath of judicial office, or made the affirmation of judicial office under the Oaths Act 1988.";

(ii) omitting subsections (2), (3) and (4); and

(iii) renumbering subsection (5) as subsection (2).

PART D

Amendment of the Evidence Act 1977-1984

[s.4(5)]

The Evidence Act is amended by omitting section 9 and substituting the following section:-

"9. Children. (1) The court may under the Oaths Act 1988 permit a child under the age of fourteen years to give evidence not on oath or affirmation, and such evidence taken and reduced into writing shall be deemed to be a deposition to all intents and purposes.

(2) Notwithstanding any provision of The Criminal Code, a person may be convicted on the uncorroborated evidence of a child, but the trial judge may warn the jury that it is unsafe to convict a person on the uncorroborated evidence of a child provided that such a warning is not required by any rule of law or practice."

SECOND SCHEDULE

[s.5]

OATH AND AFFIRMATION OF ALLEGIANCE

OATH OF ALLEGIANCE

I, , do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors, according to law.

SO HELP ME GOD!

AFFIRMATION OF ALLEGIANCE

I, , do solemnly, sincerely declare and affirm that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors, according to law.

THIRD SCHEDULE

[S.6]

GOVERNOR OF THE STATE OF QUEENSLAND

OATH OF OFFICE

I, , swear to well and truly to serve Her Majesty Queen Elizabeth the Second, Her Heirs and Successors, in the office of (insert title of office, e.g., Governor, Lieutenant-Governor, Deputy Governor, or Administrator) in and over the State of Queensland and its Dependencies in the Commonwealth of Australia, and that I will, in all things appertaining to me in my said office, do right to all manner of people after the laws and usages of the State, without fear or favour, affection or ill-will.

SO HELP ME GOD!

AFFIRMATION OF OFFICE

I, , solemnly, sincerely, declare and affirm to well and truly to serve Her Majesty Queen Elizabeth the Second, Her Heirs and Successors, in the office of (insert title of office, e.g., Governor, Lieutenant-Governor, Deputy Governor, or Administrator) in and over the State of Queensland and its Dependencies in the Commonwealth of Australia, and that I will, in all things appertaining to me in my said office, do right to all manner of people after the laws and usages of the State, without fear or favour, affection or ill-will.

FOURTH SCHEDULE

[s.8]

MEMBER OF THE EXECUTIVE COUNCIL OF THE STATE OF QUEENSLAND

OATH OF OFFICE AND OF SECRECY

I, , do swear that I will, to the best of my judgment and ability, faithfully advise and assist the Governor, Lieutenant-Governor, Deputy Governor, or Administrator of the Government of the State of Queensland in the Commonwealth of Australia, in all such matters as shall be brought under my consideration as a Member of the Executive Council of the State of Queensland, and will not directly or indirectly communicate or reveal to any person any matter which shall be so brought under my consideration, or shall become known to me, as a Member of the Executive Council, and which shall by any of those officials be directed to be kept secret.

SO HELP ME GOD!

AFFIRMATION OF OFFICE AND OF SECRECY

I, , solemnly, sincerely, declare and affirm that I will, to the best of my judgment and ability, faithfully advise and assist the Governor, Lieutenant-Governor, Deputy Governor or Administrator of the Government of the State of Queensland in the Commonwealth of Australia, in all such matters as shall be brought under my consideration as a Member of the Executive Council of the said State, and will not directly or indirectly communicate or reveal to any person any matter which shall be so brought under my consideration, or shall become known to me, as a Member of the Executive Council, and which shall by any of those officials be directed to be kept secret.

FIFTH SCHEDULE

[s.10]

OFFICIAL OATH AND AFFIRMATION

OFFICIAL OATH

I, , do swear that I will well and truly serve Her Majesty Queen Elizabeth the Second, Her Heirs and Successors, in the office of (insert title of office).

SO HELP ME GOD!

OFFICIAL AFFIRMATION

I, , do solemnly, sincerely, declare and affirm that I will well and truly serve her Majesty Queen Elizabeth the Second, Her Heirs and Successors, in the office of (insert title of office).

SIXTH SCHEDULE

[Ss.10,11]

PARLIAMENT OF QUEENSLAND

OATH OF OFFICE

"I, , do swear that I will make true Entries, Remembrances, and Journals of the things done and passed in the Legislative Assembly of Queensland during my continuance in the office of (insert title of office, e.g., Clerk of Parliament).

SO HELP ME GOD!

AFFIRMATION OF OFFICE

I, , do solemnly, sincerely, declare and affirm that I will make true Entries, Remembrances, and Journals of the things done and passed in the Legislative Assembly of Queensland during my continuance in the office of (insert title of office, e.g., Clerk of Parliament).

SEVENTH SCHEDULE

[s.12]

JUDICIAL OFFICE

OATH OF JUDICIAL OFFICE

"I, , do swear that I will well and truly serve Her Majesty Queen Elizabeth the Second, Her Heirs and Successors, in the office of (insert title of office, e.g., Chief Justice of Queensland, or Judge of the Supreme Court of Queensland) and I will do right to all manner of people according to law without fear or favour, affection or ill-will.

SO HELP ME GOD!

AFFIRMATION OF JUDICIAL OFFICE

"I, , do solemnly, sincerely, declare and, affirm that I will well and truly serve Her Majesty Queen Elizabeth the Second, Her Heirs and Successors, in the office of (insert title of office, e.g., Chief Justice of Queensland, or Judge of the Supreme Court of Queensland) and I will do right to all manner of people according to law without fear or favour, affection or ill-will.

EIGHTH SCHEDULE

[s. 13]

QUEEN'S (OR KING'S) COUNSEL

OATH OF OFFICE

I, , do swear that I will truly and honestly demean myself in the practice of a Queen's (or King's) Counsel according to the best of my knowledge and ability.

SO HELP ME GOD!

AFFIRMATION OF OFFICE

I, , do solemnly, sincerely, declare and affirm that I will truly and honestly demean myself in the practice of a Queen's (or King's) Counsel accordingly to the best of my knowledge and ability.

NINTH SCHEDULE

[s. 14]

BARRISTERS

OATH OF OFFICE

I, , do swear that I will truly and honestly demean myself, in the practice of a barrister of the Supreme Court of Queensland according to the best of my knowledge and ability.

SO HELP ME GOD!

AFFIRMATION OF OFFICE

I, , do solemnly, sincerely declare, and affirm that I will truly and honestly demean myself in the practice of a barrister of the Supreme Court of Queensland according to the best of my knowledge and ability.

TENTH SCHEDULE

[s. 15]

SOLICITORS

OATH OF OFFICE

I, , do swear that I will truly and honestly demean myself, in the practice of a solicitor of the Supreme Court of Queensland according to the best of my knowledge and ability.

SO HELP ME GOD!

AFFIRMATION OF OFFICE

I, , do solemnly, sincerely, declare, and affirm that I will truly and honestly demean myself, in the practice of a solicitor of the Supreme Court of Queensland according to the best of my knowledge and ability.

ELEVENTH SCHEDULE

[s. 26]

WITNESS

OATH

I swear by Almighty God that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

SO HELP ME GOD!

AFFIRMATION

I solemnly, sincerely, declare and affirm that the evidence I shall give will be the truth the whole truth and nothing but the truth.

TWELFTH SCHEDULE

[S.28]

VOIRE DIRE

OATH TO MAKE TRUE ANSWER

You shall true answer make to all such questions as the Court shall demand of you ... SO HELP ME GOD!

Witness to repeat ... SO HELP ME GOD!

AFFIRMATION TO MAKE TRUE ANSWER

You shall true answer make to all such questions as the Court shall demand of you ... You SOLEMNLY, SINCERELY DECLARE AND AFFIRM.

Witness to repeat ... I SOLEMNLY, SINCERELY, DECLARE AND AFFIRM.

THIRTEENTH SCHEDULE

[S.29]

INTERPRETER OF SPOKEN LANGUAGE

OATH

I, swear by Almighty God that I shall, to the best of my skill and ability, truly and faithfully translate from the English language into the language, and from the language into the English language.

SO HELP ME GOD!

AFFIRMATION

I solemnly, sincerely, declare and affirm that I shall, to the best of my skill and ability, truly and faithfully translate from the English language into the language, and from the language into the English language.

FOURTEENTH SCHEDULE

[s.30]

INTERPRETER OF SIGNS

OATH

I swear by Almighty God that I shall, to the best of my skill and ability, truly and faithfully communicate by signs or other convenient means words spoken in the English language, and translate into the English language statements made by signs.

AFFIRMATION

I solemnly, sincerely, declare and affirm that I shall, to the best of my skill and ability, truly and faithfully communicate by signs or other convenient means words spoken in the English language, and translate into the English language statements made by signs.

FIFTEENTH SCHEDULE

[s.32]

BAILIFF

OATH

You will keep this jury in some safe and convenient place and shall allow no one to speak to them neither shall you speak to them yourself in reference to the case without leave of The Court except to ask if they have agreed upon their verdict....SO HELP YOU GOD!

Bailiff to repeat...SO HELP ME GOD!

AFFIRMATION

You will keep this jury in some safe and convenient place and shall allow no one to speak to them neither shall you speak to them yourself in reference to the case without leave of The Court, except to ask if they have agreed upon their verdict...You SOLEMNLY, SINCERELY, DECLARE AND AFFIRM.

Bailiff to repeat...I SOLEMNLY, SINCERELY, DECLARE AND AFFIRM.

SIXTEENTH SCHEDULE

[s.32]

POLICE OFFICER

OATH

You will assist the bailiff in charge of this jury in keeping them in some safe and convenient place and allow no one but the bailiff to speak to them and not speak to them yourself without leave of The Court...SO HELP YOU GOD!

Police Officer to repeat...SO HELP ME GOD!

AFFIRMATION

You will assist the bailiff in charge of this jury in keeping them in some safe and convenient place and allow no one but the bailiff to speak to them and not speak to them yourself without leave of The Court...You, SOLEMNLY, SINCERELY, DECLARE AND AFFIRM.

Police Officer to repeat...I SOLEMNLY, SINCERELY, DECLARE AND AFFIRM.

SEVENTEENTH SCHEDULE

[s.33]

JURORS IN CRIMINAL TRIALS

OATH

You shall well and truly try and true deliverance make between Our Sovereign Lady The Queen and the accused whom you shall have in charge, and a true verdict give according to the evidence...SO HELP YOU GOD!

Juror to repeat...SO HELP ME GOD!

AFFIRMATION

You shall well and truly try and true deliverance make between Our Sovereign Lady The Queen and the accused whom you shall have in charge, and a true verdict give according to the evidence...You, SOLEMNLY, SINCERELY, DECLARE, AND AFFIRM.

Juror to repeat...I SOLEMNLY, SINCERELY, DECLARE AND AFFIRM.

EIGHTEENTH SCHEDULE

[s.34]

CIVIL JUROR

OATH

You shall well and truly try the issues joined between the parties (or assess the damages therein) and a true verdict give according to the evidence...SO HELP YOU GOD.

Juror to repeat...SO HELP ME GOD!

AFFIRMATION

You shall well and truly try the issues joined between the parties (or assess the damages therein) and a true verdict give according to the evidence...You SOLEMNLY, SINCERELY, DECLARE AND AFFIRM.

Juror to repeat...I SOLEMNLY, SINCERELY DECLARE AND AFFIRM.

NINETEENTH SCHEDULE

[s.35]

TRIERS

OATH

You shall well and truly try whether one of the Jurors stands indifferently to try the accused at the bar and a true verdict give according to the evidence...SO HELP YOU GOD.

Trier to repeat...SO HELP ME GOD!

AFFIRMATION

You shall well and truly try whether one of the Jurors stands indifferently to try the accused at the bar and a true verdict give according to the evidence... You SOLEMNLY, SINCERELY, DECLARE AND AFFIRM.

Trier to repeat...I SOLEMNLY, SINCERELY, DECLARE AND AFFIRM.