

THE CONTINUING ROLE OF JUSTICES OF THE PEACE IN THE NSW COMMUNITY

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Introduction

- 1 I'm delighted to have been invited to your conference dinner and to speak to you this evening. Your office is an old one, although now much changed in shape and form from its historical origins. Unlike the early justices of the peace commissioned by Richard the Lionheart, you are not literally tasked with keeping the peace. Unlike the earliest justices of the peace appointed in New South Wales by Governor Phillip, you are not charged with the administration of convict discipline. However, out of that early and burdensome past, your office has emerged as an important one, integral to the legal system and of great importance in the community more generally.
- 2 Upon your appointment as a justice of the peace, you will have each taken the judicial oath – an oath which is taken in New South Wales by judges and justices of the peace alike.¹ As part of that oath, you will each have sworn to:

...do right to all manner of people after the laws and usages of the State of New South Wales without fear or favour, affection or ill-will.²

¹ *Oaths Act 1900 (NSW)*, s 8.

- 3 How many times, I wonder, do those of us that have taken the judicial oath recall, let alone recite, its words? More fundamentally, what does the oath say about the role of justices of the peace in New South Wales? I propose to briefly reflect this evening on the continuing importance of your office, as embodied in your oath, in our ever changing modern world.

Identity in the age of the internet

- 4 In 2007, following a spate of counterfeit documents being lodged with Land & Property Information, the President of the Law Society of New South Wales sent a warning to New South Wales solicitors counselling vigilance. The letter recounted that:

The Fraud Squad has warned of the extraordinary and widespread increase in 'identification fraud', where whole, well-documented identities are acquired by fraudsters. Forged passports, drivers licences, credit cards, letterheads etc are all available to fraudsters. It is not unusual for fraudsters to have an excellent working knowledge of conveyancing procedures.³

- 5 This warning rings true more than a decade later. According to data from the Australian Bureau of Statistics, an estimated 1.6 million people, or 8.5% of Australians, experienced some form of personal fraud in the 2014/2015 period. This was an increase from 6.7% of Australians for the 2010/2011 period. Card fraud was most common, affecting an estimated 1.1 million people. An estimated 126,300 people were the victims of identity theft.
- 6 There was an article in *The Australian* recently about the Australian Border Force establishing a task force of intelligence analysts to patrol the so-called "dark net".⁴ Broadly described, the dark net is much like the ordinary internet in that it is comprised of websites, chat rooms, message boards and online marketplaces. However, unlike the ordinary internet, the dark net is hidden

² Ibid Sch 4.

³ 'Warning on counterfeit certificates of title' (2007) 4 *Law Society Journal* 47

⁴ Paul Maley, 'Task force to go deep into dark net', *The Australian*, 24 April 2017

from regular search engines such as Google. Instead, it is accessed through special anonymising software which obscures user's identities and IP addresses. Amongst other illegal products and services, there is a burgeoning market on the dark net for identity documents.

- 7 According to a report prepared by security analysts commissioned by Dell, the dark net is *"booming with counterfeit documents to further enable fraud, including new identity kits, passports, utility bills, social security cards and drivers' licences"*.⁵ The researchers reported that *"[y]ou can even purchase an entire identity online for less than the cost of a new iPhone"*.⁶ One Australian news source has reported that it is possible to have a counterfeit NSW Proof of Age card delivered by mail within 3 days of order.⁷ As with most things in life, it is apparently cheaper to buy in bulk – with one commentator noting that *"[o]rders for identities in packages of up to 100 could cost as much as 25¢ apiece"*.⁸ In the age of the internet, it may fairly be said that identity fraud is easier than ever before.

Oaths, affirmations and attestations

- 8 What does all this have to do with the ongoing role of New South Wales justices of the peace in today's society? The answer lies in the significance of the functions that you perform in witnessing the swearing of affidavits, in witnessing the signing of statutory declarations and in certifying copies of documents.

⁵ Kaleigh Rogers, 'When selling stolen identities on the dark net, customer service is key', *Motherboard*, 17 December 2014 <https://motherboard.vice.com/en_us/article/when-selling-stolen-identities-on-the-deep-web-customer-service-is-key>

⁶ Ibid

⁷ Damon Cronshaw, 'Police warnings over buying drugs, fake IDs on dark net', *Newcastle Herald*, 13 April 2014, <<http://www.theherald.com.au/story/2215768/police-warnings-over-buying-drugs-fake-ids-on-dark-net/>>

⁸ Itay Glick, 'Darknet: where your stolen identity goes to live', *Dark Reading*, 19 August 2016, <<http://www.darkreading.com/endpoint/darknet-where-your-stolen-identity-goes-to-live/a/d-id/1326679>>

9 Now of course, the functions you perform have a *formal* significance in that the law requires certain documents to be executed or certified in certain ways in certain circumstances. What I want to stress, however, is the *practical* significance of the functions you perform. Without a shred of exaggeration, in many circumstances you may be the only obstacle in the way of a rogue achieving a fraudulent purpose.

10 The unfortunate reality is that there is no shortage of legal cases in which an innocent party has been wronged on the strength of a false statement, a forged signature or some other variety of fraud. As Street J once observed in a case in which a daughter fraudulently acquired title to her father's cottage on the strength of a forged but solicitor-witnessed signature:

The statutory forms of transfer and mortgage themselves recognize the importance of identification, and purport to prescribe the only persons authorized to attest the transferor's or mortgagor's signature...Faithful compliance with the directions in this regard on the statutory forms of transfer and mortgage will lessen the risk of loss through fraud or forgery.⁹

11 It is appropriate to reflect on the basis of these sentiments regarding what is required in the formal execution and witnessing of documents. There are obvious questions that might be asked about the extent to which these formal requirements, such as for the witnessing of signatures, can really be expected to make a difference in preventing fraud. Indeed, it has been remarked in the academic literature that:

Often administered with pro forma dispatch, the ancient institution of the... oath may appear more a genuflection performed out of habit than a ceremony sacred or significant to the law.¹⁰

12 With such remarks in mind, how is it that the law rationalises the swearing of oaths and the witnessing of signatures as affording real protection? That

⁹ *Ratcliffe v Watters* (1969) 89 WN (Pt 1) NSW 497

¹⁰ 'A Reconsideration of the Sworn Testimony Requirement: Securing Truth in the Twentieth Century' (1977) 75 *Michigan Law Review* 1681, 1685

leads me back to the history of the oath and its centrality in legal systems since antiquity.

13 Oaths have a long history in the law and can be found in some form or another in most developed systems of law.¹¹ In the Roman law tradition, evidence was not strictly required to be sworn. The swearing of an oath went instead to the weight that would be accorded to the evidence. Unsworn witness statements were admissible but would be given less weight than the oral evidence of a witness who attended in person. Aside from this evidentiary function, oaths served another purpose in the Roman law tradition by providing a means of shortening or settling litigation. A plaintiff could tender a form of oath to a defendant. If the defendant accepted and swore the oath as tendered, that was the end of the plaintiff's case. The swearing of the oath "*necessarily resulted in a decision in [favour] of the oath taker*".¹²

14 In the earliest days of the common law tradition, the oath was thought to provide protection against falsity by way of an invocation of divine judgment. As *Wigmore on Evidence* recounts, the oath was viewed as:

...a summoning of Divine vengeance upon false swearing, whereby when the spectators see the witness standing unharmed they know that the Divine judgment has pronounced him to be a truth-teller.¹³

15 At least by some accounts, the view was taken under early English law that only Christians could swear an oath. This view was most strongly associated with Sir Edward Coke and his 17th century treatise the *Institutes of the Lawes of England*. Coke was categorically of the view that an "*infidel*", by which term Coke included all non-Christians, could not be a witness. Infamously, Coke declared that "*[a]ll infidels are in law... perpetual enemies...for between them,*

¹¹ See, eg, Helen Silving, 'The Oath: Part I' (1959) 68 *Yale Law Journal* 1329

¹² *Ibid* 1339

¹³ John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence* (Little, Brown and Company, 3rd ed, 1940) vol 6 §1816

as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace".¹⁴

- 16 Contrary to Sir Edward Coke's views, there were cases in the 17th century in which non-Christians were called as witnesses before the courts. Jewish witnesses, traditionally, were sworn on the Old Testament.¹⁵ There are also accounts of the oath being administered to Jewish witnesses "*by causing them [to] lay their hand on the Decalogue, and repeating the third command*".¹⁶ (That is, on the Ten Commandments and by repeating the commandment not to take the Lord's name in vain.) Other accounts record that, both before and after the time of Sir Edward Coke, Jewish witnesses "*were sworn upon their own books or their own roll*".¹⁷ (That is, upon the Pentateuch or Torah.)
- 17 The famous 18th century case of *Omichund v Barker* (1744) 125 ER 1310 clearly marks the transition away from the early understanding of the oath as an invocation of divine judgment. What followed was a more subjective understanding of the oath, "*conceived as a method of reminding the witness strongly of the Divine punishment somewhere in store for false swearing*".¹⁸
- 18 In effect, the law came to view the taking of an oath in terms of a witness forming "*an ironclad covenant with his god, pledging his eternal soul as security for his promise to testify truthfully*".¹⁹ This approach therefore required, as a minimum, belief in a supreme being who would punish for false testimony. As Willes LCJ explained the point in *Omichund v Barker* itself:

¹⁴ *Calvin's Case* (1609) 7 Co Rep 1a, 17a; 77 ER 377, 397

¹⁵ *Robeley v Langston* (1667) 2 Keble 314; 84 ER 196

¹⁶ *Anent Quakers refusing to Swear* (1676) 3 Bro Sup 92

¹⁷ *Omichund v Barker* (1744) 125 ER 1310, 1313

¹⁸ Wigmore, above n 13, §1816

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

...such infidels who believe [in] a god and that he will punish them if they swear falsely, in some cases and under some circumstances, may and ought to be admitted as witnesses in this though a Christian country. And on the other hand I am clearly of opinion that such infidels (if any such there be) who either do not believe a god, or, if they do, do not think that he will either award or punish them in this world or in the next, cannot be witnesses in any case nor under any circumstances, for this plain reason, because an oath cannot possibly [be] any tie or obligation upon them.²⁰

19 Although clearly requiring belief in some supreme being who will punish for false testimony, *Omichund v Barker* made it explicitly clear that oaths could be sworn by non-Christians. What followed was the development of a practice of swearing witnesses by the method most binding, or thought to be most binding, on their conscience.

20 *Omichund v Barker* itself was a mercantile dispute arising from trade between an English merchant and a resident of Calcutta. The Court of Chancery ordered certain commissioners to travel to Calcutta to take evidence and to certify upon their return the manner in which the oath was administered to witnesses. In upholding the admissibility of the witnesses' evidence, the Court recorded the manner in which the oath had been administered:

The commissioners accordingly returned that the oath was administered to the witnesses in the same words as here in England... and they certified that after the oath was read and interpreted to them, they touched the Bramin's hand or foot, the same being the usual and most solemn manner in which oaths are administered to witnesses who profess the Gentoo religion, and in the same manner in which oaths are usually administered to persons who profess the Gentoo religion on their examination as witnesses in the Courts of Justice erected by virtue of His Majesty's letters patent at Calcutta...²¹

21 Some of you may have heard of the "*chicken oath*" which was sometimes administered to witnesses of Chinese-descent in the Canadian province of British Columbia in the late 19th and early 20th century. The practice is said to have involved a ceremony outside the court as part of which a rooster's head

²⁰ *Omichund v Barker* (1744) 125 ER 1310, 1315

²¹ *Ibid* 1317. As per the *Oxford English Dictionary*, the reference to the "Gentoo religion" is an archaic form of reference to the Hindu faith.

would be chopped off on a block.²² The alternative “*paper oath*” was also sometimes administered, as part of which a witness would write their name on a piece of paper and burn it “*at the same time declaring that he would tell the truth; the consumption of the paper by fire signifying the fate of his soul if he should fail to do so*”.²³

22 A story in the *Oxford Book of Legal Anecdotes* humorously illustrates the idea of adopting the form of swearing most binding on the deponent’s conscience.²⁴ I cannot vouch for the veracity of the story, but the written account goes like this:

On one occasion the Counsellor (McNamara was known far and wide as ‘Counsellor Mack’) was engaged for a Plaintiff in the County Court, and had a great dread that the defendant would swear himself out of the debt by bare-faced perjury. When the defendant came to take the oath the Counsellor addressed him in Irish:

‘Listen carefully now to the terms of the oath and repeat after me-“If I do not tell the truth in this case-”

‘If I do not tell the truth in this case’

‘May a murrain seize my cattle’

‘Whats that Counsellor? Sure, that’s not the oath.’

‘Go on and repeat your oath. “May a murrain seize my cattle”

‘Oh, Glory be to God! ‘May a Murrain seize my cattle”.’

‘May all my sheep be clifted’ (i.e. fall over a cliff)

‘Yerra, Counsellor, what oath is that you’re trying to get me to take? Sure I never heard an oath like that before.’

‘Go on sir! Don’t argue with me! Repeat your oath: “May all my sheep be clifted”.’

‘Oh, God help us-“May all my sheep-” yerra Counsellor, are you sure thats in the oath?’

²² P S Lampman, ‘The Chinese Oath’ (1904) 3 *Canadian Law Review* 24

²³ Ibid

²⁴ Michael Gilbert (ed), *The Oxford Book of Legal Anecotes* (Oxford University Press, 1986) 207

‘Go on sir!’

‘Oh God, “May all my sheep be clifted”.’

‘May all my children get the falling sickness-’

‘Arrah, Counsellor, tell his Honour that I admit the debt, and I only want a little time to pay.’

- 23 What of the current practice? As you all know, as a matter of statute in New South Wales, sworn evidence may be on oath or by affirmation.²⁵ Schedule 1 to the *Evidence Act 1995* (NSW) provides an appropriate form for the oath of a witness:

I swear by Almighty God that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

- 24 In most cases, this will be suitable for individuals who are Christians and who are happy to take an oath. Notwithstanding customary practice, it is not necessary under the *Evidence Act* that a religious text be used in administering the oath.²⁶

- 25 In line with the reasoning in *Omichund v Barker*, the Schedule 1 form of oath contemplates the swearing of oaths by those who are not of Christian faith, noting that a deponent “*may name a god recognised by his or her religion*”. However, contrary to the common law approach in *Omichund v Barker*, the *Evidence Act* provides that a person may take an oath even if the person’s religious or spiritual beliefs do not include a belief in the existence of a god.²⁷ In such circumstances, the Act directs that the person may take an oath referring to the basis of the person’s beliefs in accordance with a form prescribed by the regulations. Unfortunately, those regulations have not been promulgated, and in most circumstances individuals whose religious practices would dictate swearing an oath in accordance with the strictures of their

²⁵ *Evidence Act 1995* (NSW), s 21

²⁶ *Ibid* s 24(1)

²⁷ *Ibid* s 24A(1)

beliefs rather than by reference to a god will, for the time being, have to make an affirmation.

- 26 Of course, all individuals have the choice whether to take an oath or make an affirmation.²⁸ Importantly, an affirmation has the same effect for all purposes as an oath.²⁹ An affirmation can be made without reference to any particular system of religious belief. For example, the form of affirmation set out in Schedule 1 of the *Evidence Act* reads:

I solemnly and sincerely declare and affirm that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

- 27 I have set out in this discussion to reflect on why we place faith in oaths, affirmations and attestations as a means of preventing or deterring fraud. Certainly the law no longer views oaths as a means of invoking divine retribution for falsehood. Insofar as the modern statutory framework provides for sworn evidence by way of either oath or affirmation, places affirmations on equal footing with oaths and, indeed, provides that an oath is not ineffective by virtue of lack of religious belief, the rationale in *Omichund v Barker* may also now be open to question. Do we still insist on oaths as a reminder of the divine punishment in store for false swearing? Or, in our democratic multi-cultural and multi-faith society, is there something else at play in our insistence on oaths, affirmations and attestations?

- 28 Part of the answer lies in the consequences that accompany making a false statement on oath or affirmation. A person who wilfully swears falsely in an affidavit is deemed guilty of perjury as if the person had wilfully sworn falsely in open Court in a judicial proceeding in the Supreme Court.³⁰ In this regard, it has been remarked in the United States of America that absent the prospect

²⁸ *Ibid* s 23(1)

²⁹ *Ibid* s 21(5)

³⁰ *Oaths Act 1900* (NSW), s 29

of severe criminal penalties for perjury, “*even the solemnity of the oath... cannot [e]nsure truthful answers*”.³¹

- 29 The deterrent effect of the offence of perjury notwithstanding, there should be, and I would venture is, something more to the law’s continued insistence on oaths and affirmations in an age where identities can be stolen with the click of a button. In a multicultural society of a diverse range of religious beliefs, and indeed, where many individuals lack religious belief, there is still something in the solemnity and ceremony of requiring oaths, affirmations and attestations in certain circumstances. There is something in requiring that certain actions or statements be marked with a solemn public act befitting their sincerity and seriousness. As Lamer CJ of the Supreme Court of Canada has observed in the context of sworn witness evidence:

There remain compelling reasons to prefer statements made under oath, solemn affirmation or solemn declaration. While the oath will not motivate all witnesses to tell the truth...its administration may serve to impress on more honest witnesses the seriousness and significance of their statements.³²

- 30 The same can be said of the functions that each of you administer. The act of formally executing a document before a member of the community of upstanding character and who has sworn, without reward, to do right by all manner of people, is an important marker of the seriousness and significance of certain actions. That alone may serve to encourage honesty. Beyond that, and as I have already noted, in some circumstances you may also be the only person standing in the way of a fraud or forgery being perpetrated. I don’t propose to delay you any longer, other than to sincerely thank you for your time and to commend you on your service to the community.

³¹ *United States v Mandujano* 425 US 564, 576 (1976)

³² *R v B (K G)* [1993] 1 SCR 740, 789