THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 28

Official Attestation of Forms and Documents

Part A: Statutory Declarations
Part B: Signing of Affidavits

REPORT

NOVEMBER 1978

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

The Commissioners are -

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PART A : STATUTORY DECLARATIONS

GENERAL

Terms of reference

1. 1 The Commission was asked to consider and report on the law relating to oaths, statutory declarations, acknowledgements and the like (except notarial acts), with a view to the development of uniform provisions which could be adopted as a model for the Commonwealth and the States.

Comment on terms of reference

1.2 Although the terms of reference are expressed widely the Commission in this report (Part A) has confined its attention to a consideration of the formalities required in making statutory declarations. This course of action has been taken because the law relating to statutory declarations conveniently lends itself to separate treatment. The reform of the law in this area can proceed independently of a consideration of the other aspects raised by the terms of reference. The Commission will consider the formalities required in the attestation of forms and documents other than statutory declarations at a later stage.

Uniformity

1.3 Prior to the Commission being given these terms of reference it already had a project dealing with the official attestation of forms and documents. However, at the second conference of the Australian Law Reform Agencies in April 1975, it was recommended that the Law Reform Commission of Queensland and the Law Reform Commission of Western Australia should work together on the project which now forms the terms of reference set out in paragraph 1.1 above.

1.4 At the third conference of Australian Law Reform Agencies in May 1976 the representatives of the Commissions involved confirmed that they would propose to their respective Attorneys General that the project be undertaken with a view to reform on a uniform basis. The proposal subsequently received the consent of the Attorneys General of

Queensland and Western Australia and references were forwarded to the respective Commissions accordingly.

1.5 The Commission's draft report and the question of uniformity generally was discussed with the Queensland Law Reform Commission. In view of the reservations expressed by the Queensland Law Reform Commission,[1] this report reflects only the views of the Western Australian Law Reform Commission as to the desirability of the development of uniform State and Commonwealth legislation to apply throughout Australia.[2]

Working papers

1.6 In February 1973 the Commission issued a preliminary working paper to many Western Australian Government departments and instrumentalities dealing with the methods of attestation of forms and documents, the formalities required in those methods and in particular the requirement for information to be provided by a statutory declaration. In April 1977 the Commission, having considered the comments on the preliminary working paper,[3] issued a further working paper seeking public comment on the use of statutory declarations for the supply of information. The working paper also discussed the practice in Western Australia of affixing signatures to affidavits by means of a rubber stamp.[4]

1.7 The working paper, which contains a copy of the preliminary working paper, is reproduced as Appendix II. The names of those who commented on the working paper are set out in Appendix I.

LAW AND PRACTICE IN WESTERN AUSTRALIA

Survey

1.8 Prior to the issue of the preliminary working paper in February 1973, the Commission, with the assistance of the Public Service Board of Western Australia, obtained copies of forms and documents in use by many State Government departments and instrumentalities. This

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1 See paragraphs 1.39 and 1.40 below.
2 See paragraphs 1.36 to 1.42 below.
3 Appendix III of the working paper contains a summary of the views of the commentators
4 The Commission's recommendations on this matter are made in Part B of this report: see paragraphs 2.1 to 2.11 below.

survey revealed that there were at least 242 forms and documents in use which required information to be supplied. Four methods were used in those forms and documents: affidavits,[5] statutory declarations,[6] witnessed statements,[7] and unwitnessed statements.[8]

1.9 The survey showed that approximately three-quarters of the forms and documents required information to be provided by means of an attested[9] statutory declaration under s.106 of the *Evidence Act 1906*.[10] In some cases this is a statutory requirement but in others it is merely a matter of departmental practice.[11] In some cases an attested statutory declaration, other than one under s.106 of the *Evidence Act 1906*, is prescribed.[12]

Declarations made outside Western Australia

1.10 Where a Western Australian statute requires that a statutory declaration be made in certain circumstances, and such a declaration is made in another jurisdiction in Australia, it would appear that it must be made in accordance with the law in force in that jurisdiction. Sometimes the statute expressly provides for this. For example, under s.16(2) of the *Companies Act 1961* a statutory declaration may be required as evidence of compliance with the requirements of the Act relating to the formation of a company. Under the *Companies Regulations 1976*, if such a declaration were made in Victoria, it must be made in accordance with the law in Victoria.[13] Where the maker of such a declaration knowingly makes a false statement therein he can be prosecuted in Victoria for wilful and corrupt perjury.[14]

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5 See paragraphs 2.23 and 2.11 to 2.13 of the working paper.

6 See paragraphs 2.14 to 2.21, and 2.24 and 2.25 of the working paper.

7 See paragraph 2.26 of the working paper.

8 See paragraph 2.27 of the working paper.

9 That is, a statutory declaration which must be made before a prescribed person who must attest to this fact in the document.

10 Section 106 provides :

> It shall be lawful for any justice of the peace or other person by law authorised to administer an oath to take and receive the declaration of any person voluntarily making same before him in the following form, namely -
>
> > I, A.B., [*insert place of abode and occupation*], do solemnly and sincerely declare that [*here state the facts*], and I make this solemn declaration by virtue of section one hundred and six of the *Evidence Act, 1906*.
> >
> > Declared at this day of 19 , before me, C .D ., Justice of the Peace [*or as the case may be*].

11 See paragraph 2.24 of the working paper.

12 See paragraph 2.25 of the working paper.

13 *Companies Regulations 1976* (WA) Second Schedule, form 4 and note thereto. See also regulation 7.

14 See *Evidence Act 1958* (Vic), s.141.

1.11 Sometimes, however, a Western Australian enactment requires that information given for the purposes of the enactment must be verified by statutory declaration, but does not itself prescribe the manner in which the declaration must be made. It would appear that, in such a case, s.4 of the *Interpretation Act 1918* (WA) applies. That section provides a definition of "statutory declaration" wherever those words appear in Western Australian legislation (unless the contrary intention appears) and seems to require that the declaration must be made in accordance with the law in the State or Territory in which it was made.[15]

1.12 Statutory declarations are not always required by or for the purpose of a statutory provision. For example, an insurance company in Western Australia may, as a matter of practice, require a claimant to support his claim by a statutory declaration. If the declaration is made in Western Australia it must be made in accordance with s.106 of the *Evidence Act 1906*. If the declaration were to be made in Victoria in support of an insurance claim made in Western Australia, would it be necessary for the declaration to be made in accordance with the law in force in Western Australia or that in force in Victoria? The answer to this is not altogether clear. However, it would seem that, on general principles, the formal validity of a declaration depends on the law of the jurisdiction in which it was made and therefore that the declaration should be made in accordance with Victorian law.[16] Whether this is so or not, it does appear to be clear that if a statutory declaration is made in Victoria in accordance with the law there, containing a statement which is knowingly false, the maker commits an offence under Victorian law.[17] If, on the other hand, the declaration were made in Victoria in accordance with s.106 of the *Evidence Act 1906* (WA) it would be a defence to a charge there

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15 See (b) of the definition of "Statutory declaration " in s .4 of the *Interpretation Act 1918*. That definition provides:

> 'Statutory declaration,' if made -
>
> (a) in Western Australia, means a declaration made under the *Evidence Act, 1906*, or the *Declarations and Attestations Act, 1913*;
>
> (b) in the United Kingdom or any British possession other than Western Australia, means a declaration made before a justice of the peace, notary public, or other person having authority therein under any law for the time being in force to take or receive a declaration;
>
> (c) in any other place, means a declaration made before a British Consul or Vice-Consul, or before any person having authority under any Act of the Parliament of the United Kingdom, or any Act of the Parliament of Western Australia, for the time being in force, to take or receive a declaration.

16 Whether a statutory declaration made in Victoria in accordance with s.106 of the *Evidence Act 1906* (WA) need be accepted in Western Australia may depend on whether that provision was intended to have extra-territorial effect. A legislature is presumed to intend that its legislation shall be restricted in its application to persons, property and events in the territory over which it has territorial jurisdiction, unless a contrary intention appears: see *Attorney-General v Australian Agricultural Company* (1934) 34 SR (NSW) 571 at 576 and *Ex parte Iskra* [1963] NSWR 1593 at 1605.

17 *Evidence Act 1958* (Vic), s.141.

that the form used was a substantial variation from that prescribed in Victoria.[18] In neither case could the maker be prosecuted under s.170 of the *Criminal Code* (WA) because the act which constitutes the offence was not done in Western Australia, as is required by s.12 of the *Criminal Code*.[19]

1.13 In view of the position outlined in the previous paragraph it would seem to be desirable for any person in Western Australia accepting a statutory declaration made in another jurisdiction in Australia to ensure that it was made in accordance with law in the jurisdiction in which it was made. This may be difficult because the law relating to the making of statutory declarations varies from jurisdiction to jurisdiction. [20] If the law relating to making statutory declarations were made uniform this difficulty would disappear.

THE POSITION IN OTHER JURISDICTIONS

1.14 The position in other jurisdictions was discussed in paragraphs 2.39 and 2.40 of the working paper. In essence, all other Australian jurisdictions[21] and New Zealand[22] have provisions for statutory declarations similar to those in force in Western Australia. Attestation is required in all jurisdictions.[23] There are, however, variations from jurisdiction to jurisdiction, particularly in the form prescribed. [24]

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18 See paragraphs 2.18 and 2.19 of the working paper.

19 Section 12 of the *Criminal Code* provides :

> This Code applies to every person who is in Western Australia at the time of his doing any act or making any omission which constitutes an offence.

There is also the possible defence that a declaration made in accordance with the law of another jurisdiction is not a "declaration" to which s.170 of the Code applies.

20 See paragraph 1.14 below.

21 Commonwealth: *Statutory Declarations Act 1959*, s.8.
New South Wales: *Oaths Act 1900*, ss.21 and 24.
Queensland: *Oaths Act 1867*, ss.13 and 14.
South Australia: *Oaths Act 1936*, s.25.
Tasmania: *Evidence Act 1910*, s.132.
Victoria: *Evidence Act 1958*, s.107.

22 *Oaths and Declarations Act 1957*, ss.7 to 9 and 11.

23 The witness required varies from jurisdiction to jurisdiction. For example, in Western Australia a comparatively wide range of people may witness a statutory declaration including a justice of the peace, or other person authorised to administer an oath, a commissioner for declarations, a classified officer of the State or Commonwealth Public Service, a State school teacher and a police officer: see paragraphs 2.20 and 2.21 of the working paper. In Queensland, however, the range of persons who may witness a statutory declaration is restricted to a justice of the peace, notary public, persons authorised to administer an oath, or any barrister, solicitor or conveyancer of the Supreme Court: *Oaths Act 1867*, s.13.

24 The form prescribed in Victoria (*Evidence Act 1958*, s. 107 and Fourth Schedule) is as follows :

> I A.B.of do solemnly and sincerely declare that &c. and I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of an Act of the Parliament of Victoria rendering persons making a false declaration punishable for wilful and corrupt perjury.
>
> (Signed) A.B.

RECOMMENDATIONS

An unattested statutory declaration

1.15 In the working paper the Commission suggested that in many cases the use of attested statutory declarations is unnecessary and that provision should be made for an unattested statutory declaration as an alternative to the existing attested form contemplated by s.106 of the *Evidence Act*.[25] There was an overwhelming response by the commentators, who represented a broad spectrum, in favour of the introduction of an unattested statutory declaration. [26]

1.16 The requirement of attestation may be said to serve four purposes -

1. A declarant is less likely to make untruthful statements because of the formality involved in making the statutory declaration.

2. In some cases it may be desirable to have a person who can satisfy himself as to the identity of the declarant.

3. It may be desirable to have a witness who can show that the declarant was not under undue influence or coercion at the time the declaration was made.

4. It may be desirable to have a person who can ensure that the declarant understands the contents of the declaration.

1.17 The formality referred to in purpose one above arises from the form of declaration prescribed and the fact that the declaration must be made before one of a number of prescribed persons. However, because of the wide range of persons authorised to attest declarations[27] a person may not be impressed by the formality of the occasion. Moreover in many cases, it would seem that the formality which is expected to stimulate truth is missing,

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Declared at this day of 19
before me, C.D.,
A justice of the peace for Victoria [*or as the case may be*].

25 See paragraphs 2.44, 2.45 and 2.48 of the working paper.

26 The Law Society was divided on the question.

27 See paragraphs 2.20 and 2.21 of the working paper.

and the declaration itself may even be invalid.[28] In fact, one commentator suggested that the excessive use of statutory declarations had debased the meaning and solemnity with which attestation was once regarded. Moreover, mere formality may not stimulate truth. If a person intends to lie in order to gain a benefit it may be doubted whether formal attestation will affect that intention. As the Commissioner of Titles, Mr. N.J. Smyth, said in commenting on the working paper:

> I do not think that any practical formality can be devised which will dissuade the person who is determined to mislead us from so doing. The statutory declaration is a useful sword in dealing with the business of the vast majority of bona fide transactions, it is not an infallible shield against the fraudulent minority.
>
> The essential element is that the declarant should be aware that if he makes a false declaration he can be punished. If that requirement can be fulfilled without recourse to an attesting witness, then I think an attesting witness is not necessary.

The threat of a criminal sanction may well be a greater deterrent than the formality, such as it is, involved in making an attested statutory declaration.

1. 18 As to the third purpose, the circumstances in which it would be desirable to produce such a person are not likely to occur frequently. In any event the witness may not be able to give evidence of any probative value on the matter. If the declarant disowns the document or its contents or claims undue influence he may be subject to cross-examination and witnesses may be available on these matters.

1.19 The principal arguments against the requirement that information in forms and documents be provided by an attested statutory declaration are those of delay and inconvenience. This may be particularly so in remote areas where a person may not have ready access to one of the persons before whom a statutory declaration may be made.

1.20 The Commission has concluded that in most cases attestation is unnecessary and that the inconvenience caused by a requirement for it cannot be justified by any of the purposes referred to in paragraph 1.16 above. The Commission notes that a form of unattested declaration is used on the Commonwealth income tax return. This is a very important form and one on which a significant number of charges for making false statements are based. The

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28 See paragraph 10(c) and (d) of the preliminary working paper.

Commission understands that this form has been used over a considerable period of time and has not presented difficulties during prosecutions for making false statements in it. For these reasons, the Commission recommends that provision should be made for an unattested statutory declaration.[29] It would appear that the most convenient place to provide for such a declaration would be in the *Declarations and Attestations Act 1913*, rather than in the *Evidence Act 1906*.

1.21 In the working paper, the Commission suggested that s.106 of the *Evidence Act 1906* should not be repealed as attested statutory declarations may be required for some purposes.[30] However, the Commission is now of the view that the existence of both the proposed unattested statutory declaration and the attested statutory declaration provided for by s.106 of the *Evidence Act 1906* could cause confusion because the public may be unsure whether they are required to make an attested or unattested statutory declaration in a particular case. It is also of the view that the attested statutory declaration is unnecessary in most cases. For these reasons, it recommends that s.106 of the *Evidence Act 1906* be repealed.[31]

1.22 The Commission is aware of at least two Acts in which provision is made for an attested statutory declaration[32] other than that provided for by s.106 of the *Evidence Act* and which would not be affected by the repeal of that section. It is the Commission's view that these provisions should be reviewed to determine whether attestation is necessary, and if not, whether the proposed unattested statutory declaration could be adopted.

1.23 If provision is made for the proposed unattested statutory declaration, it is the Commission's view that any forms subsequently included in statutes or regulations should not

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29 The Law Reform Commission of British Columbia has also examined the requirement for statutory declarations required by or provided for in Statutes of British Columbia to be witnessed. It concluded that:

> …what we have called the 'formalities of verification' are, where their sole purpose is to reinforce the honesty and accuracy of written or oral statements in out-of-court settings, *unnecessary, time-consuming, and complicated*. We are therefore of the opinion that they should be abolished and replaced with a more simple and straightforward means of securing veracity.
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> …our proposal...briefly stated...is that where statements are required by statute, their accuracy and honesty should be reinforced by the imposition of criminal liability for false statements, without the interposing of any particular formality in the making of the statement: Law Reform Commission of British Columbia, Report on *Extra Judicial Use of Sworn Statements* (1976), at 26.

30 See paragraph 2.48 of the working paper.

31 One consequence of the repeal of s.106 would be that it would be necessary to amend the definition of "Statutory declaration" in s.4 of the *Interpretation Act 1918* so that it refers to the proposed unattested statutory declaration and not to s.106

32 *Registration of Births, Deaths and Marriages Act 1961*, s.63, Sixth Schedule.
Electoral Act 1907, Electoral Act Regulations 1949. See, for example, forms 7A, 26B, 26D and 48.

provide for an attested statutory declaration, but should adopt the form of the unattested statutory declaration.

1.24 Although the Commission is of the view that attested statutory declarations should not be used in future, it does recognise that in special circumstances a Government department or instrumentality may require an attested statutory declaration. This might arise where the need to fulfil one of the purposes of attestation referred to in paragraph 1.16 above outweighs the inconvenience caused by a requirement for attestation. In these circumstances, provision could be made in the relevant Act or regulation for an attested statutory declaration.

Criminal sanction

1.25 Under s.170 of the *Criminal Code* it is an offence to make a statement in an attested statutory declaration which is knowingly false in a material particular.[33] However, this provision would not apply to a person who makes a false statement in an unattested statutory declaration. It is the Commission's view that the threat of a criminal sanction is necessary to deter persons from making false statements in declarations. The Commission therefore recommends that it should be an offence to make a statement in an unattested statutory declaration which is knowingly false in a material particular.[34]

1.26 It appears that it is a defence to a charge of making a false statement in a declaration that the declaration was not duly made or was not in the form prescribed.[35] A person may therefore escape conviction on what may appear to be a legal technicality. It is important that any form prescribed makes clear to the declarant -

(a) that he is required to declare that the contents are true; and

(b) that it is an offence to make a statement which is knowingly false in material particular .

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33 See paragraph 2.17 of the working paper.

34 In *R. v Davies* (1974) 7 SASR 375 at 395 Wells J. said :

> ...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 .

35 There is a paucity of cases, in this area, see paragraphs 2.16, 2.18 and 2.19 of the working paper.

1.27 If a person were permitted to shelter behind a formal defect it would place an onus on bodies, such as the Titles Office, which rely heavily on statutory declarations, to enquire in every case whether a declaration had been duly made. This would reduce greatly the convenience of statutory declarations as a means of obtaining proof of matters. The majority of commentators agreed that the present law was unsatisfactory in this respect and should be amended.

1.28 It is the Commission's view that the essential element in the making of a declaration is that the declarant knew he was required to declare his belief in the truth of the declaration. It follows that a declarant who makes a knowingly false statement should not be able to shelter behind some formal defect. Consequently, the Commission recommends that s.27(2) of the *Oaths Act 1936* (SA) should be adopted in Western Australia. That section provides that it is not a defence to a charge of knowingly making a declaration untrue in any material particular that the declaration was not duly made or in the form prescribed, so long as the court is satisfied that the declarant knew that he was required to declare his belief in the truth of the declaration.

Corroboration

1.29 Under s.171 of the *Criminal Code* a person cannot be convicted of an offence under ss.169[36] and 170 of the Code upon the uncorroborated testimony of one witness. It appears that this provision is an historical anomaly arising from the requirement in ecclesiastical law that there could be no conviction for perjury if the testimony of only one witness was offered as proof of his guilt as there would only be one oath against another.[37] A modern rationale for corroborative evidence, namely, that it is directed at protecting witnesses from false charges at the hands of those against whom their testimony is directed, does not appear to be applicable to offences under ss.169 and 170 because statements sworn or made involving offences under ss.169 and 170 are not usually sworn or made in judicial proceedings.[38] Corroborative evidence is also considered to belong to those areas where false accusations are likely to occur.[39] This, too, would not apply to offences under ss.169 and 170 of the *Criminal Code*. As

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36 This section provides for the offence of making false statements which are required to be verified under oath, or by affirmation or solemn declaration.

37 See paragraph 2.32 of the working paper.

38 Ibid.

39 For example in a rape trial.

the Commission can see no justification for requiring corroboration in case of charges of offences under ss.169 and 170 it recommends that s.171 of the *Criminal Code* be repealed.

Form of unattested statutory declaration

1.30 A shortcoming of the form of the declaration required by s.106 of the *Evidence Act 1906* is that it makes no reference to the fact that a person commits an offence if he makes a statement in a declaration which is knowingly false. Although it may be argued that a person who makes a statement in a statutory declaration is aware that he should not make a false statement and that the statements are true this is not expressed in the form prescribed. A number of those who commented on the working paper said that it was essential that a declarant should be aware he is committing an offence if he makes a false statement in a declaration. The Commission agrees with these views and recommends that the form of unattested statutory declaration prescribed should state that the contents of the declaration are true and that it is an offence to make a statement which is knowingly false in a material particular. It is also the Commission's view that the form of the declaration should be as simple as possible. After reviewing the comments received the Commission recommends that the following form, which is a simplified version of the form suggested in the working paper,[40] should be provided:

I, A.B. [*insert address and occupation*] make this declaration under the [*statutory provision authorising unattested statutory declaration to be inserted*]. I declare that the statements herein are true in every material particular.

I am aware that it is a criminal offence to make a declaration which is knowingly false in a material particular.

Declared at …….. this ……... day of …….19...

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Signature of person making declaration.

40 See paragraph 2.46 of the working paper.

1.31 The Commission's view is that the declaration should be signed by means of a handwritten signature and not by means of a rubber stamp or other facsimile.[41]

Scope of use of unattested statutory declaration

1.32 At present, the use of the attested statutory declaration provided by s.106 of the *Evidence Act 1906* is not restricted to those circumstances where its use is required by law. For example, insurance companies frequently require that policy holders use this method for providing information in support of a claim. Most commentators favoured the view that there should be no restriction on the range of circumstances in which the unattested statutory declaration could be made. The Commission agrees with this view.

Reliance on statutory declarations

1.33 In the working paper the Commission raised the question whether statutory protection ought to be given to a person who acts in reliance on a statutory declaration.[42] Under the present law a person who acts in reliance on a statutory declaration containing a false statement to the detriment of a third person could be sued by that person for the loss suffered. Such a suit could be founded on either contract or tort depending on the relationship between the parties.[43] For example, a person may have an action in defamation against a newspaper which published a news item of a defamatory nature relying on a statutory declaration made by some other person. Liability for defamation is strict. Honest belief in the truth of an allegation is not a defence.[44] A further example is where A, who owes money to B, pays the money to C in reliance on a statutory declaration by C in which C represents that he is B's agent. The fact that A relied on the statutory declaration of C would not relieve him of his liability to pay that money to B. In neither contract nor tort is there a specific defence of reliance on a statutory declaration to a claim for loss suffered.

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41 The use of a rubber stamp or other facsimile by a person swearing an affidavit and the person taking the affidavit is discussed in Part B of this report.

42 See paragraphs 2.36 to 2.38 of the working paper.

43 The third person may also have an action against the declarant in deceit for injurious falsehood. This action "...consists in the publication of false statements, whether oral or in writing, concerning the plaintiff or his property, calculated to induce others not to deal with him": Fleming, *The Law of Torts* (5th ed. 1977) at 697.

44 See Fleming, *The Law of Torts* (5th ed. 1977) at 540.

1.34 The object of providing a simple unattested statutory declaration is to afford persons a convenient and practical means of verifying information in a statement in a document. To go further and accord special protection to persons acting in reliance on a statutory declaration would be undesirable since it would obviate the need for them to make further enquiries even if the circumstances indicated that it would be prudent to do so.

1.35 It is the Commission's view that there is no justification for providing such protection to persons who rely on statements contained in a statutory declaration. The common law remedies should continue to be available to any person injured as the result of action taken by a person relying on a statutory declaration.

Uniformity

1.36 At present, if a statutory declaration required by a Western Australian statute is made outside the State, it seems that it must be made in accordance with the law of the State or Territory in which it was declared.[45] Thus if made in Victoria it would appear that it must be declared in the form and in the manner prescribed in Victoria. The Commission understands that this requirement has caused difficulty since declarants are often unaware of it. In commenting on the working paper the Commissioner for Corporate Affairs, Mr. R.K. Warren, said:

> ...failure to appreciate this can cause considerable difficulties for them at a later stage (eg where the original declaration is inadequate and a time limit has expired before they can be made aware of that fact and given an opportunity to make a fresh declaration).

In the example given above, even if the time had not expired, a person would be inconvenienced because it would be necessary to make a further declaration and forward it to Western Australia. Doubtless similar problems are encountered in other jurisdictions. The Commissioner of Titles also considered that uniformity was desirable because the Titles Office frequently has to consider statutory declarations made in other jurisdictions.

1.37 Uniformity is desirable from the point of view of the operation of Government departments and instrumentalities and those who deal with them as well as for those engaged

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45 See paragraphs 1.10 to 1.12 above.

in business and commerce. The need for uniformity has been supported by the Insurance Council of Australia and Perpetual Trustees WA Ltd (formerly the Perpetual Executors, Trustees and Agency Company (W.A.) Limited). In commenting on the working paper the manager of the latter company, Mr. Butcher said:

> ….since our activities, as with those of a large number of commercial concerns, extend to the other States we would regard it as most desirable that there should be uniform legislation on the subject .

1.38 If uniformity were achieved,[46] three readily apparent advantages would follow -

1. it would be easier for a declarant to make a declaration in accordance with the law in force in the jurisdiction in which the declaration was made;[47]

2. it would also be easier for a person or body intending to act on a statutory declaration, such as the Titles Office or an insurance company, to check that it had been so made;[48] and

3. a company or other body operating in more than one State could use a single form of declaration, rather than be required to print a separate form of declaration for each jurisdiction.

1.39 Many of the commentators, including government departments and instrumentalities, trustee companies and the Insurance Council of Australia, had dealings with persons in other States and believed that uniformity was desirable. The Commission agrees that uniformity is desirable in this area. This question was discussed with the Queensland Law Reform Commission who had reservations about the desirability of a recommendation for the use of

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46 The Commission is aware that some companies do, at present, use a uniform form of statutory declaration. For example, one insurance company uses the following form of declaration:

> ...I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of an Act of Parliament of …rendering persons making a false declaration punishable for wilful and corrupt perjury.

This form of declaration appears to be based on the form prescribed in s.107 and the Fourth Schedule of the Victorian *Evidence Act 1958*, and would be valid if made in Victoria: see footnote 24 above. However, if it were made in Western Australia, whether for use in Western Australia or in Victoria, the maker would have a defence to a charge under s.170 of the *Criminal Code* of knowingly making a false statement in a statutory declaration that the form used was a substantial variation from the form prescribed in Western Australia: see paragraph 2.18 of the working paper.

47 See paragraphs 1.10 to 1.12 above.

48 See paragraph 1.13 above.

unattested statutory declarations in Queensland - especially if attested declarations were still to be required in some cases - since the public would be likely to be confused. The Law Reform Commission of Western Australia considers, however, that confusion would be minimal if attested statutory declarations could be made only where they were specifically required by a statute, the unattested statutory declaration being available in all other circumstances.

1.40 The Queensland Law Reform Commission also noted that if attested statutory declarations remained there could be some conflictual problem between one State and another concerning the recognition of such declarations. For example, assume that States A and B have abolished statutory declarations, generally, in favour of unattested statutory declarations, except for particular cases provided for by statute. In State A a statute may require an attested statutory declaration in circumstances in which it is not provided for in State B. In such a case, if a statutory declaration were made in State B, for use in State A, an unattested statutory declaration would have to be made in State B and this would not be acceptable in State A. However, the Law Reform Commission of Western Australia considers that this problem could be overcome if State B authorised the making of an attested statutory declaration where that was required by a statute of another State. Alternatively, State A could authorise the making of an unattested statutory declaration in other States in which such an attested statutory declaration was not provided for. The Commission favours the latter approach.

1.41 The reservations of the Queensland Law Reform Commission indicate that it may be difficult to achieve a uniform law to apply throughout Australia in respect of the use of unattested statutory declarations. The Western Australian Law Reform Commission considers, however, that there would be much to be achieved by the adoption of a uniform law which authorised a form of unattested statutory declaration for general use. If individual States wished to retain the use of an attested statutory declaration in a particular case, it would then be necessary to deal with the conflictual problem referred to in the preceding paragraph. If an unattested statutory declaration were first introduced in Western Australia, the question of uniformity could be considered at a later date in the light of the experience gained from its use in Western Australia.

1.42 Initially, as a step towards uniformity, it may be desirable to have the Commonwealth and State Governments agree to the use of unattested statutory declarations in any "national" companies legislation that may be implemented in the future.

SUMMARY OF RECOMMENDATIONS

1.43 The Commission recommends that -

(a) Provision be made for an unattested statutory declaration.

(paragraphs 1.15 to 1.20)

(b) The form of unattested statutory declaration be as follows –

I, A.B. [*insert address and occupation*] make this declaration under the [*statutory provision authorising unattested statutory declaration to be inserted*]. I declare that the statements herein are true in every material particular.

I am aware that it is a criminal offence to make a declaration which is knowingly false in a material particular.

Declared at …….. this ……... day of …….19...

_____

Signature of person making declaration.

(paragraph 1.30)

(c) There should be no restriction on the range of circumstances in which an unattested statutory declaration could be made.

(paragraph 1.32)

(d) Provision be made for an offence of making a statement in an unattested statutory declaration which is knowingly false in a material particular.

(paragraph 1.25)

(e) Section 106 of the *Evidence Act 1906* be repealed.

(paragraph 1.21)

(f) Section 27(2) of the *Oaths Act 1936* (SA) be adopted in Western Australia.

(paragraphs 1.26 to 1.28)

(g) Section 171 of the *Criminal Code* be repealed.

(paragraph 1.29)

(h) The declaration should be signed by means of a handwritten signature and not by means of a rubber stamp or other facsimile.

(paragraph 1.31)

(i) The unattested statutory declaration should be provided for in the *Declarations and Attestations Act 1913*.

(paragraph 1.20)

(j) Uniform legislation permitting the general use throughout Australia of an unattested statutory declaration be enacted.

(paragraphs 1.36 to 1.42)

PART B : SIGNING OF AFFIDAVITS BY AFFIXING A RUBBER STAMP

TERMS OF REFERENCE

2.1 The Commission was asked to consider and report on whether the signatures of the deponent and the person before whom an affidavit is taken should be in handwriting.

PRESENT LAW AND PRACTICE

General

2.2 Although it had been held in a number of cases that, where a statute requires a signature, it is sufficient if the person signs by affixing a facsimile of his signature,[1] the Commission is not aware of any similar decision with respect to affidavits.

Supreme Court and District Court

2.3 In the Supreme Court and the District Court affidavits must be signed on each page by the deponent and by the person before whom an affidavit is sworn, and that person must also complete and sign the jurat.[2] Where the deponent is blind or illiterate, he may make a signature or mark.[3] The Commission is advised that it is not the practice to present to the Supreme Court or District Court affidavits signed by means of a rubber stamp. [4]

Local Courts

2.4 There is no express provision in the rules made pursuant to the *Local Courts Act 1904* similar to that applicable to the Supreme Court and the District Court referred to above. It is not clear whether the rule applicable to the Supreme Court and the District Court referred to above applies to Local Courts. The Commission understands that the practice of Local Courts

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1 For example, an order of a judge or a summons: see paragraph 3.5 of the working paper.

2 *Supreme Court Rules 1971*, Order 37 rule 2(5). The *Supreme Court Rules 1971* apply to the District Court: *District Court of Western Australia Act 1969*, s .87.

3 Ibid., Order 37 rule 4(1)(c).

4 See paragraph 3.3 of the working paper.

is to require a person making an affidavit to sign the affidavit personally, but to allow the use of a rubber stamp of the signature of the person before whom the affidavit was taken. [5]

RECOMMENDATIONS

2.5 The main argument for allowing either a deponent or the person before whom an affidavit is taken to sign an affidavit by means of a rubber stamp or other facsimile is that it is a convenient practice. However, this argument appears to have little weight in the case of a deponent as it is unlikely that any person will find himself having to swear many affidavits. The requirement for a handwritten signature causes little inconvenience. Further, to allow a deponent to use a rubber stamp may lead to abuse. A rubber stamp or other facsimile, if stolen, lost or lent by the person whose signature is reproduced to another person could be affixed to an affidavit without the person whose signature is reproduced actually swearing the affidavit.

2.6 No commentator was in favour of a deponent being able to sign an affidavit by means of a rubber stamp. The then Commissioner of State Taxation, Mr. J.R. Ewing did, however, suggest that there may be a need for a rubber stamp where a person has a physical handicap.

2.7 Express provision exists for the signing of affidavits by a deponent who is either blind or illiterate. This provision, which does not extend to persons who are physically handicapped, could be extended to such persons so that they would be able to sign the affidavit by making a mark.

2.8 As the convenience argument does not carry a great deal of weight in the case of a deponent and because the use of a rubber stamp or other facsimile could be open to abuse, the Commission recommends that a deponent should be required to sign an affidavit by means of handwriting and not by means of a rubber stamp or other facsimile. If this recommendation is adopted the Commission suggests, in the interests of clarity, that the *Supreme Court Rules 1971* and the *Local Court Rules* be amended to make it clear that a handwritten signature is required.

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5 See paragraph 3.3 of the working paper.

2.9 As an affidavit may only be taken by a commissioner for affidavits appointed under s.175 of the *Supreme Court Act 1935*, a justice of the peace, a judge of the Supreme Court, a District Court judge or the Master of the Supreme Court,[6] the range of persons who may take an affidavit is narrow.

2. 10 Such persons may find themselves having to take affidavits on a regular basis, and consequently the convenience argument carries greater weight than in the case of a deponent. These persons also hold responsible positions in the community and it may be expected that they would not abuse the privilege of being able to sign an affidavit by means of a rubber stamp or other facsimile. However, there is always the possibility that some other person could obtain possession of the stamp so that the use of a rubber stamp could be open to abuse. For this reason the Commission recommends that the person before whom an affidavit may be taken should also be required to sign an affidavit by means of handwriting and that the use of a rubber stamp or other facsimile should not be permitted. The Commission suggests that consideration be given to amending the *Supreme Court Rules 1971* and the *Local Court Rules* to clarify the matter.

SUMMARY OF RECOMMENDATIONS

2.11 The Commission recommends that -

(a) A deponent to an affidavit should be required to sign an affidavit by means of handwriting and not by means of a rubber stamp or other facsimile.

(paragraph 2.8)

(b) The persons before whom an affidavit may be taken should be required to sign an affidavit by means of handwriting and not by means of a rubber stamp or other facsimile.

(paragraph 2.10)

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6 The *Supreme Court Act 1935*, s.176 and Order 37 rule (1) of the *Supreme Court Rules 1971*.

(Signed) Neville H. Crago
Chairman

Eric Freeman
Member

David K. Malcolm
Member

28 November 1978

APPENDIX I

List of those who commented on the working paper

Aboriginal Affairs Planning Authority
Associated Banks in Western Australia
Commissioner for Corporate Affairs
Commissioner of Police
Commissioner of State Taxation
Commissioner of Titles
Department for Community Welfare
Department of Agriculture
Department of Mines
Iddison R., S.M.
Insurance Council of Australia
Khan, A.N.
Perpetual Trustees WA Ltd
Road Traffic Authority
The Institute of Chartered Accountants in Australia, Western Australian Branch
The Law Society of Western Australia
The Royal Australian Institute of Architects, Western Australian Chapter
The Treasury
The West Australian Trustee Executor and Agency Company Limited
Western Australian Government Railways
Western Australian Institute of Technology