

[CONSULTATION DRAFT] Code of Practice in relation to Affidavits – Oaths Act 1936 section 33(1)(b)

Introduction – about affidavits

An **affidavit** is a written statement of fact, sworn on oath or affirmed, which may be used as evidence in court.

The person who makes the affidavit is called the **deponent**. The deponent makes the affidavit by taking an oath or affirmation in the presence of an authorised affidavit witness (an **authorised person**) that:

- they are the person named in the affidavit
- the contents of the affidavit are true
- the signature or mark on the document is theirs.

An affidavit is usually set out in the format required by the court in which it is to be lodged.

The '**jurat**' (also described as the signing clause, witnessing clause or attesting clause) of an affidavit is a certificate on an affidavit showing when, by whom and before whom the affidavit was sworn or affirmed.

The onus is on the person who requires the affidavit to ensure it is in the correct format and all instructions and rules are adhered to.

Before witnessing an affidavit, an authorised affidavit witness should ascertain the jurisdiction in which the affidavit is to be used and ensure that they administer the relevant oath or affirmation in accordance with the applicable requirements for that jurisdiction.

The classes of persons authorised to witness affidavits in South Australia are set out in Clause 2 of Schedule 1 of the *Oaths Act 1936* (SA) and the *Oaths Regulations 2021* [list attached].

Introduction - difference between an Oath and an Affirmation

An **oath** is an attestation to the truth of a statement, which is administered or taken as follows:

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

- b) in any other manner and form which the person taking the oath declares to be binding on the person's conscience; or
- c) in any other manner or form authorised or permitted by law.

An **affirmation** is an alternative to an oath. It is also a verbal attestation to the truth of a statement, but it is made without swearing to a God or faith or otherwise as described above. Instead of the person 'swearing' a statement, an affirmation is to be administered to a person by asking them 'Do you solemnly and truly affirm' followed by the words of the appropriate oath (omitting any words of imprecation or calling to witness) after which the person must say 'I do solemnly and truly affirm'. An affirmation has the same legal force and the same legal effect as an oath. People are free to choose to swear or affirm an affidavit and they do not need to give a reason for this.

These requirements for oaths and affirmations for South Australia are set out in section 6 of the *Evidence Act 1929 (SA)*.

Code of practice in relation to affidavits for use in a South Australian jurisdiction

General

1. The deponent must swear or affirm the affidavit in the presence of a person authorised to take affidavits pursuant to the *Oaths Act 1936 (authorised person)*.
2. An affidavit must be sworn or affirmed in accordance with section 6 of the *Evidence Act 1929 (SA)*.

Taking of affidavits by audio visual link

3. If an affidavit is taken in circumstances where the authorised person and the deponent meet remotely by audio visual link (AVL), a requirement that something be done in the presence of or before an authorised person will be taken to be satisfied if the following requirements are complied with:
 - a) the requirement that the remote meeting between an authorised person and a deponent of an affidavit by AVL be conducted so that the authorised person and the deponent are visible to each other and can hear each other while the deponent swears or affirms the contents of the affidavit and signs the affidavit;
 - b) the requirement that the authorised person—
 - i. observe the deponent signing the affidavit in real time; and

- ii. attest or otherwise confirm that—
 - A. the affidavit was sworn or affirmed by the deponent; and
 - B. the deponent's signature on the affidavit was witnessed, by signing the affidavit or a copy of the affidavit;
 - iii. be reasonably satisfied the affidavit the authorised person signs is the same affidavit, or a copy of the affidavit, sworn or affirmed and signed by the deponent;
 - iv. endorse the affidavit, or the copy of the affidavit, with a statement—
 - A. specifying the method used to witness the swearing or affirming and signing of the affidavit by the deponent; and
 - B. that the requirements under the *Oaths Act 1936* for taking affidavits by AVL were complied with in relation to the taking of the affidavit.
4. For the purposes of clause 3 of this Code, and without limiting the ways an authorised person may confirm the witnessing of an affidavit, if the deponent sends a copy of the affidavit signed by the deponent electronically to the authorised person or the authorised person has an electronic copy of the affidavit signed by the deponent, the authorised person may countersign the affidavit as soon as practicable after witnessing the signing of the affidavit.

Electronic execution of affidavits

Notes: (from the *Oaths Regulations 2021*)

1. The *Oaths Regulations 2021* provide that a requirement for a deponent or an authorised person to sign or initial an affidavit, annexure, exhibit, certificate or other document attached to an affidavit is satisfied if the deponent or authorised person signs or initials the affidavit, annexure, exhibit, certificate or other document by electronic means.
2. An initial or a signature is executed by electronic means if:
 - (a) a method is used to identify the person and indicate the person's intention in respect of the information recorded in the affidavit; and
 - (b) the method used was either—
 - i. as reliable as appropriate for the purpose for which the affidavit was recorded, in light of all the circumstances; or
 - ii. proven in fact to have fulfilled the functions described in (a), by itself or together with further evidence.
3. An affidavit that is signed or initialled by electronic means must include a statement on it that the declaration was signed or initialled by electronic means.

List of authorised affidavit witnesses under *Oaths Act 1936 (SA)*

- a) a Commissioner for taking affidavits in the Supreme Court;
- b) a justice of the peace;
- c) a police officer, other than a police officer who is a probationary constable;
- d) persons admitted and enrolled as a notary public of the Supreme Court;
- e) any person empowered, authorised or permitted by or under any Act or rules of a court or tribunal to take affidavits.

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