

OATHS ACT 1936

SECTION 33(1)(B)

Code of Practice in Relation to Affidavits

This Code of Practice is published by the Attorney-General under Section 33 of the *Oaths Act 1936* (SA).

This Code of Practice will **commence on 1 January 2025**.

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 an oral 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):

6—Oaths, affirmations etc

- (1) An oath shall be administered and 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 his hand and, after the oath has been tendered to him, shall say “I swear”; or
 - (b) in any other manner and form which the person taking the oath declares to be binding on his conscience; or
 - (c) in any other manner or form authorised or permitted by law.
- (2) Where an oath has been lawfully administered and taken, the fact that the person taking the oath had no religious belief, or that the oath was not taken so as to be binding on his conscience, shall not affect, at law, the validity or effect of the oath.
- (3) A person is permitted, and should be offered the choice, to make an affirmation instead of an oath in all circumstances in which, and for all purposes for which, an oath is required or permitted by law.
- (4) An affirmation is to be administered to a person by asking the person “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”.
- (5) Every affirmation has, at law, the same force and effect as an oath.
- (6) No oath or affirmation is invalid by reason of a procedural or formal error or deficiency.

Code of Practice in Relation to Affidavits under (SA) *Oaths Act 1936*

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) [set out above].
3. The authorised person must sight photo identification to establish that the person signing and swearing or affirming the affidavit is the deponent named on the affidavit.

Taking of Affidavits by Audio Visual Link

4. 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 the statement—

This affidavit was witnessed remotely under the observation of the authorised person through an audio visual link and the requirements under the Oaths Act 1936 for taking affidavits by audio visual link were complied with.
5. For the purposes of this Code and the *Oaths Regulations 2021*, 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 of the affidavit.

Electronic Execution of Affidavits

Notes: (from the *Oaths Regulations 2021*)

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.

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.

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.

Reasonable Modifications

Notes: (from the *Oaths Regulations 2021*)

The authorised person may make or permit reasonable modifications to the process of taking an affidavit if the deponent has a disability or is a child and requires assistance with the process.

If reasonable modifications are made, the authorised person must certify on the affidavit what modifications were made.

Example: if the affidavit was read to the deponent by the authorised person and the deponent nodded in agreement, this must be stated in writing by the authorised person on the affidavit.

If a person provided assistance to the deponent, the authorised person must write on the affidavit the name and address of the person who provided the assistance and what type of assistance was provided (Example: translation assistance or assistance with writing or reading). This does not apply to assistance by a person who, in a professional capacity, prepared or wrote the affidavit for the deponent on the deponent client's instructions, including a legal practitioner or conveyancer.

ATTACHMENT

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

- a Commissioner for taking affidavits in the Supreme Court;
- a justice of the peace;
- a police officer, other than a police officer who is a probationary constable;
- persons admitted and enrolled as a notary public of the Supreme Court;
- any person empowered, authorised or permitted by or under any Act or rules of a court or tribunal to take affidavits;
- a member or special member of the Australian Federal Police;
- a person engaged under the *Public Service Act 1999* of the Commonwealth at classification APS Level 6 or higher to whom investigative or enforcement functions or powers of the Inspector-General of Bankruptcy have been delegated under the *Bankruptcy*

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Act 1966 of the Commonwealth or to whom investigative or enforcement functions or powers of the Registrar have been delegated under the *Personal Property Securities Act 2009* of the Commonwealth;

- an authorised officer appointed under the *Dangerous Substances Act 1979*; or
 - an authorised officer appointed under the *Petroleum Products Regulation Act 1995*;
 - an inspector appointed under the *Employment Agents Registration Act 1993*;
 - an inspector appointed under the *Explosives Act 1936*;
 - an inspector appointed under the *Fair Work Act 1994*;
 - an inspector appointed under the *Long Service Leave Act 1987*;
 - an inspector appointed under the *Mines and Works Inspection Act 1920*;
 - an inspector appointed under *Shop Trading Hours Act 1977*.
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