

Frequently Asked Questions

Oaths, Affirmations, Affidavits, Statutory Declarations and Certifications

GENERAL

1. What does the Oaths and Affirmations Act 2018 do?

The *Oaths and Affirmations Act 2018* and related regulations bring together, clarify and update laws about oaths, affirmations, affidavits and statutory declarations that were previously found in the *Evidence (Miscellaneous Provisions) Act 1958*.

This legislation also provides a clear statutory process for certifying that a document is a true copy of an original document. Organisations are not required to follow the certification processes but they can choose to use them.

OATHS AND AFFIRMATIONS

2. What is the difference between an oath and an affirmation?

An oath is a solemn promise to tell the truth, which is made before a deity. An oath is generally sworn when a person has a belief in a god or has some form of religious or spiritual beliefs, although a person may swear an oath even if their religious or spiritual beliefs do not include a belief in the existence of a god.

An affirmation is a solemn promise to tell the truth. An affirmation is usually used by people who do not have any spiritual or religious beliefs or any belief in the existence of a god. The legislation makes it clear that people who do believe in a god or have spiritual or religious beliefs can make an affirmation.

The legal effect of swearing an oath or making an affirmation is the same. In each case a person is solemnly committing themselves to telling the truth.

A person swears an oath or makes an affirmation either immediately before giving oral evidence in a court or a tribunal and/or when making an affidavit that will be given to the court as written evidence. Sometimes oaths and affirmations are made when a person is appointed to a special position, such as a judge or Member of Parliament.

3. What happens if a person lies under oath or affirmation?

An original document is any document that an authorised certifier, using their best judgement, determines to be original. If a person lies under an oath or an affirmation they can be charged with the offence of perjury. This offence has a maximum penalty of 15 years imprisonment.

4. Who can swear an oath or make an affirmation?

Any person may swear an oath or make an affirmation, as long as that person is able to understand the nature of an oath or affirmation.

5. Who can administer an oath or an affirmation in a court or tribunal?

A court, tribunal, judicial officer or a person acting judicially, as well as a person who is performing duties in relation to a court or tribunal and any prescribed person or person who is a member of a prescribed class of persons and various others specified, may administer an oath or affirmation for court or tribunal purposes.

6. What must a person say when making an oath or an affirmation?

The words of an oath or affirmation will depend on the reason it is being made.

Generally, an oath may be taken using the following, or similar words:

"I swear (or promise) by Almighty God (or the person may name a god recognised by the person's religion) that [*words of the oath prescribed or allowed by law*]."

An affirmation may be made using the following, or similar words:

"I solemnly and sincerely declare and affirm that [*words of the affirmation prescribed or allowed by law*]."

7. Can children use simpler language when making an oath or affirmation, either in court or for the purposes of making an affidavit?

Yes, they may use similar, simpler words including: "I promise to tell the truth".

8. Must a person use a religious text or have a belief in a god when swearing an oath?

A person may hold or use a religious text when swearing an oath, but is not required to do so. While often a person who swears an oath will have a belief in a god, a person may swear an oath even if the person's religious or spiritual beliefs do not include a belief in the existence of a god.

The form of oath made by a person does not need to include a reference to a god, and may instead refer to the basis of the person's beliefs.

An oath is effective even if the person who takes it does not have a religious belief or a religious belief of a particular kind.

The substance of these provisions is not new and was previously contained in the *Evidence (Miscellaneous Provisions) Act 1958*. The provisions in the new *Oaths and Affirmations Act 2018* ensure the law is consistent for all oaths and affirmations, whether made in courts, tribunals or elsewhere.

9. Can a person with a disability that prevents them from complying with the usual requirements of swearing an oath or making an affirmation still make an oath or affirmation?

If a person swearing an oath or making an affirmation has a disability that prevents them from complying with the process of swearing an oath or making an affirmation then the person who administers an oath or affirmation may make reasonable modifications to the process.

For example, a hearing-impaired person may read and sign an oath or affirmation instead of saying it aloud. A person who is unable to speak may be able to listen to an oath or affirmation being read and nod agreement.

If a person is illiterate, blind or cognitively impaired and seeks to take an oath or make an affirmation for the purposes of an affidavit, then the person administering the affidavit must read it to the person making it.

However, the person must be able to understand that they are making a legal promise to tell the truth, and that being untruthful under oath or affirmation is an offence. If a person seeking to swear an oath or make an affirmation is unable to understand the nature of an oath or affirmation, then that person will not be able to do so.

10. Who can administer an oath or an affirmation for other purposes?

Any person can be authorised by or under an Act to administer an oath or affirmation for specified purposes.

11. Must all oaths and affirmations comply with the Oaths and Affirmations Act 2018?

No. Part 2 of the Act provides a process for making oaths and affirmations where other laws are silent or have 'gaps' in the process. For example, if legislation requires an oath or affirmation but does not set out a form or process, the form and process in the Act can be used.

AFFIDAVITS

12. What is an affidavit?

An affidavit is a written statement that has been confirmed to be true by the person making it (deponent). The deponent confirms its truth by swearing an oath or making an affirmation before a person authorised by law to take an affidavit. Taking an affidavit is also called 'witnessing' or 'administering' an affidavit. There is a prescribed affidavit form which can be used for the written part of an affidavit. The written form is not mandatory. The words for the oath or affirmation are on the Example Affidavit on the Department of Justice and Community Safety website. These words are mandatory.

An affidavit is a form of sworn evidence and can be used in court proceedings and for other purposes authorised by law. An affidavit can serve to either collect a handful of exhibits together for ease of handling or reference, or to set out a person's own account of relevant events in numbered paragraphs.

13. Who can make an affidavit?

Any person, whether an adult or a child, may make an affidavit, as long as at the time of making the affidavit that person has the capacity to understand the nature of an oath or affirmation. That is, they must be able to understand that they are making a legal promise to tell the truth, and that being untruthful in an affidavit is an offence.

14. Who can administer an affidavit?

The *Oaths and Affirmations Act 2018* (The Act) lists some of the people who can administer an affidavit. It also allows other legislation and regulations to give people the authority to administer affidavits. The list of people in the Act who can administer an affidavit is broadly the same as those previously authorised under the *Evidence (Miscellaneous Provisions) Act 1958* but with some anomalies removed.

Some examples of people who can administer affidavits under the Act include judicial officers, honorary justices, public notaries, court registrars, Victorian Civil and Administrative Tribunal members and registrars, members and former members of both Houses of Parliament, Australian legal practitioners, police officers of or above the rank of sergeant or for the time being in charge of a police station, and public servants with a classification prescribed in regulations. The full list of prescribed affidavit takers can be found on the Department of Justice and Community Safety website at www.justice.vic.gov.au.

15. What is the penalty for making a false statement in an affidavit?

If a person lies in an affidavit they can be charged with perjury. This offence has a maximum penalty of 15 years imprisonment.

16. Who can administer an affidavit out of Victoria for use within Victoria?

In addition to those listed in the attached list of authorised affidavit takers, an Australian Consular officer, certain local employees of the Commonwealth in overseas locations, and employees of the Australian Trade and Investment Commission are authorised to take an affidavit in any place out of Victoria for use within Victoria, as well as any person having authority to administer an oath or affirmation in a place outside of Victoria.

If an affidavit can or must be taken by a Justice of the Peace or a bail justice, then it can be taken by a Justice of the Peace or bail justice outside of Victoria, for use in Victoria.

17. Is there a particular form that must be used for an affidavit?

Under existing law, each court or tribunal specifies the requirements for affidavits used in that court or tribunal. Regulations made under the *Oaths and Affirmations Act 2018* specify the basic contents and requirements for all affidavits, although it is not mandatory to adopt the prescribed form. Courts and tribunals may also customise the content of particular affidavits to suit their requirements in court rules.

The Regulations set out the words a person must say when swearing the oath or making the affirmation that forms part of their affidavit. These words are contained in the template affidavit form, which can be found at www.justice.vic.gov.au.

If another Act or Court rule is inconsistent with the requirements of the Act and specifically requires a different form for specific purposes, then that different form should be used. Otherwise the form prescribed by the Act is appropriate.

18. What is an example of 'inadvertent non-compliance that does not materially affect the nature of an affidavit'?

If a person makes a small, insignificant mistake that does not strictly comply with a requirement then the affidavit may still be valid. However, it is not possible to provide a list of examples that may or may not fall within this category. This will depend on each case, and may ultimately depend on a court ruling. Not making the oral oath or affirmation is not inadvertent non-compliance, and will invalidate an affidavit.

19. Can a person who administers an oath or affirmation for an affidavit charge a fee for doing so?

A person may not charge for administering an oath or affirmation to a person making an affidavit or signing an affidavit. Doing so is an offence punishable by 10 penalty units. However a person may charge for preparing or drafting the contents of the affidavit. This is not new and was the previous law under the *Evidence (Miscellaneous Provisions) Act 1958*.

The only exception is for public notaries, who are permitted to charge a fee for their services when taking affidavits intended solely for use outside of Australia.

Questions for authorised affidavit takers

20. If I am authorised because I am a member of a particular profession (e.g. police officer), am I authorised only to take affidavits related to my work, or is my authorisation broader than that (e.g. privately executed documents)?

If you are authorised because you are a member of a particular profession then you are authorised to take affidavits both related and unrelated to your profession.

The only exception is persons employed in a court or tribunal with a classification level of 2 or 3, such as Victorian Civil and Administrative Tribunal counter staff, who are only permitted to take affidavits in the course of their duties.

21. How can I determine if somebody would benefit from reasonable modifications in making their affidavit?

If a person is able to understand that they are making a legal promise to tell the truth, and that being untruthful in an affidavit is an offence, they can make an affidavit.

If a person also has a disability that makes it difficult or impossible to comply with the legal requirements for making an affidavit, you may need to modify the process so that a deponent can complete their affidavit. Making reasonable modifications to the affidavit process does not require a medical assessment. You should use your own good judgement about what is necessary to ensure a person's disability does not prevent them making an affidavit.

22. How should I ask the person making their affidavit to swear the oath or affirm? (E.g. can I say 'Repeat after me', or can the deponent read from a printed card, or can they answer 'Yes' to questions such as, 'Are the statements made in this affidavit true and correct?')

A person making an oath or affirmation for an affidavit must say the prescribed words aloud. They may repeat the words after the authorised affidavit taker has spoken them, or read them from a card. It is not sufficient (unless reasonable modifications must be made because of a disability) to simply answer yes to questions such as 'Are the statements made in this affidavit true and correct?'.

23. When saying the capacity in which I am authorised, how specific should I be? For example, should I state that I am a lawyer or legal practitioner or legal practitioner within the meaning of the Legal Profession Uniform Law (Vic)?

You should use the wording referred to in the attached list of authorised affidavit takers. So, for example, an **Australian legal practitioner** is authorised to take an affidavit. If the affidavit is taken by such a person then that term should be used. Terms like lawyer or legal practitioner might be considered to include a person who practices law in another country. That person usually would not be authorised to take an affidavit in Victoria.

Questions for people making affidavits

24. Can I be assisted by an interpreter?

Yes, a person may be assisted by an interpreter when making an affidavit. It should be noted that affidavits are usually prepared on the basis that they might be used in a court or a tribunal. If the affidavit is made in a language other than English, it is unlikely that the court or tribunal would accept it, unless it was accompanied by an affidavit from a qualified interpreter who:

swore an oath or made an affirmation that they had accurately translated the prescribed words from English into the deponent's language and translated what the deponent said in their language into English, and

- provided a written translation in English of the deponent's affidavit.

STATUTORY DECLARATIONS

25. Is there a particular form that must be used for a statutory declaration?

Yes, under the *Oaths and Affirmations Act*, a written statutory declaration must be in the form prescribed by regulations. The template statutory declaration form can be found at www.justice.vic.gov.au. There was no prescribed form for a statutory declaration under the previous law.

26. What if a person uses the wrong form or the form is out of date?

The new provisions under the *Oaths and Affirmations Act 2018* and related regulations commence on 1 March 2019. The Oaths and Affirmations (Affidavits, Statutory Declarations and Certification) Regulations 2019 prescribes the information which must be on a statutory declaration form.

In case an old form of statutory declaration is accidentally used, the Oaths and Affirmations Transitional Regulations 2019 provide a transitional period from 1 March 2019 to 31 December 2019. During this time, statutory declarations made in accordance with the repealed process under the *Evidence (Miscellaneous Provisions) Act 1958* will still be valid, regardless of whether the witness who took the statutory declaration only became authorised under the new Act.

27. What is a statutory declaration? How is it different to an affidavit?

A statutory declaration is a legally recognised written statement that the person making the statutory declaration (the declarant) promises is truthful. It is witnessed by a person who is authorised by legislation to witness statutory declarations. It includes an acknowledgement that the declarant knows that it is an offence to make a statement they know to be untrue.

Unlike an affidavit, a statutory declaration is not made on oath or by affirmation. But it is still a criminal offence to make a false statutory declaration. The penalty for making a false statutory declaration may be a fine or imprisonment. So a person must treat the making of a statutory declaration seriously.

A statutory declaration can be used where sworn evidence provided in the form of an affidavit is not required but a legally recognised statement is, such as when a person makes an application for a mortgage with a bank.

28. What is the penalty for making a false statutory declaration?

A person who makes a statement in a statutory declaration that the person knows to be untrue commits an offence that is punishable by a fine of up to 600 penalty units or up to imprisonment for 5 years or both.

29. Who can make a statutory declaration?

Any person, whether an adult or a child, may make a statutory declaration.

30. Who can witness a statutory declaration under the Oaths and Affirmations Act 2018?

There is a wide variety of people who are able to witness a statutory declaration under the Act. A full list of authorised statutory declaration witnesses can be found at www.justice.vic.gov.au. They include:

- Those who can administer an affidavit, including judicial officers, such as judges and magistrates, honorary justices, public notaries, court registrars, Victorian Civil and Administrative Tribunal members, members and former members of both Houses of Parliament, Australian legal practitioners and others;
- A person authorised to take a Commonwealth statutory declaration, such as a chiropractor, nurse, optometrist, physiotherapist, certain Australia Post officers and numerous others; and
- Those who are prescribed in regulations made under the Act, such as a school principal, a protective services officer, a public servant with a certain classification and various others; and
- Anyone specifically authorised under a specific Act.

31. What is an example of ‘inadvertent non-compliance that does not materially affect the nature of a statutory declaration’?

If a person makes a small, insignificant mistake that does not strictly comply with a requirement then the statutory declaration may still be valid. However, it is not possible to provide a list of examples that may or may not fall within this category. This will depend on each case, and may ultimately depend on a court ruling.

32. Will it be easier to find witnesses for a statutory declaration under the new legislation?

Yes, the new legislation expands the list of people able to witness Victorian statutory declarations. From 1 March 2019 a person who is authorised to witness a Commonwealth statutory declaration is also authorised to witness a Victorian statutory declaration. This greatly increases the number of people who are authorised to witness Victorian statutory declarations.

Regulations made under the *Oaths and Affirmations Act 2018* authorise some other people who were not previously authorised to witness statutory declarations, such as police reservists, protective services officers, and licensed conveyancers, thereby adding to the list of available witnesses.

33. Why do statutory declarations need to be witnessed?

Statutory declarations have a wide variety of uses. They are often used to obtain a right or benefit and therefore must contain truthful information. For example, a person may make a statutory declaration in support of taking carer's leave, or when a person makes an application for a mortgage with a bank.

The organisation receiving the statutory declaration must rely on the declaration being true and correct. The requirement of having a statutory declaration witnessed adds formality and accountability to the process so that the receiving organisation can be confident that it can act on the information and material provided.

34. Can a person with a disability that would prevent them from making a statutory declaration in the usual way still make a statutory declaration?

Another person may assist a person to make a statutory declaration, and, if that occurs, the person assisting must, on the face of the document, write their name and address and explain the nature of the assistance provided, for example, assistance with writing or reading.

The *Oaths and Affirmations Act 2018* also provides that a person who is illiterate, blind or cognitively impaired may make a statutory declaration, but only if the person witnessing the statutory declaration reads it to the person making it.

The Act also allows a statutory declaration witness to modify the usual process to take into account a person's disability. For example a person who is unable to speak may be able to read the oral declaration and nod assent.

35. Must a statutory declaration be in writing?

Yes, a statutory declaration must be made in writing, and in the form prescribed by the regulations.

However, when a person makes a statutory declaration the law will now require that they must say certain words to confirm the truth of the statement. These words or declaration can be found in the regulations or in the instructions on the statutory declaration form on the Department's website.

Before 1 March 2019 different witnesses had different practices. Some witnesses required a person making a statutory declaration to make a declaration aloud but others only required the statutory declaration to be signed. From 1 March 2019 the law is clear and a person making the statutory declaration will have to make a short

declaration confirming the statement is true and correct in front of the witness **and** also sign the statutory declaration.

36. Can a person charge for witnessing a statutory declaration?

The *Oaths and Affirmations Act 2018* does not prohibit an authorised witness from charging to witness/take a statutory declaration but usually this is regarded as a public service and most witnesses do not charge a fee. It is not expected that the Act will change this custom.

However, Honorary Justices are prohibited under the *Honorary Justices Act 2014* from charging for any service they perform, including witnessing a statutory declaration.

Questions for authorised statutory declaration witnesses

37. If I am authorised because I am a member of a particular profession (e.g. engineer), am I authorised only to witness statutory declarations related to my work, or is my authorisation broader than that (e.g. privately executed documents)?

If you are authorised because you are a member of a particular profession then you are authorised to witness statutory declarations that are both related and unrelated to your profession.

38. If I am authorised in my profession but am employed in a “temporary” or “casual” capacity, am I still considered an authorised person?

You should consult the attached list. Some people who are employed in a particular profession on a temporary or casual basis may be authorised, but others may not be unless they are employed on a full time basis. Generally speaking, unless otherwise specified, witnesses authorised in their profession but employed in a “temporary” or “casual” capacity will be permitted to witness statutory declarations for the duration of their time in the authorised role.

39. How can I determine if somebody would benefit from reasonable modifications in making their statutory declaration?

You will need to exercise your ordinary judgment. You are not expected to be a psychologist, psychiatrist or a medical professional so you are not required to undertake a complex assessment.

40. How should I solicit the oral portion of the statutory declaration when taking a statutory declaration? (E.g. do I say ‘Repeat after me’, or can the deponent read off a printed card, or can they answer ‘Yes’ to questions such as, ‘Are the statements made in this declaration true and correct?’)

A person making a statutory declaration must say the prescribed words aloud. They may repeat the words after the authorised statutory declaration witness or read them from a card. It is not sufficient to simply answer yes to questions such as ‘Are the statements made in this statutory declaration true and correct?’

41. When saying the capacity in which I am authorised, how specific should I be? For example, should I state that I am a lawyer or legal practitioner or legal practitioner within the meaning of the Legal Profession Uniform Law (Vic)?

You should use the wording referred to in the attached list of authorised statutory declaration witnesses. So, for example an **Australian legal practitioner** is authorised to witness a statutory declaration. If the statutory declaration is taken by such a person then that term should be used. Terms like lawyer or legal practitioner might be considered to include a person who practices law in another country. That person would usually not be authorised to witness a statutory declaration in Victoria.

Questions for people making statutory declarations

42. Can I be assisted by an interpreter when making a statutory declaration?

Yes, a person may be assisted by an interpreter when making a statutory declaration. In this situation the interpreter must clearly write or stamp on the front page of the statutory declaration their name and address, and that they provided translation or interpreting assistance.

CERTIFICATION OF COPY DOCUMENTS

43. Why are certified copy documents needed?

It is sometimes necessary to prove something with a document but it is not possible to give the original document, e.g. a certified copy of a driver's licence in a passport application, or a certified copy of an academic transcript when applying for a new course of study. A process is required to ensure that the copy document is an accurate copy of the original document and therefore can be relied upon.

44. How does the certification process under the Oaths and Affirmations Act 2018 work?

Before certifying a copy of an original document, an authorised certifier must inspect the original document to ensure that it is an original document and inspect the copy to ensure it is identical to the original document.

Identical does not mean that the copy must be of the same size or colour as the original, provided the use of a different size or colour does not result in the loss of any material information.

The authorised certifier then writes or stamps the copy document with words prescribed by the legislation that confirm that the copy is a true copy of an original document, signs and dates the copy, and writes or stamps the copy with their name, qualification and address.

45. Who can certify copy documents under the Oaths and Affirmations Act 2018?

- An authorised affidavit taker
- A person authorised to witness a statutory declaration
- A person authorised by or under another Act
- A person prescribed in regulations made under the *Oaths and Affirmations Act 2018*.

46. Must a person use the process set out in the Oaths and Affirmations Act 2018 to certify a document as a genuine copy of an original?

No, the certification process in the Act may be used to certify a document as a genuine copy of an original, but the process is not mandatory. Some industries or organisations already have robust processes in place to ensure the integrity of copy documents. For example, under laws for the transfer of property, certain documents like a driver's licence or passport must be produced to authorised agencies, such as Australia Post, so that the identity of those doing the land transfer can be verified. Copies of the original documents are made and stored to verify identity. These processes are not affected by the new Act.

Certification procedures that already exist in other Acts will not be displaced by the Act's certification processes either. For example, the *County Court Act 1958* contains a process for the Registrar or Deputy Registrar to certify true copies of entries in the register books of the court which will continue to apply. If the certification system in the *Oaths and Affirmations Act 2018* is to be used, it must be specifically adopted in legislation, regulations or policy documents and only then will it apply.

47. What documents can be certified as copies of originals?

A copy of an original document may be certified as a true copy.

An authorised certifier may not be able to tell, with absolute certainty, whether a document is truly an "original document". So the *Oaths and Affirmations Act 2018* provides that the authorised certifier must simply use their best judgement and decide if it is an original document.

Also sometimes a register is kept of public information. An authorised copy of an entry on a register of public documents or an extract certified as a true extract from the register is regarded as "an original document" because the official holder of the register has issued or certified the document. Even where the holder of the register issues

multiple authorised copies or multiple extracts of a document, each of those documents would be considered an "original document" under the Act.

For example, a birth certificate which has been issued to an individual by the Registrar of Births Deaths and Marriages will be regarded as the "original document", even though it is a copy of particulars recorded on the Register. Certified copies could be made of the birth certificate using the process in the *Oaths and Affirmations Act 2018*.

48. Can a person certify a copy of a certified copy of a document?

Yes, a person may certify a copy of a certified copy of a document. In such a case the authorised certifier must inspect the certified copy of the original document to ensure it appears to be authentic and inspect the copy of the certified copy to ensure it is identical to the certified copy.

49. Can a document in a language other than English be certified?

Yes, a document in a language other than English can be certified, if the authorised certifier is of the opinion that the copy and the original document are identical.

50. Will the certification scheme in the Oaths and Affirmations Act 2018 affect certification arrangements that are already in place for other schemes?

Not necessarily. Other schemes may provide for other certification arrangements and may maintain their current system, make changes or expressly adopt the certification scheme in the Act.

The scheme provided for by the Act does, however, create a clear and robust system of certification of documents that are copies of originals with authorised certifiers.

Questions for authorised certified copy witnesses

51. Should an authorised certifier use their personal or professional address when certifying documents?

Either address is permitted under the *Oaths and Affirmation Act 2018*, however authorised certifiers are advised to use their professional address unless there is a compelling reason not to do so.