

PREPARING AFFIDAVITS FOR THE MAGISTRATES COURT

Getting an affidavit right

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Disclaimer

This publication is intended to give general information about the subject of law that it deals with. While every effort has been made to ensure accuracy, the law is complex and constantly changing. No responsibility is accepted for any loss, damage or injury, financial or otherwise, suffered by any person acting or relying on information contained in or omitted from this publication.

This kit shows how to prepare an affidavit in the Queensland Magistrates Court.
Caxton Legal Centre Inc.

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01 What is an affidavit?

An affidavit is a written statement, which sets out the facts of your case – your story – in numbered paragraphs. These facts need to be facts that are within your own knowledge. The affidavit must be signed by you (the deponent) before a qualified witness (usually a Justice of the Peace, solicitor or barrister).

The Magistrates Court will only accept affidavits that are written following the rules of the court, and this kit has been prepared to help make sure your affidavit follows those rules.

All the facts that you provide to the court and that are accepted by the court are known as your evidence. For further information, please refer to the section 'What should I include in my affidavit' below.

Your evidence could also be given in your own words in court from the witness box (verbal evidence).

02 Who is the deponent?

The person who signs the affidavit is called the deponent. A deponent deposes (states) that the written information in the affidavit is true.

03 Why is an affidavit necessary?

Writing an affidavit will save time for the court and for you. It is often easier for you to set out your thoughts clearly in writing before you go to court. Telling your story in court may be stressful for you, and you might accidentally forget some important details of the case.

The court hopes that you will settle your dispute before going to court. You may be more willing to come to an agreement with the other party once you know the basis of their case. You will find this out from the affidavit/s which normally will be exchanged before the court hearing.

04

What forms are available from the Magistrates Court?

The Magistrates Court makes some forms available to members of the public. An affidavit form (called a Form 46) can be obtained from the Magistrates Court or downloaded from the Queensland Courts website. You can save the Form 46 from the Queensland Courts website onto your own computer and fill it in from there.

All documents prepared for the Magistrates Court, including affidavits, must have a heading on top of the front page, which has to include the name of the court (e.g. the Magistrates Court of Queensland), the court registry handling the file, the names of the parties and the court file number.

This is necessary so that documents relating to your case can be easily identified in court.

The Brisbane Magistrates Court is located at 363 George Street, Brisbane and its phone number is: 3247 5598. Please refer to the telephone book or the website at www.courts.qld.gov.au/contact for the locations of other courts.

05

How should I set out my affidavit?

All Magistrates Court affidavits should be typed on A4 paper and be set out in consecutively numbered paragraphs. There is a sample affidavit in this kit.

Your affidavit must be written in first person, i.e. you need to tell what you did, saw, said or heard, for example by writing 'I said', 'I went' or 'I saw'.

Start by stating your name, your residential address or place of employment, and any description of yourself or your role that relates to the dispute.

Then describe the first thing that happened and set out your story from beginning to end. Each numbered paragraph should contain a separate event or idea. Keep each paragraph as short as possible so your affidavit will be easy to read and understand. Each page must be numbered.

06

What should I include in my affidavit?

The following details need to be included in your affidavit:

- your story, told truthfully and accurately
- all relevant facts in short, numbered paragraphs (usually one event per paragraph)
- copies of all relevant documents (see the section headed ‘How do I attach letters or documents to my affidavit?’)

- your response to any matters raised in any affidavit provided to you by the other party. If you disagree with anything said in the other party’s affidavit, you should refer to it and explain why you disagree. For example “I refer to paragraph 6 of the affidavit of John Smith, sworn on 2 January 2012. The Ford Laser swerved into oncoming traffic. I observed another car...”

See that sample affidavit for more details.

07

What should not be included in my affidavit?

You should never be deliberately untruthful. Lying can seriously damage your case. There are severe penalties under the *Criminal Code* 1899 (Qld) in Queensland for lying to or deliberately misleading the court.

The court will not always accept everything you say or have written. There are strict rules of evidence which prevent the court from taking into account inappropriate statements. A statement will not be accepted into evidence by the court if it is unnecessary, irrelevant, scandalous, argumentative, or it sets out opinions by people who are not qualified to give them.

See Attachment A for a more detailed explanation of these terms and some examples of what you should avoid saying in your affidavit.

The court will normally reject statements if they are *hearsay*. Hearsay is basically information which you have heard from someone else. For example, your neighbour might tell you that she saw someone enter your home while you were at work. You could not put that information in your affidavit because it is hearsay.

First person statements are not hearsay – for example, it would not be hearsay if your neighbour swears an affidavit about what she has actually seen.

There are some important exceptions to the rules against hearsay.

The laws about evidence are complex and you should get legal advice if you are in any doubt about what you think you need to include in your affidavit.

If inappropriate material is included in your affidavit, the court may order that it be struck out or removed. This creates a risk that you will have to pay part of the costs of the other party when the Magistrate makes his or her final decision. The court may say that it was your fault that time was wasted and order you to pay costs to the other party for this.

Do not exaggerate! Think carefully when answering questions about ‘how often’ or ‘how many’, and when using words such as ‘never’ or ‘always’. Avoid using terms like ‘usually’, ‘often’, ‘sometimes’, ‘many’ and ‘few’, as they can mean different things to different people. It is much better to use specific phrases such as ‘more than four times but less than ten’ or ‘at least twice a week’.

What are the rules about signing my affidavit?

Your affidavit must be signed at the end of the document by you (as the deponent) and a qualified witness. If there is more than one page, both of you must sign at the bottom of each page. Lawyers, specifically barristers and solicitors, can witness affidavits. A Justice of the Peace or a notary public can also witness an affidavit.

You and your witness must each initial each change and changes should only be made before the affidavit has been signed. If you need to change the affidavit after it has been signed, you should prepare a new copy and have it witnessed again. If it looks like the affidavit has been changed after it has been signed, the Magistrate or Judge may question the changes.

Any changes to a typed affidavit must be done neatly. Rule a single line through whatever you want to delete with a biro and write the changes. Do not use liquid paper on your affidavit; the court will not accept it.

sample affidavit – form 46

AFFIDAVIT r 431

MAGISTRATES COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: 1 of 2012

Name of the court

Name of the registry

Court file number

Plaintiff: WILLIAM JAMES SMITH

and

Defendant: CHERYL JONES

Names of the parties

AFFIDAVIT

ROBERT GREEN of 27 George Street, Coorparoo, in the State of Queensland, panel beater, states on oath [*or*: solemnly and sincerely affirms and declares]:

1. I am the owner of Auto Repairs situated at George Street, Coorparoo in the State of Queensland, and have been a panel beater for 20 years.
2. On the 20th day of December 2011, I repaired a damaged Ford Laser sedan, 'the Laser' (registration number PJQ 130).
3. Exhibit A to this affidavit is the repair account for the necessary repairs to the damaged Laser motor vehicle, and the amounts specified in that account are a fair and reasonable charge for that work.
4. All the facts and circumstances deposed to are within my own knowledge save such as are deposed to from information only, and my means of knowledge and sources of information appear on the face of this my affidavit.

Sworn [*or*: Affirmed] by ROBERT GREEN

On 1 JUNE 2012

At BRISBANE

In the presence of:

This is the standard last sentence for affidavits verifying the information is true and within your knowledge. It must be included at the end of the affidavit.

Signed: (*Deponent/s to sign*)

Taken by: (Person taking the affidavit to sign)

When an affidavit is more than one page in length this information must be included at the bottom of each page.

Deponent

(*Commission for Declarations /Solicitor/JP*)

AFFIDAVIT

Name: WILLIAM JAMES SMITH

Filed on behalf of / by Plaintiff

(*or name of party filing*)

Address: 5 STATION ROAD
COOPAROO QLD 4151

This information goes at the bottom of the first page of the affidavit.

Form 46 Rule 431

Phone: 07 3500 0000 (fax: 3500 4500)

Affidavits longer than one page should be numbered at the bottom of each page.

1

How do I attach letters or documents to my affidavit?

Copies of any documents and letters referred to in your affidavit should be attached at the end of the affidavit. These documents may be important to help you to prove your case. To attach documents, you must say what each document is and how it is relevant in the text of your affidavit. Each document attached must be introduced and described in the text of the affidavit as 'the exhibit marked 'A' (or 'B' or 'C') is a copy of (describe the document)'. For example:

"I have paid to Instant Car Repairers the amount of \$7,300.00. The attached exhibit marked 'A' is a copy of the account I received from them on 12 March, 2012."

You must write the letter 'A' (or 'B' or 'C' etc.) in the centre of the top of the letter or document that you are exhibiting. A Certificate of Exhibit must be attached to the letter or document.

The Certificate of Exhibit verifies that the exhibit attached to your affidavit is the correct one. It must be signed by both you and a witness. Sometimes your affidavit may have a lot of exhibits, so the Certificate of Exhibit ensures that they are all attached in the correct order. For a copy of a Certificate of Exhibit see page 10.

Usually, if you are attaching documents to your affidavit, your actual affidavit will appear first, followed by the Certificate of Exhibit and the exhibited documents, each one being identified as exhibits A, B, C and so on. A single exhibit sometimes will be made up of several pages forming the one document.

sample certificate of exhibit – form 47

CERTIFICATE OF EXHIBIT r 435

MAGISTRATES COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: 1 of 2012

Plaintiff: WILLIAM JAMES SMITH
and
Defendant: CHERYL JONES

CERTIFICATE OF EXHIBIT

Exhibit A to the affidavit of ROBERT GREEN sworn [affirmed] twenty second day of July 2012.

Note:

Each separate exhibit should be given its own letter.

Bound and marked A-F are the exhibits to the affidavit of (name of deponent) sworn [affirmed] [date].

(Deponent to sign)

Deponent

(Person taking affidavit to sign)

(Commissioner for Declarations/Solicitor/JP)

This is where
the witness
signs

CERTIFICATE OF EXHIBIT

Name: WILLIAM JAMES SMITH

Filed by the Plaintiff

Address: 5 STATION ROAD
COOPAROO QLD 4151

Form 47 Rule 435

Phone: 07 3500 0000 (fax: 3500 4500)

sample invoice 247

EXHIBIT A

Auto Repairs

Tel: (07) 3232 4444
Fax: (07) 3232 4441
27 George Street Coorparoo

Invoice: 247

20 December 2011

Vehicle: Ford Laser PJQ 130

Item	Cost
Front right fender	\$40.50
Right fender replacement	\$200.00
Right headlight	\$60.25
Headlight replacement incl. electricals	\$115.40
Total	\$416.15

Payment terms are 14 days from date of invoice.

10

Where do I file (lodge) my affidavit?

Once you have signed your affidavit before a witness, you must make two photocopies and take them to the counter of the Magistrates Court for filing. The clerk will stamp each copy with the stamp of the court.

The original affidavit will be placed on the court file. The two copies are returned to you. One copy is for you and one is for you to give to the other party in the case. You must arrange to serve the other party with their copy.

11

Witnesses

If you have a witness to support your story, you normally should arrange for your witness to prepare a supporting affidavit setting out any relevant facts. This must then be filed with the court.

Any witnesses who have completed affidavits will usually be called upon to make themselves available for cross-examination by the other side during the actual hearing. You should warn your witnesses about this.

In any case, the court can order a witness to appear so that they can then be examined or cross-examined.

If a potential witness is refusing to cooperate, but they are needed to give evidence (either in person or by producing documents to the court), that witness will need to be subpoenaed to ensure that they comply. This involves a special procedure. Get legal advice about this if it becomes an issue.

You will normally know by the day before a hearing if the other side wants to cross-examine one of your witnesses, because you will be given a notice of this. (Think about whether you also need to give a similar notice.) If a witness is required to attend at court and fails to show up, the court may decide to ignore the affidavit or give it only limited weight. This could affect your chances of winning.

A subpoenaed witness must be given sufficient notice to make sure that they can arrange to be at court with any relevant documents. They must also be given a reasonable amount of conduct money to cover their costs of appearing. More details about this are contained in the court rules, called *The Uniform Civil Procedure Rules 1999 (Qld)* (the UCPR) or can be obtained from your legal advisor.

12 Will the court accept an affidavit if it is not in the correct form?

The court probably will not accept an affidavit if it is not in the proper form; however, you could still try asking the court or the Magistrate to accept what you have prepared, even if it is not correct.

The court will sometimes agree to accept an affidavit that is irregular in its form.

13 What is service?

The court has created special rules about the service of documents to ensure that each party named in a court action is aware of the case being brought against them by the other side. You must therefore serve a copy of your affidavit (and any other affidavits prepared by your witnesses) on the other party before the court hearing.

Serving documents basically means that you are personally giving a document to someone or arranging to get a copy to them in accordance with the court rules. [Take note that there are special rules for the service of children, prisoners and people with impaired capacity.]

14 The timeframe for service

- Affidavits in support of court applications must be filed and served at least 3 business days before a hearing.
- An affidavit in support of an application for summary judgement must be filed and served at least 8 business days before the hearing.
- For most other matters, an affidavit should be filed and served at least 2 business days before a court hearing.

In certain urgent situations, an affidavit may even be filed and served at the start of a hearing, but there will need to be exceptional reasons for the court to allow this to happen.

If this does happen you should ask for an adjournment so you have some time to read the material.

How do I 'serve' the other party?

In the Magistrates Court, the rules for service have been simplified. Basically, unless the court orders otherwise or personal service is specifically required under other rules, you can post a copy of the filed affidavit to the other party's current home or business address (or last known address) in a properly addressed, stamped envelope. (However, if the other party has a lawyer acting for them in the court case, you must serve the person by sending/delivering the documents to the law firm.)

If you decide to serve by post, it is best to use certified post. Ask for a receipt to be provided for the certified post once it is collected. This is useful evidence of what you have done.

Alternatively, you can also still serve documents in person – either yourself, or by having another adult serve the document/s. If the person you are trying to serve is not at home, you may serve the documents by leaving them with another adult who appears to live at the relevant address.

If no-one is there, you can even leave the document in a prominent position where it is likely to come to the other person's attention at that address. (In some circumstances, you can even serve documents by facsimile or email. This is explained in the UCPR Rule 112.)

If you cannot find out where the other party lives or works, you can also hire the process server to try to locate them for you. There is no guarantee that they will be able to find an address for you. Process servers charge fees, so make sure you ask in advance what the fee will be.

The rules for serving documents for legal matters dealt with outside the Magistrates Court are not necessarily the same as those described above, so check with the relevant Court if that applies to you.

16 Will I be cross-examined in court?

Your affidavit contains your story and will be the basis of your case. Both you and the other party are permitted to ask questions about the contents of each other's affidavit (this is known as cross-examination).

You and other witnesses must be sure that the affidavits are truthful and accurate.

17 What if I have special needs?

If you are blind, have difficulty reading or understanding English or have another form of print disability, you cannot sign an affidavit unless it has been read aloud to you. In such circumstances, it is usual that the witness will read it to you. To establish that this has been done, you must sign or make your mark next to the special wording that states that the document was read out to you and that you appeared to have understood it.

There are two options for the wording, according to the deponent's ability. The relevant clause should be inserted before the space where the deponent signs the affidavit on each page:

[who certifies that the affidavit was read in the presence of the deponent who seemed to understand it, and signified that that person made the affidavit.]

or

[who certifies that the affidavit was read in the presence of the deponent who seemed to understand it, and signified that that person made the affidavit, but was physically incapable of signing it.]

18 Where can I find a translator?

If your first language is not English, you may have some difficulty in preparing an affidavit and presenting it to the court. All affidavits must be in English. There are specially qualified translators who can assist you.

For further information about this type of assistance and the costs involved, contact the Translating and Interpreting Service (telephone 13 14 50). Special witnessing clauses are used in these circumstances.

Where can I find out about the law regarding affidavits in the Magistrates Court?

The legal requirements for affidavits in the Magistrates Court are found in the *Uniform Civil Procedure Rules 1999* (Qld).

Checklist

Before you take your affidavit to the Magistrates Court, check that:

- ✓ **your story has been told truthfully and accurately**
- ✓ **your affidavit looks similar to the example included here**
- ✓ **you and your witness have signed at the bottom of each page**
- ✓ **all exhibits (attachments) to your affidavit have been properly marked and signed by a witness as set out in in the example here**
- ✓ **you have made two photocopies to take with you.**

Attachment A – Examples of objectional material

Unnecessary material includes:

- Information which has previously been given by you or the other party to the court in another affidavit or court document.
- Detailed information which does not add anything to the substance of your story.
- Information which is obvious or is not in dispute.

Irrelevant material includes:

- Information which does not relate to the dispute before the court.
- Information which is not current, including minor episodes which happened years ago.
- Personal opinions about the other party's character.

Scandalous and oppressive material includes:

- Information (sometimes untruthful) which is designed only to shock the reader.
- Information given to attack someone's reputation.
- Personal opinions disguised as accusations about another person.

Argumentative material includes material:

- Arguing about minor or unimportant details.
- Denying a fact simply for the sake of denying it, rather than because a denial is needed.

Opinions by unqualified people include:

- Opinions about a medical condition or state of mind where the person giving the opinion does not have a suitable medical qualification.
- Opinions as to the value of property or assets where that person is not a qualified valuer or does not deal in property.
- Opinions which require some sort of training or knowledge beyond that of an average person.

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