



4 Appendices

Appendix A: state, territory and Commonwealth laws

The following is a list of the state, territory and Commonwealth laws under which a statutory declaration or affidavit may be made, in or for the relevant jurisdiction:¹⁰

Commonwealth	<i>Statutory Declarations Act 1959</i> (for statutory declarations) <i>Evidence Act 1995</i> (for affidavits)
NSW	<i>Oaths Act 1900</i>
Victoria	<i>Evidence (Miscellaneous Provisions) Act 1958</i>
Queensland	<i>Oaths Act 1867</i>
Western Australia	<i>Oaths, Affidavits and Statutory Declarations Act 2005</i>
South Australia	<i>Oaths Act 1936</i> (for statutory declarations and affidavits) <i>Evidence (Affidavits) Act 1928</i> (for affidavits)
Tasmania	<i>Oaths Act 2001</i>
ACT	<i>Statutory Declarations Act 1959</i> (Cth) (for statutory declarations) <i>Oaths and Affirmations Act 1984</i> (for affidavits)
Northern Territory	<i>Oaths, Affidavits and Declarations Act 2010</i>

The following NSW Acts and Regulations are also relevant:

Justices of the Peace Act 2002
JP Regulation 2020
Oaths Regulation 2017

A complete version of all NSW Acts and Regulations in force is at the website www.legislation.nsw.gov.au  This is the official NSW Government website for online publication of legislation. It is recommended that you do not rely on any other websites to check legislation, as they do not have the official versions of NSW Acts and Regulations, and may not be up to date.

¹⁰ This is not a full list, because other legislation may be relevant to affidavits, such as various court rules.

Appendix B: approved identification documents

Any one of these approved identification documents is acceptable, as long as it has not expired. The only exception is for an Australian passport, which is acceptable if it expired no more than two years ago. **You must not accept any identification document that has been cancelled.**

- A **driver licence or permit** with a photograph of the person in whose name the licence is issued, whether issued in Australia or another country, including a digital driver licence
- A **NSW photo card** issued under the *Photo Card Act 2005*
- An **Australian proof of age card**, which contains the photograph of the person in whose name the card is issued
- An **Australian passport** (either current or expired less than two years ago)
- A **passport or similar document** with the person's photograph and signature issued by another country or by the United Nations (with an English language translation if not in English)
- A **national identity card** issued by another country or the United Nations for identification with the person's photograph and signature (with an English language translation if not in English)
- An Australian citizenship certificate
- A **foreign citizenship certificate** (with an English language translation if not in English)
- A **birth certificate**, whether issued in Australia, another country or by the United Nations (with an English language translation if not in English)
- A **birth extract** issued by an Australian state or territory
- An **integrated birth certificate** as issued by the state of NSW
- A **pension card** issued by Centrelink that entitles the person in whose name the card is issued to financial benefits
- A **credit card or passbook** from a bank, building society or credit union
- An **account or statement of account** from a bank, building society or credit union, up to one year old
- A **Medicare card, pensioner concession card, Department of Veterans' Affairs entitlement card** or other entitlement card issued by the Federal or any State Government
- An **electoral enrolment card** or other evidence of enrolment as an elector, up to 2 years old
- A **student identity card** or a **certificate or statement of enrolment** up to two years old from an educational institution and including a photograph.
- In the case of an inmate, an **inmate identification card**, or other document containing information identifying the inmate and including a photograph, prepared or used by the correctional centre in which the inmate is held

- In the case of a forensic patient, a **residential identity card**, or other document containing information identifying the patient and including a photograph, prepared or used by the mental health facility, correctional centre or other place in which the patient is detained
- In the case of a mental health patient other than a forensic patient, a **residential identity card**, or other document containing information identifying the patient and including a photograph, prepared or used by the mental health facility to which the patient is admitted
- A **police identification card** issued to a police officer by the Commissioner of Police

A copy of one of the above identification documents is acceptable if the copy has been certified as a true copy. The following people are authorised to provide certification:

- Justice of the Peace;
- Public Notary;
- Commissioner of the Court for taking affidavits;
- Australian legal practitioner authorised to take and receive any affidavit;
- the NSW Registrar-General;
- a Deputy Registrar-General; or
- other person authorised by law to administer an oath.

However, the person who certified the copy must not be the same person who is witnessing the statutory declaration or affidavit.

You must not accept a certified copy of an identification document if the copy shows that the original has expired (except for an Australian passport, which is acceptable if it expired no more than two years ago) or that the original has been cancelled.

Appendix C: capacity and competence

You can and should always assume that a person has capacity and is competent. However, situations may arise where you need to query a person's legal capacity and legal competence in delivering your JP functions.

Definition of capacity and competence in a legal sense



A person has **capacity** if they sufficiently understand the general nature of the decision they are being asked to make or the act they are being asked to perform.

A person is **competent** if they are mentally and physically able to do it.

Circumstances where a person may lack capacity include:

- where the person is a minor (under 18 years of age);
- is elderly or infirm; or
- appears to have an intellectual or cognitive impairment.

Circumstances where a person may lack competence include:

- where the person has a cognitive impairment or
- if the person has difficulty communicating in English.

If you are concerned that a person might not have capacity or might not be competent, take the following steps before witnessing the person's signature.

Capacity

If you are concerned about a person's capacity, ask open-ended questions about the purpose, effect and contents of the document.

Statutory declarations

In the case of a statutory declaration, ask questions to check that the client understands the following:

- the purpose for the statutory declaration (for example, to 'tell my story' or 'give information' to the organisation that requires the declaration);
- the purpose that an organisation is likely to use the declaration (for example, to issue a licence or cancel a fine);
- what they have said in their declaration (its contents);
- that it is important to tell the truth in the declaration; and
- what can happen to the person if they don't tell the truth in their declaration (that it is a serious criminal offence to make a false statement, and that the penalties include imprisonment).

If you are satisfied that the person understands these things, you may witness the statutory declaration in the usual way (see **Section 2.1** on page 12). If you are not satisfied, you must decline to witness the statutory declaration.

Affidavits

In the case of an affidavit, ask questions to check that the client understands the following:

- the purpose for the affidavit (for example, to 'tell my story to the court');
- what they have said in their affidavit (its contents);
- what it means to swear an oath (for example, 'promising [name of religious deity] that I am telling the truth') or to make an affirmation (for example, 'promising that I will tell the truth'); and
- what can happen to the person if they don't tell the truth in their affidavit (that it is a serious criminal offence to make a false statement, and that the penalties include imprisonment).

If you are satisfied that the person understands these things, you may witness the affidavit in the usual way (see **Section 2.2** on page 32).

There may be instances where a person doesn't understand what is meant by 'swearing' or 'affirming' their affidavit. However, if the person can respond rationally to your questions and understand the difference between a truth and a lie, you may use the following modified procedure:

1. Tell the person that it is important to tell the truth in their affidavit.
2. Ask the person to declare that they will not tell lies in their affidavit.
3. If the person agrees that they will not tell lies, you should cross out 'Sworn' or 'Affirmed' in the signature panel and instead write 'Declared pursuant to s.32 of the *Oaths Act 1900*'.
4. The person signs the affidavit in the usual way.
5. You can then sign your name in the signature panel and on each page in the usual way (if there are any annexures, you should amend each annexure certificate by crossing out 'Sworn/Affirmed' and instead write 'Declared' before you sign the certificate).

However, you must decline to witness the affidavit if the following applies:

- the person does not understand the difference between the truth and a lie;
- the person is not able to respond rationally to questions; or
- if you are concerned for some other reason that the person does not have capacity.

Other documents

If the document relates to a transaction of some kind, it is important to ask appropriate questions to satisfy yourself that the person understands:

- the **general nature of the transaction** (for example, 'selling my house');
- the **main choices involved** (for example, the person chose between selling or not selling and chose to accept the sale price offered); and
- the **consequences of the transaction for the person** (for example, the person will receive money from the sale and the house will not belong to them anymore).

The greater the consequences of the transaction for the person, the more care you need to take to make sure that the person understands.

If you are satisfied that the person understands these things, you may witness the document in accordance with the instructions on the document.

If you are not satisfied that the person has capacity, you must decline to witness the document.

More information about capacity

You can read more about legal capacity in the following publications:

- ‘When a client’s capacity is in doubt: A Practical Guide for Solicitors’, which is published by the Law Society of NSW. A copy is available on the Law Society’s website at www.lawsociety.com.au under ‘Resource Centre’, ‘Areas of Law’, then ‘Elder Law’.
- ‘*Capacity Toolkit*’, which is published by the NSW Department of Communities and Justice. A copy is available on the Department’s Diversity Services website
- ‘*Equality Before the Law Bench Book*’, which is published by the Judicial Commission of NSW. A copy is available on the Judicial Commission’s website at www.judcom.nsw.gov.au. The Bench Book provides guidance about capacity to swear or affirm, and about the kinds of adjustments that can be made for, and tips to assist communicating with:
 - people with disabilities (especially Sections 5.3.1 and 5.4.2 of the Bench Book);
 - children and young people (especially Sections 6.3.2 and 6.3.4 of the Bench Book);
 - Aboriginal and Torres Strait Islanders (especially Section 2.3.3 of the Bench Book); and
 - people from non-English speaking backgrounds (especially Sections 3.3.1, 3.3.3 and 3.3.5 of the Bench Book).

Competence

If you are concerned about a person’s capacity, consider whether this can be addressed by providing reasonable help. For example:

- reading documents aloud to a person who has a visual impairment;
- using simpler language to communicate with a child or with a person who has a cognitive impairment;
- allowing a person who has difficulty communicating in English to be assisted by an interpreter (see **Section 2.5** on page 71); or
- having someone physically assist the person to sign the document (see **Section 2.6** on page 91).

Appendix D: list of frequently asked questions

This is a list of all frequently asked questions included in this handbook, and their page reference.

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