

Unfair dismissal and reinstatement application guide

Queensland Industrial Relations Commission



Document Details

Security Classification	OFFICIAL		
Date of Review of Security Classification	July 2020		
Authority	Registrar, Industrial Registry		
Author	Industrial Registry		
Document Status	Final	Consultation Release	<input checked="" type="checkbox"/> Final Version

Contact for enquiries and proposed changes

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Acknowledgements

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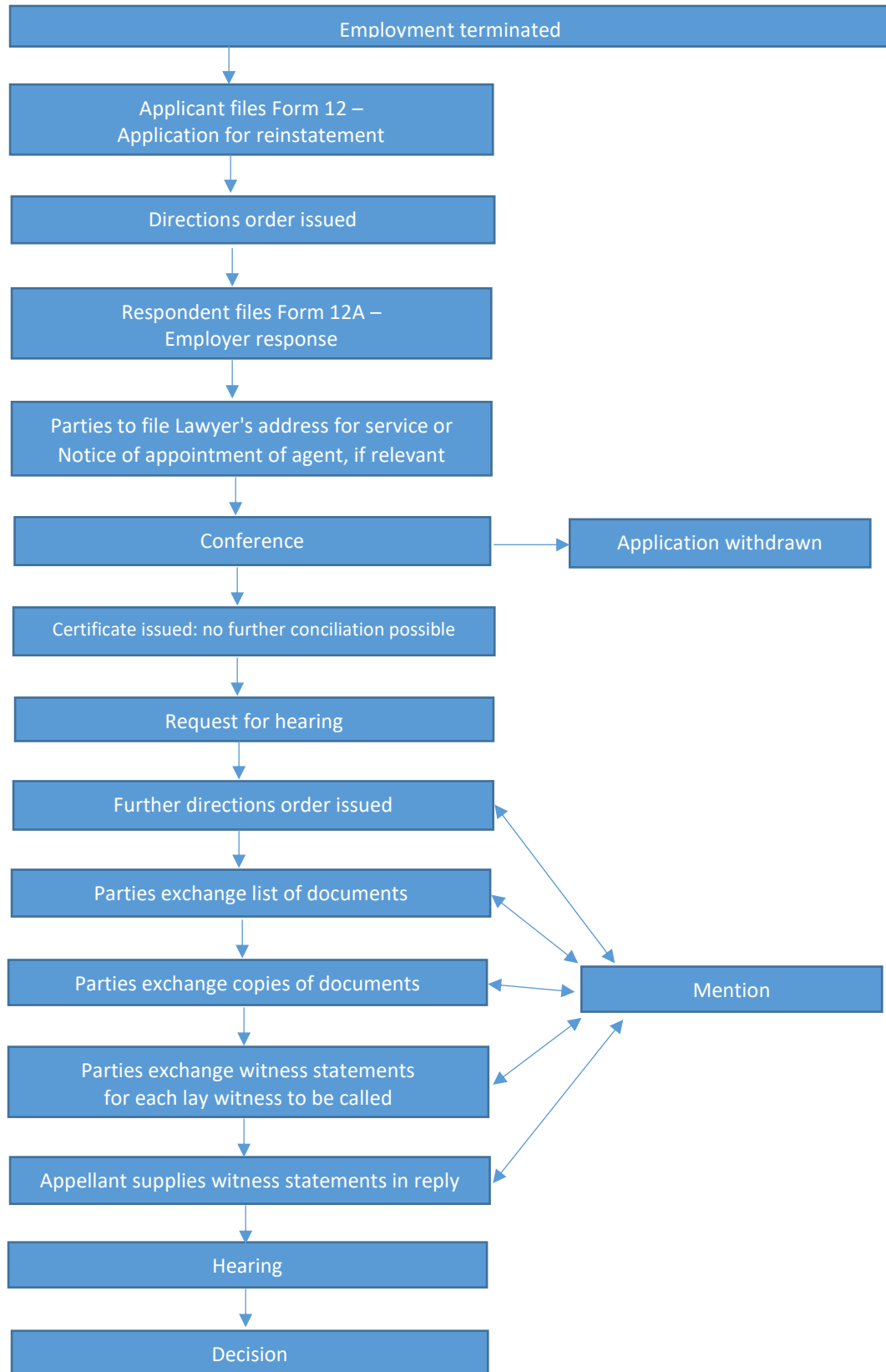
Current as at 25 June 2019

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Reinstatement application process flow chart



Part 1: Purpose

This document is for guidance only. Individual applications may be managed differently if circumstances require.

This guide sets out an overview of the procedures that the Queensland Industrial Relations Commission (commission) will usually adopt in managing reinstatement applications made under section 317 of the *Industrial Relations Act 2016* (Qld).

At the back of this guide there is a glossary of terms commonly used throughout this guide and at the commission.

These black boxes indicate items of importance. Pay attention to them.

This guide is written for self-represented parties.

Legally represented parties, or parties represented by an agent, should note that the procedures outlined in this guide are centred on the directions orders issued in instances where the appellant is self-represented.

Part 2: Introduction and overview

This section is intended to introduce you to the commission, its related jurisdictions and its general structure.

2.1 What is the Queensland Industrial Relations Commission?

The commission has jurisdiction over the following areas:

- Industrial disputes involving state and local government employees
- Unfair dismissals and reinstatement applications for state and local government employees
- Workers' compensation appeals
- Work-related anti-discrimination complaints
- Public service appeals
- Trading hours
- Work, health and safety reviews
- Long service leave payment applications
- Other matters prescribed under various acts.

In dealing with most of those jurisdictions the commission holds conferences to assist parties to understand each other. Conferences are generally more informal. Matters that do not settle at conference usually go to a hearing. A hearing is a formal process presided over by a member of the commission.

There are four types of members at the commission:

- The President, who is also a judge of the Supreme Court of Queensland
- The Vice President
- Deputy Presidents
- Industrial Commissioners.

When addressing a member of the commission at a hearing or in a conference:

- The President, Vice President and the Deputy Presidents are referred to as Your Honour
- Commissioners are Commissioner.

If you are writing to a member or the Registrar you should use their title as the salutation i.e. Dear Deputy President, Dear Commissioner, or Dear Registrar.

Each of the members has an associate. The associate's role is to assist the member with their duties. Associates are unable to provide you, or any other party with legal advice. Associates are the contact point between parties to a matter and the member and between the Industrial Registry (registry) and the member's chambers.

Associates should only be directly contacted if the matter is urgent or if the commission directs you to contact the associate instead of the registry.

In most instances you should contact the registry before you contact the member's associate. If the associate is free you will be put through.

2.2 What is the Industrial Registry?

The registry is the support body for the commission and the Industrial Court of Queensland (court). It is where forms and materials are filed for appeals, applications and notifications. The registry is headed by the Industrial Registrar and is supported by the Deputy Registrar and staff of the Registry. The registry is located at:

Industrial Registry
Level 21 Central Plaza Two
66 Eagle St
Brisbane Qld 4000

The staff of the registry cannot provide parties with legal advice, but they can assist you with identifying which form to use in certain situations and other procedural matters.

If you are filing by email and what you are filing is quite large, the registry may require you to provide a number of hard copies too.

See: **APPENDIX A** to this guide on page 41, Practice Note 1 of 2018 ELECTRONIC FILING AND HARD COPIES OF DOCUMENTS.

If you ever need to write to the registry or send an email (qirc.registry@qirc.qld.gov.au), you can address your message to the Industrial Registrar (i.e. "Dear Registrar").

Part 3: Applications to the commission

This part of the guide covers applications to the commission. How to apply, times limits for making an application and other topics related to commencing an application. Generally important to consider your conduct during your application. See Appendix C starting on page 41 for more detail about the Codes of conduct.

3.1 What is an application?

Reinstatement applications are applications made to the commission in circumstances where the worker believes that they have been unfairly dismissed by their employer. These applications are governed by Division 2 of Part 2 of Chapter 8 of the *Industrial Relations Act 2016* (Qld).

3.2 Basis on which an application is decided

Reinstatement applications depend on whether the employee was unfairly dismissed. If the dismissal was unfair then the commission will be able to use the remedies set out in section 321 or 322 of the *Industrial Relations Act 2016*. Those remedies are either reinstatement, re-employment or compensation. However, compensation may only be ordered if the commission considers that reinstatement or re-employment would be impracticable. There are limits on how much compensation the commission can award.

A dismissal will be unfair if it was harsh, unjust, or unreasonable.

Section 320 of the *Industrial Relations Act 2016* lists those things which must be considered in deciding whether a dismissal was harsh, unjust, or unreasonable. The things which the commission must consider are:

- whether the employee was notified of the reason for dismissal
- whether the dismissal related to:
 - the operational requirements of the employer's undertaking, establishment or service
 - the employee's conduct, capacity or performance
- if the dismissal relates to the employee's conduct, capacity or performance:
 - whether the employee had been warned about the conduct, capacity or performance
 - whether the employee was given an opportunity to respond to the claim about the conduct, capacity or performance
- any other matters the commission considers relevant.

3.3 Who are the parties to a reinstatement application?

In a reinstatement application there are usually only two parties – the worker who has made the application and the organisation to which the application relates. If a worker makes an application

for reinstatement they will be known as the applicant and the other party will be called the respondent.

A union can also make the application for the worker. If that is the case then the union will be the applicant instead of the worker.

3.4 Are there any time limits for making an application?

Yes. The application must be made within 21 days of the dismissal taking effect. However, the commission may allow an extended period in which to apply if it is persuaded that there are reasons to allow the further time. See: section 317(2) of the *Industrial Relations Act 2016*.

3.5 How to make an application - Form 12 - Application for reinstatement

Applications commence at the commission by filing a Form 12 – Application for reinstatement. You can access Form 12 from qirc.qld.gov.au under the forms tab.

Form 12 and all other forms can be filed at the registry via the following methods:

- **By e-mail:** qirc.registry@qirc.qld.gov.au
- **In person over the counter:** Industrial Registry
Level 21 Central Plaza Two
66 Eagle St
Brisbane Qld 4000
- **By post:** Industrial Registry
GPO Box 373
Brisbane Qld 4001
- **By fax:** (07) 3221 6074

In most instances the registry will communicate with you by email. If you have not provided an email address on your Form 12 then the registry will be in contact with you requesting that you provide an email address. If you do not have an email address then the registry will communicate with you by post.

The office hours of the registry are: 8.30am-4.45pm, Monday to Friday, excluding public holidays and the compulsory Christmas to New Year closure.

You will be unable to file documents on public holidays, or closures, or outside of office hours.

3.5.1 How to complete the Form 12

Providing the appropriate amount of information in the Form 12 is important. Too much information may make it difficult for the respondent and the commission to understand your application. The efficient use of information is important.

There are a series of questions you must answer. Please ensure that all questions are answered and that all of the relevant contact information has been completed.

Form 12 requires you to indicate the decision you are seeking. There are some pre-filled orders that mirror sections 321, 322, and 323 of the *Industrial Relations Act 2016*.

The Form also requires that you file an affidavit to support your application. See Appendix B on preparing an affidavit.

See **Appendix B** for more information on preparing a supporting affidavit.

Only attach documents to the form which are strictly relevant to the making of the application, such as the supporting affidavit and any exhibits to the affidavit. There will be opportunities in the future to provide further documentation in support of your application.

3.6 What happens once the application is filed in the registry?

Once your completed Form 12 has been filed with the registry it will be processed. A new file will be created with your details and a matter number will be given to the file. The matter number will look like this: TD/2018/501

When contacting the registry use your matter number so your file can be located easily. The registry will also date your Form 12. This means that it will be stamped and dated as in Figure 1.

Industrial Registrar's date stamp represents the date of filing of the form in the registry. If your form is received by the registry after office hours (see above) then it will not be stamped until the next business day.



Figure 1 – Date Stamp

After your file is created the registry will send you and the respondent a stamped copy of the Form 12 and a directions order. This is the only instance where the registry will send documents to other parties for you. For more information about the directions order see Part 4 Directions order of this guide.

3.7 Finding a Justice of the Peace and other witnesses for forms

Some forms require your signature to be witnessed by a justice of the peace, commissioner for declarations, lawyer or other qualified person. This is because you will be swearing to the accuracy of your application. There are consequences for knowingly misleading the commission.

A justice of the peace or a commissioner for declarations can be found at a bank or a post office. Alternatively, you can search for a justice of the peace or a commissioner for declarations who is near you at: www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/about-justice-of-the-peace

3.8 Filing and serving documents

There are a number of references in the two directions orders to file and serve. It is important to understand what these words mean.

File—means that you must provide the document stated in the directions order to the registry. You must do this in the way that the registry requires.

Serve—means that you must effectively provide a document stated in the directions order to the other party or parties in the matter. You must make sure that the other party or parties have a copy of the document. Effective service is your responsibility.

Part 4: Directions order

This part of the guide covers what a directions order is, explains the way in which they are issued and provides further detail on particular terms and concepts within the directions orders that are issued in reinstatement applications.

4.1 What is a directions order?

The commission organises reinstatement applications around directions orders. They are the road-map for how your application will be conducted, when documents are due to be filed, which documents should be filed and provided to other parties and when you will need to come to the commission for a conference or hearing.

A directions order itself is a formal document which directs the conduct of a matter, it will set out in numbered steps what must be done, by when and by which party.

You must comply with a directions order.

Failure to comply with a directions order can have negative consequences for your application.

4.1.1 Types of directions order

There are several types of directions orders, all of which need to be complied with, including:

- the standard directions order
- a further directions order
- an amended directions order
- a further amended directions order.

Further means another directions order.

Amended means that the directions order has changed slightly. A date may have been moved or a correction may have been made. Additional directions orders will be numbered. Do not be alarmed if you see further directions order no. 2, this is only done so parties can keep track of which directions order is which.

4.2 Example directions order

On the following page inside the black box, is a copy of the directions order which is issued by the registry after your Form 12 has been stamped and processed by the registry. That directions order is an example of the first directions order issued in a reinstatement application. The directions order can look intimidating at first, but once you read through it you may notice that it is broken down into clear steps for each of the parties to complete.

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 2016

John Citizen
Applicant

v

State of Queensland (Department of Administrative Affairs)
Respondent

Matter No. TD/2018/501

APPLICATION FOR REINSTATEMENT PURSUANT TO SECTION 317

DIRECTIONS ORDER

AFTER reading the Application in the above matter filed on 14 May 2018, IT IS ORDERED:

1. That the Respondent file in the Industrial Registry and serve a copy on the Applicant, a completed Form 12A – Employer's Response to Application for Reinstatement within 7 days of receipt of this Directions Order.
2. Should either party wish to be represented by an Agent, a Form 33 – Notice of appointment of agent (or in the case of a Solicitor: Form 34 – Lawyers notice of address for service) must be filed in the Industrial Registry.

NOTE:

Once these Directions Orders have been complied with the Industrial Registry will be in contact to determine dates for a conference.

Dated 17 May 2018

Registry Officer
For the Industrial Registrar

4.3 Example further directions order

Once your matter has had a conference the registry will issue a further directions order. An example of such an order is set out below. The text following the directions order directs you to other parts of this guide for further detail.

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 2016

John Citizen
Applicant

v

State of Queensland (Department of Administrative Affairs)
Respondent

Matter No. TD/2018/501

APPLICATION FOR REINSTATEMENT PURSUANT TO SECTION 317

FURTHER DIRECTIONS ORDER

AFTER reading the Applicant's request to proceed to hearing dated 4 June 2018, IT IS ORDERED:

1. That the Applicant supply to the Respondent by 4.00 pm on 11 June 2018, a list of documents in their possession or under their control relevant to a matter in issue in the proceedings.
2. That the Respondent supply to the Applicant, by 4.00 pm on 11 June 2018, a list of documents in their possession or under their control relevant to a matter in issue in the proceedings.
3. That the Applicant supply to the Respondent, by 4.00 pm on 18 June 2018, copies of those documents contained in the list disclosed which the Respondent requests and for which the Applicant has no legal claim to privilege.
4. That the Respondent supply to the Applicant, by 4.00 pm on 18 June 2018, copies of those documents contained in the list disclosed which the Applicant requests and for which the Respondent has no legal claim to privilege.
5. That the Applicant supply to the Respondent, and file in the Industrial Registry, a statement of evidence for each witness to be called (including the Applicant) and which is to be relied upon in the hearing, by 4.00 pm on 12 July 2018.
6. That the Respondent supply to the Applicant, and file in the Industrial Registry, a statement of evidence for each witness to be called and which is to be relied upon in the hearing, by 4.00 pm on 16 July 2018.
7. That the Applicant supply to the Respondent, and file in the Industrial Registry, any witness statements in reply by 4.00 pm on 30 July 2018.

NOTE:

Once all Directions Orders have been complied with by the due dates listings will be in contact to determine dates for hearing.

Dated 4 June 2018

Registry Officer
For the Industrial Registrar

For more information:

- List of documents see 4.5.1 on page 16 below.
- Copies of those documents see 4.5.2 on page 17 below.
- Statement of evidence for each witness to be called see 4.6 on page 18 below.

4.4 What if you need more time to comply with the directions order?

If you are unable to comply with the directions order in the time specified, you must seek an extension from the commission. An extension can be sought by submitting the request in writing to qirc.registry@qirc.qld.gov.au and explaining why the extension is sought. A brief email will be enough.

You should also ask the other party, or parties' whether they consent to the extension of time. Within your request for extension you must inform the registry or the commission of the other party or parties' attitude to the extension.

If they consent to the extension then the extension will most likely be allowed. If the extension is not consented to, the commission will determine whether or not the extension should be allowed. The commission may request that the parties provide further information.

4.5 List of documents and copies of documents

The provision of a list of documents and copies is also called disclosure and discovery.

Disclosure is done by the provision of a list of documents.

A document is not just a paper document it can also be tape recordings, videos, CCTV footage, e-mails etc.

Disclosure refers to the process of providing relevant documents to other parties.

4.5.1 List of documents

Parties in a matter (the appellant or the respondent/s) must tell each other about all of the documents that they are in possession of or have under their control and are relevant to the matter. If you do not have a copy of the document then you should not tell the other parties that you have it.

In their possession refers to ownership of the document. A document that a party possesses is one that they own.

Under their control of the person includes documents that the party has the power or authority to retrieve. Thus, relevant documents held at the office of a party's accountant or solicitor or relevant documents held by the head office of the respondent employer would have to be listed.

A document is relevant if it relates to an issue which is in dispute between the parties and which has the potential to support one party's case over the other party's case. What was said by the applicant and by the respondent at the conference may give some indication of what issues are disputed.

The list should allow the other parties to identify the documents specifically but not necessarily to know its content. It does not need to be in a great level of detail.

Consider how you would like the list of documents that you will receive from the other parties to look and how much information you would need in order to tell whether you would need a copy of the document. You should put a similar amount of detail into the list that you prepare.

4.5.2 Copies of documents

Once the parties have exchanged their respective list of documents they will have an opportunity to consider whether they would like copies of any of the documents in the list provided.

If you would like a copy of a document, or documents, then you must write to the relevant party and ask them for the document. A copy of the document must be provided unless the party who listed it claims that it is subject to privilege.

You will be unable to obtain a document if it is subject to privilege. One kind of privilege that might be claimed is the privilege against self-incrimination. A person is not obliged to answer a question or produce a document that has the tendency to expose that person to a criminal conviction or civil penalty. Another kind of privilege that might be claimed is client legal privilege. A document does not have to be produced if the dominant purpose for which it was brought into existence was the obtaining or giving of confidential legal advice.

The parties must provide documents by the time and date specified in the directions order. The exchange of documents is not overseen by the registry or the commission.

4.5.3 Non-party documents

If either of the parties seek documents that a non-party (e.g. an employer or former employer) has possession of, they can do so by following the process under the *Industrial Relations (Tribunal) Rules 2011*. The process involves the filing of a Form 29 - Notice of Non - Party Disclosure with the registry for approval.

Any Non-Party Disclosure should be immediately sought once the reinstatement application is filed. Any delay will mean that all of the relevant material will not be available to a party when drafting their list of documents.

Once the Form 29 has been approved, the notifying party (i.e. the party who filed the Form 29) must then serve the Notice of Non-party Disclosure on the party requested to provide the documents (requested party) and also on any person who may have an interest in the requested documents and/or who may be affected if the requested documents are provided (affected party). See Part 6 of this guide for more information about the Notice of Non – Party Disclosure and other notices.

4.5.4 Disclosure (document lists and copies) example

For example, a dismissed worker might say that their dismissal arose from an investigation that had not considered all of the relevant material and, consequently, arrived at the wrong conclusions. The matter in issue is whether the dismissal was unfair—in this instance it will mean showing that the dismissal was unfair because it was unreasonable as a result of a failure of the investigation. The worker would have received copies of show causes notices, letters related to the investigation, meeting agendas, and emails about all process that was undertaken in the lead-up to the termination of the worker's employment. The dismissed worker should list all of those documents as part of their list of documents because they are in the worker's possession; under the worker's control; and, they are relevant to the matter in issue. The respondent will list all of the documents that it has in its possession; which are under its control; and, which are relevant to the application.

The dismissed worker will review the respondent's list of documents and may see that they do not have copies of some of those documents or may not have seen some of the documents before. The dismissed worker should then request that copies of those documents, which they wish to have, be provided. The respondent will do the same thing. The parties must then provide to each other the respective documents requested by the deadline set out in the directions order.

Remember, you will not be able to obtain documents if they are covered by a type of privilege.

4.6 List of names of all witnesses

The list of names of all witnesses should state the full names of all persons you will be calling to provide evidence in support of your case at the hearing.

If you fail to call someone who could provide relevant evidence to your matter it may count against your case.

How you extract evidence from witnesses, and evidence generally, is covered at Part 7.6 of this guide.

4.7 Statement of evidence for each witness to be called

The further directions order requires that you serve on the respondent a "statement of evidence for each witness to be called (including the Applicant) and which is to be relied upon in the hearing". This means that for each witness you call you will need to provide a statement of the evidence that

they will provide to the Commission. The statement of evidence can take the form of an affidavit or a witness statement – there is no preference for either approach.

The commission requires that you do this so that the parties to your matter can know, roughly, what evidence your witnesses will be presenting to the commission and, likewise, so that you can know, roughly, what evidence the witnesses called by the respondent/s will be saying. This avoids a "hearing by ambush" and makes sure that the parties are better prepared to establish their cases.

The statement of evidence will then become the "evidence in chief" for the particular witness. This assists the proceedings to move along faster.

4.8 What is a trial plan?

In some cases, usually where a hearing is listed for four (4) days or more, or where the parties seek to call an extensive number of witnesses, the commission will generally require the parties to submit an agreed trial plan. If the commission requires a trial plan you will be advised of that requirement.

A trial plan requires the parties to indicate the time expected for opening submissions (if required), for evidence-in-chief, cross-examination and re-examination, for each of the witnesses to be called and closing submissions for each party. Both parties are then committed to the agreed trial plan and must seek the agreement of the commission if they wish to depart from it.

Where the parties fail to produce an agreed trial plan within the timeframe specified, each party will be required to provide their draft trial plan and the commission will devise a trial plan for the hearing and the parties will be bound by that trial plan.

Part 5: Conferences

This part of the guide covers conferences. For reinstatement applications a conference is an informal meeting between the parties, and a member of the commission, with an aim of helping the parties to achieve a settlement in their matter.

5.1 What is a conference?

After the first set of directions have been complied with the registry or the commission will contact the parties to arrange a time for when the parties will be able to attend a conference.

A member of the commission will chair the conference where the issues in dispute between the parties may be explored and refined. At the conference, the parties have the opportunity to address the member of the commission on the issues they feel should be clarified. Although general guidance might be given, it is not the role of the commission to provide advice about how a party may conduct their case. The member of the commission who chairs such a conference will not be the member who hears the application.

Generally, during these conferences, the parties will further explain their respective positions and the facts around the dismissal. The commission will then help the parties with reviewing, refining and/or narrowing the issues. The member of the commission will also explain the hearing process.

Specifically, the conference can assist the parties to understand their prospects if the matter went to a hearing. The conference can also steer the parties towards a settlement—many conferences end with a settlement and the application being withdrawn.

5.2 What can I expect at a conference?

As conferences are informal they will usually not be held in a court room. Instead, you will be seated around a large table with the other parties, a member of the commission, and the member's associate. Reinstatement application conferences are not recorded.

By the time of the conference the respondent will have filed its Form 12A – Employer response to application for reinstatement. This means that the commission will have both parties version of events and will be able to discuss the application in a more precise way with both of the parties at a conference.

What will happen at a conference is entirely dependent on how complicated the matter is, how prepared the parties are, and how the particular member decides to approach it all. There are some general points which might guide you however, in what to expect.

Conferences are not adversarial – this means that it is not about "winning" the conference or stating a case at the conference so that you convince the member that your side of the matter is correct. That is not why conferences are held.

In some conferences it may become apparent that the directions order may need to be amended to allow further time for the filing of additional, or new, material.

The conference can also assist the parties in reaching an agreement about specific issues and to discuss the nature of the evidence that will be led during the hearing. Other matters that may be discussed at the conference include the number of days that a hearing might take and the number of witnesses to be called to give evidence.

If your conference does not result in a settlement then the commission will issue a certificate stating that the matter has not settled and that it is not likely to settle.

Part 6: Notices

There are four kinds of notices which you can use to compel people who are not parties to the proceedings to do something for the purposes of providing information to the commission.

6.1 The notices

There are five forms relevant to the issue of notices in reinstatement applications:

- Form 29 – Notice of non-party disclosure
- Form 32 – Request for attendance notice
 - Form 32A – Attendance notice to give evidence
 - Form 32B – Attendance notice to produce
 - Form 32C – Attendance notice for production and to give evidence

Part 2, Subdivisions 7 and 7A, of the *Industrial Relations (Tribunals) Rules 2011* governs the use of the notices. Forms 32, 32A, 32B, and 32C are all covered by Subdivision 7. Form 29 is covered by Subdivision 7A.

6.2 What are the different notices for?

The notices generally require people to do things for the hearing, including to attend the commission to give evidence orally, to attend the commission to provide a document to the commission, or both, or to provide a document to a party. If a non-party can produce the document without having to attend the commission, that option should be utilised first.

6.2.1 Obtaining documents

Notices can be used to obtain documents that you do not have and have not been given to you by the respondent during disclosure but are relevant to the application. You should start by filing a Form 29 – Notice of non-party disclosure if you wish to obtain documents from people other than the respondent. Once you have filed your forms correctly a member of the commission or the Registrar will approve them and the forms will be returned to you to serve on the relevant parties.

6.2.1.1 Date range

Form 29 should be specific in the documents that you are seeking. If you are seeking email correspondence, for example, covering a period of time – ensure that the date range of the emails is relevant to the application. If the date range is excessive and beyond the relevant period you risk your notice being rejected by the registry. You may also find that the non-party who is subject to the

notice will object. The *Industrial Relations (Tribunals) Rules 2011* cover the ways and the grounds on which a non-party can object.

6.2.1.2 Proper Officer

If you are seeking documents from a large organisation, you must appropriately identify the party to whom the notice applies. It is not sufficient to address your notice to, for example, the State of Queensland. The proper officer should not be a person who is specifically identified, rather, it should be a position within an organisation (i.e. Senior Human Resources Advisor).

6.2.1.3 Affected Party

You must appropriately identify other people affected by the notice – there is space for this on the form. An affected party is someone who might also be the subject of the material or information that you are seeking or the owner of a document other than the non-party. Affected parties may also object to the production of a document sought.

6.2.2 Attendance at the commission

You may also want a particular person to attend the commission, either to provide documents or to provide oral evidence, or to do both.

If you wish to issue attendance notices then you must also file a Form 32 – Request for attendance notice as well as a completed Form 32A, or 32B, or 32C. Once you have filed your forms correctly, a member of the commission or the Registrar will approve them and the forms will be returned to you to serve on the relevant parties.

6.2.3 Forms

You will find the forms mentioned above on the website of the Queensland Industrial Relations Commission – qirc.qld.gov.au

Part 7: Hearings

Hearings are formal and are conducted in a court room. Witnesses are called, documents are tendered as evidence and parties make submissions.

The parties must ensure all oral evidence, documentation and/or other material on which they intend to rely upon at the hearing is ready to be presented at the hearing. Any documentation/material not presented at the hearing will not be in evidence and will not be considered by the presiding member when deciding your application.

7.1 How do I get to a hearing?

At a conference the member may establish whether the parties would like the matter to be heard. If the member is satisfied that the matter should go to a hearing the file will be returned to the registry for allocation to a different member for hearing. The member who was allocated your matter for the conference will not be the member who hears and determines the matter.

If the member does not address the issue of whether or not there will be a hearing and you would like to proceed to a hearing, you may request that the matter be heard. The request for the matter to be heard must be made within six months of the conference. You can do this by following rule 65 of the *Industrial Relations (Tribunals) Rules 2011*. That rule requires you to write to the commission and request that a time, date and place for the hearing be fixed. You can write to the commission by writing to the registry at qirc.registry@qirc.qld.gov.au.

A second set of directions will be issued, an example of which is provided above at 4.3 Example further directions order. Once the directions order has been complied with the registry will contact you and the other party or parties requesting dates for hearing availability.

Once a date has been organised and a member has been allocated the file, you will receive a Notice of listing which sets out when the hearing will be, where it will be held and who will be hearing the application. The Notice of listing will also contain any other information which might be specific to your application.

7.2 What is a mention?

Sometimes the commission will list matters for a mention approximately two weeks before the set hearing dates. The aim of a mention is to ensure that all directions have been complied with and that the parties are ready to proceed to hearing without delay. Assuming that all of the directions in the issued directions orders have been complied with, the commission will then allocate the matter to a member of the commission for the hearing of the application.

Mentions are also used to resolve small procedural issues that occur during the course of a matter. That might involve a party flagging a particular issue and wanting to talk to the commission about that issue in court with the other party/parties present.

7.3 What do I need to prove?

It is important to note that the onus of proof is on the applicant. That means that if you are making an application then you bear the responsibility of proving certain things. When proving something you must meet the standard of proof. In reinstatement applications the standard of proof is the balance of probabilities.

However, the standard of proof can be higher depending on the gravity of the circumstances which led to the dismissal. The onus of proof can be reversed and can fall on the respondent if there are very serious allegations made against the dismissed worker.

You must establish that the dismissal was unfair by demonstrating that it was harsh, unjust or unreasonable. As has been outlined above, section 320 of the *Industrial Relations Act 2016* lists the things that must be considered in deciding whether a dismissal was harsh, unjust, or unreasonable. The things the commission must consider are:

- whether the employee was notified of the reason for dismissal
- whether the dismissal related to:
 - the operational requirements of the employer's undertaking, establishment or service
 - the employee's conduct, capacity or performance
- if the dismissal relates to the employee's conduct, capacity or performance:
 - whether the employee had been warned about the conduct, capacity or performance
 - whether the employee was given an opportunity to respond to the claim about the conduct, capacity or performance
- any other matters the commission considers relevant.

You should also consider what information you will need to provide to the commission to enable it to properly consider the above matters.

7.4 The hearing

A hearing in the commission is a formal process where parties put forward arguments and other information (known as submissions) that are based on the evidence before the commission. The evidence before the commission will be the oral evidence of witnesses and the documents provided by the parties during the hearing.

A typed record of what was said in the hearing is produced for later reference, this is known as the transcript. Parties to matters before the commission may obtain copies of the transcript free of charge. If you wish to receive a copy of the transcript you must complete the transcript order form available on the commission's website qirc.qld.gov.au/qirc/transcripts/index.htm.

If you are representing yourself you will sit at a table (known as the bar table) facing one or more members of the commission who will sit at a raised platform (known as the bench). The commission member's associate sits at the table immediately in front of the bench and faces the parties.

If you have any questions about procedures please ask the associate before proceedings start. Like the registry, associates do not give legal advice. If you do not understand something during proceedings ask the commission member hearing the proceedings.

You can settle and withdraw your application any time during the proceedings by agreement with the other parties involved.

7.5 Preparing for a hearing

Once it has been decided that the matter will be dealt with by way of a hearing you will need to ensure that any witnesses you intend to call are present at the hearing. You will also need to bring any documents which you intend to present in support of your case.

As the applicant you will be responsible for any witness expenses for the witnesses you call. These expenses are to be paid in advance unless otherwise agreed.

You should arrive at the location of the hearing with plenty of time to spare before the listing time for the matter. The member's associate can show you where to sit if you ask and will answer any procedural questions that he or she can.

Usually the applicant will open its case first. The respondent will open its case when you have closed yours. As the applicant you will have an opportunity to provide the commission all of the evidence that is relevant and not excluded for any particular reason. Documents you wish to provide to the commission in support of your case must be tendered through a witness. This means you must ask a particular witness questions about a document that they have knowledge of, this document is tendered and will become an exhibit.

7.6 How does oral evidence work?

In reinstatement applications witness evidence is usually written (affidavit or witness statement). The witness will be cross-examined on the content of their affidavit.

There is an established process for the presentation of oral evidence before any court, commission or tribunal. It has three phases:

- evidence-in-chief (this phase is done by the party who called the witness)
- cross-examination (this phase is done by the other party or parties)
- re-examination (this phase is done by the party who called the witness)

Each of these three phases is repeated for each witness. The three phases are explained in greater detail below.

7.6.1 Examination-in-chief

All witnesses must give evidence under oath or an affirmation to the commission. Even if the chief evidence of the witness is provided in an affidavit format they will be required to appear at the commission and be sworn or affirmed. If the witness has provided an affidavit containing all of their evidence, the examination-in-chief will be an exercise in having the witness state that the affidavit is their own.

The party who calls the witness will conduct the examination-in-chief.

In reinstatement applications it is common practice for the evidence-in-chief of a witness to be provided in an affidavit format.

7.6.2 Cross-examination

After the examination-in-chief has finished, the side which did not call the witness will conduct the cross-examination. A cross-examination is an opportunity to test the evidence of the witness provided in the examination-in-chief.

7.6.3 Re-examination

Upon the conclusion of the cross-examination, the party who did the examination-in-chief will then do the re-examination. A re-examination is used to clarify any issues that arose from the cross-examination. Only questions arising out of what was said in cross-examination may be asked in re-examination.

7.6.4 Remainder of the witnesses for the appellant

After you have finished giving your evidence, you will have the opportunity to call any other witnesses in support of your case. If witnesses do not freely agree to become witnesses the appellant must request that an attendance notice to give evidence be issued by the commission to compel that person to attend the hearing and give evidence. This should be done once the hearing dates are advised in the further directions order. In circumstances where an attendance notice to give evidence is issued, you will be required to pay witness expenses for that person.

For more information about an attendance notice to give evidence see Part 6 of this guide.

7.6.5 Expert evidence

Both parties may consider presenting medical or expert evidence to support their case. This will be done by calling expert witnesses such as general practitioners or specialist practitioners (i.e. psychiatrists, orthopedic surgeons, engineers, accountants etc.). Whilst lay witnesses must give evidence in person, expert witnesses may give evidence over the phone.

Where expert witnesses are called, the party calling the witness will need to pay the expenses of the expert witness and arrange in advance for the expert witness to give evidence at a pre-determined time during the hearing.

It is important to note that presenting a medical report on its own cannot be considered without having the expert witness give evidence orally to support that document and being available for cross-examination by the other party.

To ensure an expert witness attends the hearing (either in person or via telephone) as required, the party calling the expert witness should request that an attendance notice to give evidence be issued by the commission. For more information about an attendance notice to give evidence see Part 6 of this guide.

7.6.6 Respondent's case

After you have called all of your witnesses your case will be closed. The respondent will then open its case and call its witnesses. For each witness the respondent calls you will have an opportunity to cross examine them.

7.7 Submissions

After all evidence has concluded the parties are required to make written and/or oral submissions. Who presents or files submissions first is something that you will have an opportunity to discuss with the member hearing your matter and the respondent/s. Whoever presents or files their submissions first will usually be given one opportunity to reply to the other side's submissions – this reply is usually limited to issues of law and not fact.

If submissions are to be in writing, the member of the commission hearing the application will issue directions for the filing of written submissions. Those directions may be in a formal directions order like those you will have previously received or they may be made orally at the conclusion of the parties' evidence.

Part 8: Decisions

In most applications the member who heard the matter will not make a decision immediately, instead the member will reserve his or her decision. This means that the decision and the reasons for that decision will be provided to the parties at a later date. Currently, members aim to have decisions to parties within three months of the hearing.

If you are waiting for a decision, but it has been less than three months since the submissions were made by the parties, you should not contact the registry or the associate. Neither the registry nor the associate will be able to provide you with an estimated timeframe for the decisions release.

8.1 Publication of decisions

Once the member has made a decision and finished writing the reasons a copy will be emailed to the parties. All decisions in reinstatement applications are published on the Supreme Court Library website and are publically accessible – the names of parties are withheld in very rare circumstances.

Decisions are made available to the public because they can be instructive for future factual scenarios that are similar, act as a precedent and allow for effective public scrutiny of the decision making processes of the commission and its members.

Part 9: Appealing a decision of the commission

If you are unhappy with the decision of the commission in your matter you may appeal the decision to the Industrial Court of Queensland.

If you do wish to appeal the decision you must do so within the appeal period. The appeal period is 21 days from the date on which the decision of the commission was released – this date will be on the front page of the decision. The decision will also be emailed to you on that day. If you do not have an email address it will be sent to you by post on the day on which it is released.

9.1 How do you appeal to the Industrial Court of Queensland?

You must use Form 5 – Application to appeal if you wish to appeal the commission's decision to the Industrial Court of Queensland. Form 5 requires you to state the grounds of appeal. Generally, you can only appeal on two grounds:

- an error of law
- an excess, or want of jurisdiction.

If you wish to go beyond those two grounds then you must seek the leave of the Industrial Court to do so. You can do this in your Form 5 noting that you are seeking leave to appeal on grounds other than those in s 557(1) and pursuant to s 557(2) of the *Industrial Relations Act 2016* (Qld).

Part 10: Costs

Hearings before the commission or the Industrial Court of Queensland can be expensive. Barristers, solicitors, experts and witnesses are all involved and can all incur expenses you may be required to cover if you are unsuccessful.

In unfair dismissals, costs are not automatically awarded to the losing party. Costs are awarded on application – see section 545 of the *Industrial Relations Act 2016* for more information.

If costs are awarded this means that the unsuccessful party will be required to pay the costs of successful party or parties. Costs include the cost of obtaining legal advice and legal representation, any expenses in calling witnesses (flights etc.) and the outlays for expert reports and opinions.

If a party has no legal representation then there will be no costs which are recoverable for their legal representation.

10.1 Witness attendance, expenses, and conduct money

Witnesses who attend the commission are entitled to have their reasonable expenses of travelling to the commission paid by the person who calls them to the commission. Those witnesses are also entitled to an allowance which would be payable to a witness in a civil action in the Supreme Court—this daily amount is called conduct money.

Expert witnesses are entitled to a high rate of conduct money. The longer the expert is required, the more conduct money they will be entitled to each day.

You should research the amount of conduct money which should be paid as it increases over time.

If you do not pay the reasonable expenses of the witness and provide them with the required conduct money, the witness will have a lawful reason for not attending the commission.

Part 11: The model litigant principles

State agencies such as the Workers' Compensation Regulator or Crown Law have a set of guiding principles for the conduct of litigation. Those principles are called the model litigant principles. They are not applied rigidly and they do not override any legislative requirements or authorities concerning the agency's functions.

For a downloadable copy of the model litigant principles please visit:

www.justice.qld.gov.au/justice-services/legal-services-coordination-unit/legal-service-directions-and-guidelines/model-litigant-principles

Part 12: Etiquette and communications

This part of the guide covers small points of etiquette for conferences, mentions, directions hearings and hearings. There is no need to be nervous when you have to speak. The member is there to listen to you and will ask you questions if they need further clarification or if they did not understand something that you said.

12.1 General points

Make sure you attend the commission early to avoid delaying the proceedings.

If you are delayed for any reason it is important that you contact the registry as early as possible to ensure a message is sent to the associate.

If you have a mobile phone make sure it is switched off in the conference or hearing room.

When the commission member enters the room those present will be asked to stand. If it is a hearing you should stand when you are addressing the member.

In a hearing it is customary to bow to the bench by slightly inclining your head and bending slightly at the hips at the beginning of the proceedings. Similarly, if you leave the hearing room while proceedings are underway you should bow in the same way when you reach the door of the court room. You are not bowing to the member you are bowing to the coat of arms behind the member which is symbolic of the Crown's authority.

The member will ask for appearances. Simply state your name slowly and say that you are appearing for yourself. The member may ask you to spell your name – this will be so that the transcript can accurately reflect the spelling of your name.

Whether it is a conference or a hearing, the commission member may ask each of the parties, in turn, for a brief statement describing what the matter is about. It is a good idea to have this prepared in advance, you can read from it if you wish.

Make sure you speak loud enough for everyone to hear and so that, if the proceedings are being transcribed the transcribers can clearly understand you.

In a hearing it is customary to stand when you are addressing the commission member or questioning a witness.

Do not speak when a witness is taking an oath or an affirmation.

Do not interrupt the other party or the commission member when they are speaking.

Do not eat or chew while in the hearing. Water is provided in each conference or hearing room - no other fluids are permitted (i.e. coffee, tea, or soft drinks).

You should show respect by dressing neatly although you do not have to wear a suit.

You may notice parties who are familiar with the commission using phrases such as 'If the commission pleases', as a newcomer to the commission you are not expected to necessarily follow such practices.

12.2 Communicating with the registry or the commission

If you communicate with the registry or the commission for any reason which is connected with your matter you must also inform the other parties of what you are communicating.

If you are sending an email to the registry or a member's associate you must copy in the other parties to your application.

If you call the registry or a member's associate you must also relay what you spoke to the registry or the commission about to the other parties to your application.

If you fail to copy in or convey your communications to the other parties in your matter, the registry or the member's associate may inform the other parties of what you have sent or told the registry or the commission.

Constant failures to copy in other parties will not be viewed favourably by the registry or the commission.

Part 13: Finding legislation and cases

13.1 Legislation

If you are looking for the authoritative Government Issued copy of the relevant legislation (*Industrial Relations Act 2016*) then you can find a free version online at the Queensland Legislation Website: www.legislation.qld.gov.au. All current and previous state legislation can be found here.

The Australian Legal Information Institute ("AustLII") also provides a free resource for locating legislation. It will allow you to search Acts by each section. You can locate AustLII at: www.austlii.edu.au

You can also contact the Supreme Court Library Queensland for assistance with locating legislative materials if you have difficulty. The contact details for the Library can be found on its website: www.sclqld.org.au

13.2 Cases

If you are looking for cases from the commission or the Industrial Court, the Supreme Court Library Queensland has published all decisions made by the commission since 2014. The commission's decisions can be found here: <https://www.sclqld.org.au/caselaw/QIRC>

The Industrial Court's decisions can be found here: <https://www.sclqld.org.au/caselaw/ICQ>

The Australian Legal Information Institute ("AustLII") also publishes the commission and the court's decisions: www.austlii.edu.au

Part 14: Glossary

This part of the guide contains words that you will frequently come across in your reinstatement application.

14.1 Frequently used terms

Adjourn/Adjournment: When a conference, mention, or hearing is adjourned it is ended either definitely or until a later time when it will be resumed. In many conferences and hearings the member will "adjourn the commission" either so that the member can leave the room so that parties can have a discussion or because that particular part of the proceedings is over.

Affidavit: An Affidavit is a sworn written statement of fact. Affidavits provide a factual account of an event, or a thing, and are written from the witnesses' perspective about things that the witness saw or heard.

Agreed Trial Plan: See 4.8 on page 19.

Amended directions order: See 4.1.1 Types of directions order on page 13.

Applicant: A person or employee organisation who filed an application for reinstatement in the registry under section 317 of the *Industrial Relations Act 2016*.

Balance of probabilities: The standard to which you must prove your case – i.e. you must present evidence which allows the commission to find that it was more probable than not that something happened or that something caused your injury.

Cross-examination: See 7.6.2 on page 27.

Directions order: See 4.1 on page 13.

Disclosure: See 4.5 on pages 16 to 18.

Examination-in-chief: See 7.6.1 on page 27.

File and serve: See 3.8 on page 12.

Further amended directions order: See 4.1.1 on page 13.

Further directions order: See 4.1.1 on page 13.

List of documents: See 4.5.1 on page 16.

Onus of proof: See 7.3 on page 25.

Parties: See page 3.3 on page 9.

Re-examination: See 7.6.3 on page 27.

Seek leave: Means to ask the commission whether you may do something – for example, this may be seeking leave to be legally represented, or seeking leave to amend a filed document.

Self-Represented Litigant: A person, and not a company or organisation, who is not represented by a lawyer, agent or industrial organisation.

Submissions: See 7.7 on page 28.

Appendix A – PN/2018/1 Electronic filing and hard copies of documents

PRACTICE NOTE NUMBER 1 OF 2018

INDUSTRIAL REGISTRAR

ELECTRONIC FILING AND HARD COPIES OF DOCUMENTS

This Practice Note applies to all documents sought to be filed with the Industrial Registry.

This Practice Note must be complied with. However, the Industrial Registrar may, in appropriate circumstances, waive compliance with this Practice Note. The Industrial Registrar may also stipulate other requirements for the filing of documents in addition to those contained in the *Industrial Relations (Tribunals) Rules 2011* (Qld).

In this Practice Note:

electronically file—means to file by electronic or computer-based means.

soft copy—means a document in a non-printed, electronic or computer-based format.

hard copy—means the original and printed version of a document.

page—means a page conforming to rule 13 of the *Industrial Relations (Tribunal) Rules 2011* (Qld).

1. A person may only electronically file a soft copy of a document with the Industrial Registry that is 30 pages or fewer in length.
2. If a soft copy of the document which a person seeks to electronically file is more than 30 pages then the document will not be accepted for filing until a hard copy of the document is supplied to the Industrial Registry.
3. If a person seeks to electronically file more than one document at a time, or within a short period of time, and the combined length of the documents is more than 30 pages then the documents will not be accepted for filing until a hard copy of each of the documents is supplied to the Industrial Registry.
4. If a person is required to file a hard copy of a document as a consequence of 2 or 3 above then the document will only be filed upon receipt of the hard copy by the Industrial Registry.
5. A document will only form part of the file once it is accepted for filing.
6. This Practice Note will commence operation on Monday 4 June 2018.

M. P. Shelley
Industrial Registrar
5 April 2018

Appendix B – Preparing an affidavit

Form 12 requires that an affidavit be filed in support of the application. This means that you will need to prepare a Form 20 – Affidavit.

What is an affidavit?

An affidavit is a written and sworn, or affirmed, document which is prepared by a party or witness in a matter. An affidavit sets out facts in a neutral tone so that the Commission can examine them objectively when making a decision or when trying to assist the parties in a conciliation conference.

The facts that are set out in an affidavit which is accepted by the Commission form part of the evidence for your application. This means that it is important for you to take the time to clearly, and simply, state the facts which are relevant to your application.

How to set out an affidavit

There are two rules governing affidavits in support of applications, they are rules 11 and 52 of the *Industrial Relations (Tribunals) Rules 2011*. Those rules require that an affidavit complies with the following:

1. The affidavit must be in approved form, use Form 20 – Affidavit.
2. The affidavit must be written in the first person, for example:

I said to John that I was not happy about his conduct. John said to me that he did not care.

3. The affidavit must identify the person making the affidavit, the residential or business address, or place of employment of the person making the affidavit, and state whether the affidavit is sworn or affirmed. There are spaces on the Form 20 – Affidavit which allow you to provide this information.
4. Be divided into consecutively numbered paragraphs, with each paragraph, as far as is practical, covering one idea each, for example:

[1] I have been employed as a teacher at Brisbane City State School for 20 years.

[2] On 1 February 2001 I was teaching my allocated class, 6A, when I was assaulted by a student. The student who assaulted me was Jack Sims.

[3] 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 on the face of this my affidavit.

5. If the affidavit is being sworn by one person for another person that information will need to be included too.

6. The day on which and the place where the affidavit was sworn will need to be completed. There is room for this in the form.
7. Generally, an affidavit should set out all the facts that you will rely in and which are within your knowledge and are relevant.

What to include

Your supporting affidavit should cover the facts and circumstances leading to the dismissal and facts and circumstances of the dismissal and the making of the application. You should also attach as exhibits:

- any show cause notices you received
- your respective responses to those show cause notices
- the letter of termination of your employment

Signing an affidavit

Affidavits are signed by both the person who's affidavit it is (also known as the deponent) and the witness (the person taking the affidavit). Both the person making the affidavit and the witness need to sign every page of the affidavit. There is space on the Form 20 for both signatures to be on every page. The witness needs to be a "qualified witness" which means that it must be witnessed by a lawyer, justice of the peace, or commissioner for declarations.

Exhibits in an affidavit

You may wish to refer to exhibits, which you will attach to the document, during the course of your affidavit. Those exhibits must be covered by a certificate (Form 21) which you will need to complete and place in front of every exhibit. The Form 21 will need to be witnessed by a qualified witness too.

Further guides

The links below will take you to useful guides on preparing affidavits, even though they are for different jurisdictions:

- Caxton Legal Centre – [*Preparing an Affidavit for the Magistrates Court*](#)
- Family Court of Australia & Federal Circuit Court of Australia – [*Preparing an affidavit*](#)
- Justice Connect – [*Preparing Documents for Court*](#)

Appendix C – Codes of conduct



INDUSTRIAL COURT OF QUEENSLAND **QUEENSLAND INDUSTRIAL RELATIONS COMMISSION**

CODES OF CONDUCT

Section 436 of the *Industrial Relations Act 2016* provides that the President is, among other things, to develop a code of conduct for—

- (i) Members of the Queensland Industrial Relations Commission; and
- (ii) persons appearing before the QIRC.

Pursuant to s 412 of the Act, these codes also apply, with the necessary changes being made, to Members when sitting in the Industrial Court and to persons appearing before the Court.

The following sets out the codes which apply pursuant to s 436.

CODE OF CONDUCT FOR MEMBERS OF THE COMMISSION

1. Members are responsible for ensuring that proceedings are fair and that parties are treated with courtesy and respect.
2. During proceedings, Members have a responsibility to:
 - listen to evidence
 - ask questions to clarify points that are unclear and to obtain information that is relevant to the considerations which the Member must take into account

- manage the behaviour of persons appearing before the Commission to ensure that all parties are treated with courtesy and respect
 - exclude irrelevant information
 - discourage repetition, and
 - deal with each matter on its merits, in accordance with the relevant provisions of the applicable legislation.
3. Otherwise, members of the Commission are to observe the guidelines (with such changes as are necessary) contained in the *Guide to Judicial Conduct* (3rd Edition) published for the Council of Chief Justices of Australia and New Zealand by the Australasian Institute of Judicial Administration¹

CODE OF CONDUCT FOR PERSONS APPEARING BEFORE THE COMMISSION

The *Industrial Relations Act* contemplates that there will be five categories of persons who may appear before the Commission. They are:

- (a) a litigant in person;
- (b) an agent appointed in writing;
- (c) if the party or person is an organisation—an officer or member of the organisation;
- (d) a lawyer ; or
- (e) any person (including a Government Legal Officer) appointed to represent the State of Queensland.

A lawyer is bound by the rules of conduct of the relevant professional body – the Bar Association of Queensland or the Queensland Law Society.

All other persons are included in the term “parties and their representatives”

CODE FOR PARTIES AND THEIR REPRESENTATIVES

1. Parties and their representatives have obligations to behave appropriately to both the Commission and each other, and in a way that helps provide a fair hearing for all.

¹ <https://aija.org.au/wp-content/uploads/2017/12/GUIDE-TO-JUDICIAL-CONDUCT-3rd-Edition.pdf>

2. Parties and their representatives should:

- treat the Commission and other parties/representatives with courtesy and respect
- act honestly, and not knowingly give false or misleading information
- cooperate with other parties and the Commission to enable the just, efficient, timely and cost effective resolution of the issues in dispute
- act promptly, comply with Commission directions, and minimise delay
- take reasonable steps to make sure the costs incurred in connection with proceedings are reasonable and proportionate to the complexity and importance of the issues and amount in dispute, and
- where appropriate, take reasonable steps to resolve disputes by agreement or to minimise the number of issues in dispute.

3. Communication with Associates

- A party or any representative may only communicate with the Associate of a member of the Commission or Court where it is appropriate to do so.
- Unless there is great urgency, communication must be in writing (which includes by email). In the case of such urgency, telephone communication is permitted.
- In most cases, a party or any representative may only communicate with an Associate with the consent or prior knowledge of the other parties.
- If the issue in the communication is uncontroversial, or unlikely to result in dispute, then consent is not required but the communication must be copied to the other parties at the same as it is sent to the Associate.

