



Catherine  
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## **Women and the Law:**

A guide to help women  
navigate the legal system

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# Using this guide

This free guide has been published by the team at Catherine Henry Lawyers to help women to navigate the legal system in four areas of life:

- family and relationships
- health
- money
- work.

We realised there wasn't such a guide for women but the need for one is very apparent.

Going through a family breakdown is one of life's most traumatic events. Knowing where you stand legally, right from the start, is very important so that you can enforce your rights and confidently start to make plans to move forward with your life.

Women report more episodes of ill health, consult health care professionals more regularly, and take more medications than men. They live longer, spend more time in hospital and have historically been the subject of more controversial medical treatments than men. Ill health is especially traumatic when it has been caused by poor medical treatment or behaviour by health care professionals. Women make more complaints against health care providers than men but, sadly, their complaints are not always taken as seriously by health professionals.

When a woman has suffered an injury, the law has traditionally not always recognised the full impact of that injury on the woman's life, focussing as it does on calculating loss in purely economic terms. This is particularly true in the case of injuries involving women's sexual needs, in stark contrast to the seriousness with which such injuries sustained by men are regarded by the courts.

We all have workplace rights that we need to protect, but women in the workplace often face challenges that do not confront their male colleagues, particularly on the issues of wage disparity and discrimination due to pregnancy and family responsibilities.

The highest rate of increase in homelessness and poverty in Australia today is being experienced by women over 55 years of age. Knowing how to protect and maximise your assets is key to not being part of these statistics.

This guide looks at the issues and provides information and tips for women to protect themselves as well as seek justice or compensation.

We will continue to update this guide and welcome your feedback on how it can be improved. Please send your feedback to [admin@catherinehenrylawyers.com.au](mailto:admin@catherinehenrylawyers.com.au) or call (02) 4929 3995.

For the latest copy visit [www.catherinehenrylawyers.com.au](http://www.catherinehenrylawyers.com.au)

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## Disclaimer

Information about the law is summarised or expressed in general statements in this publication. The information should not be relied upon as a substitute for professional legal advice or reference to the actual legislation.

# Women, Family and the Law

## Dealing with family breakdown

Going through a family breakdown is one of life's most traumatic events.

Knowing where you stand legally, right from the start, is very important so that you can enforce your rights and confidently start to make plans to move forward with your life.



## Applying for divorce

Few of life's challenges are more stressful than the breakdown of a marriage.

Australia's divorce laws, set out in the Family Law Act, operate on a 'no fault' system. You don't need to show any wrong doing to get divorced. The only ground to be proven when applying for divorce is that the marriage has irretrievably broken down. This is established by you and your spouse having been separated for at least 12 months. A divorce order won't be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed. If you have been separated but are living under the same roof you have separated for the purposes of gaining a divorce. If you separate, and later resume cohabitation but separate again within 3 months, and then continue to live separately and apart, the two periods of separation can be added together to form the necessary 12 months of separation.

### Children and divorce

If there are children under 18 the divorce order does not take effect unless the Court declares that it is satisfied:

- that there are proper arrangements in place for the care of the children OR
- there are circumstances by reason of which the divorce order should take effect even though the Court is not satisfied that proper arrangements are in place for the care of the children.

### Applying for divorce orders

You can apply to the Court for a divorce either jointly with your spouse, or separately. The Court will grant a divorce order once satisfied that the necessary requirements have been met. In most cases the divorce order will become final one month and one day following the making of this order. Either party is free to re-marry at this point.

### Do I have to attend Court?

You only need to attend Court if you are making a sole application for divorce and you have children under the age of 18.

### Divorce and property settlement

You do not have to be divorced to have a property settlement. If you do get divorced, you have one year from the date that the divorce order takes effect to apply to the Court for a property settlement. Outside of this period you need the Court's permission to apply for property settlement. You cannot assume that the Court will give its permission.

### More information

[Family Circuit Court of Australia – how to apply for a divorce](#)

## Property settlements: marriage and de facto relationships

One of the most difficult things about separating can be dividing your assets.

It is important for you to understand the process and to have clear advice about your entitlements as soon as possible after separation.

### **When to start the process**

You don't have to wait until you've been separated for a certain period or divorced before you sort out a property settlement. We recommend sorting out a property settlement as soon as possible.

There are time periods in which you must take action. Married couples have 12 months from the date that the divorce order takes effect to apply to the court for a property settlement. De facto couples have two years from the date of separation to apply to the court for a property settlement.

### **De facto relationships – a preliminary point**

A court can only make a property settlement order in relation to a de facto relationship if one or more of the following provisions applies.

- Your de facto relationship lasted for at least two years in total
- You have a child with your de facto partner
- You have made a substantial contribution to the relationship (e.g. a financial contribution and/or a home making contribution and/or a parenting contribution) and the failure to make an order would result in serious injustice to you
- The relationship was registered under a state or territory law.

There are also some geographical requirements before the Court can make a property settlement order in relation to a de facto relationship, but that is rarely an issue.

### **How to work out a property settlement**

Whether you were married, or you were in a de facto relationship, the law sets out five steps in working out the division of property.

1. Determine whether it is just and equitable to make an order.
2. Identify the assets and debts of each party.
3. Assess the contributions made by each party. Contributions include:
  - bringing assets to the relationship
  - earning an income
  - caring for children
  - receiving a lump sum during the relationship e.g. an inheritance
4. Consider the factors listed in section 75(2) of the Family Law Act (section 90SF(3) in a de facto relationship). This includes considering the arrangements for children and the income of each party.
5. Determine whether the proposed order is just and equitable.

## **Making an agreement out of court**

The best possible outcome is if you can reach a fair agreement with your ex-partner without going to court.

Before doing so, it is essential that each party make full disclosure of their financial position. It is important that you get legal advice.

A settlement should be formalised by way of a consent order made by the Family Court or by way of a financial agreement. There are two reasons for this.

1. A consent order or a financial agreement provides finality, except in very limited circumstances (such as if a party has not made full financial disclosure).
2. A consent order or a financial agreement provides exemption from stamp duty for pursuant assets transferred.

## **Court proceedings**

If agreement can't be reached, then the matter will need to go to the Family Court or Federal Circuit Court. The court will determine the division of property in accordance with the five steps (see above).

## **What orders can be made?**

In a property settlement many different orders can be made. They commonly include:

- selling the home and dividing the proceeds
- one person retaining the home as long as they discharge the mortgage and possibly make a payment to the other person
- splitting superannuation from one person's superannuation fund to the other person's superannuation fund
- orders relating to personal property, such as one person retaining a motor vehicle, or contents, or the division of these items.

## **More information**

[How long will my property settlement take?](#)

[Family Court of Australia – property and finances after separation](#)

[ASIC MoneySmart – divorce and separation financial checklist](#)

## Parenting disputes

### Parental responsibility and living arrangements

When people separate an important question is what happens with the children? There are two main issues to consider.

1. Parental responsibility. This refers to the duties, powers, responsibilities and authority which a parent has in relation to a child. It usually arises when considering long term decisions such as a child's health, religious and educational needs. When making a parenting order the court must apply a presumption that it is in the best interests of the child for the parents to have equal shared parental responsibility. This presumption does not apply in all circumstances e.g. where there are reasonable grounds to believe that a parent of a child has engaged in family violence or in abuse of the child.
2. Sorting out the time that the children live with/spend with each parent.

### What if we agree about parenting arrangements?

If you come to an agreement, you may wish to put it in writing.

One option is a **parenting plan**. It is a written agreement between you and your ex-partner which sets out the parenting arrangements for your children. It does not go to court.

The limitation of a parenting plan is that, after making it, it is possible for a person to apply to the Court for a parenting order. The Court is not bound by the parenting plan but is to have regard to the terms of the parenting plan if doing so is in the best interests of the child.

A second option is a **consent order**. Your agreement is sent to the Court (you do not need to attend) and the Court makes orders as set out in your agreement. It is legally enforceable.

### What if we can't agree about parenting arrangements?

You may not be able to agree with your ex-partner about the parenting arrangements for your child. In most cases we advise that you attend mediation (family dispute resolution) to attempt to reach an agreement. Generally, it is mandatory to attempt mediation prior to applying to the Court for parenting orders.

If you still can't reach agreement, then it is necessary to apply to the Court for parenting orders. The Court can initially make interim orders and then ultimately final orders.

### The best interests of the child

When the Court decides whether to make a particular parenting order, it must regard the best interests of the child as the paramount consideration. This applies whether the order is sought with the consent of both parties or it is a contested case. In determining what is in the child's best interest, there are two primary considerations.



1. The benefit to the child of having a meaningful relationship with both parents.
2. The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

The second of the two primary considerations is given greater weight.

Additional considerations in determining what is in the child's best interest include:

- the child's views, depending on their age and maturity
- the nature of the child's relationship with each parent
- the extent to which each parent has participated in decision making for any long-term issues in relation to the child
- the extent to which each parent has taken the opportunity to spend time with and communicate with the child
- the likely effect on a child if there was to be a change in their circumstances such as where they would live, who they would live with, and any separation from a parent, sibling or other significant person in their life
- the capacity of the child's parents and any other relevant person to provide for the needs of the child
- the existence of any family violence involving the child or a member of the child's family.

### **Grandparents and others**

If you are a grandparent, or any other person concerned with the care, welfare or development of the child, you may apply to the Court for parenting orders. This could be an order that the child spend time with you and communicate with you or that the child live with you.

### **More information**

[Federal Circuit Court of Australia – applying for parenting orders](#)

[Parenting Arrangements](#)

[AVO-ADVO Parenting Orders](#)

[Can I stop my ex taking the children overseas?](#)

## Spousal maintenance

Women often find themselves in a very vulnerable financial position when they separate from their partners, especially those who are not in the paid workforce or only earning a part-time wage due to child care commitments and other family responsibilities.

For many women, coming to an agreement about how to split common assets is not as pressing as the need for an ongoing source of money to meet their immediate costs of living.

### **What is spousal maintenance?**

Following separation, a **spousal maintenance order** can be made by the Court – either a periodic payment or a lump sum payment if the applicant is unable to support themselves and the respondent has the capacity to pay.

The inability of a person to support themselves has to be either due to family responsibilities for children under 18 or the inability to be gainfully employed due to impairment or any other adequate reason.

Spousal maintenance orders can be made in respect of former married and de facto couples.

A claim for spousal maintenance can be made on an urgent basis and ends if the party receiving maintenance remarries or re-partners.

### **Court considerations when making a spousal maintenance order**

- The age and health of the parties
- The capacity of the parties for appropriate employment
- The property and financial resources of the parties
- If the marriage has affected one parties ability to earn an income
- If there are children to maintain
- The commitments of each of the parties that are necessary to enable the party to support himself/herself
- What a suitable standard of living would be for the party applying for the maintenance
- If either party is cohabiting with another person – the financial circumstances relating to the cohabitation.

### **Time limits**

An application must be made within 12 months from the date of a divorce order or two years in the case of a de facto relationship.

### **More information**

[Family Court of Australia – Spousal Maintenance](#)

## Domestic violence and family violence

Australian women are:

- on average one woman a week is murdered by a current or former partner
- nearly three times more likely than men to experience violence from an intimate partner
- almost four times more likely than men to be hospitalised after being assaulted by their spouse or partner
- more than twice as likely as men to have experienced fear or anxiety due to violence from a former partner.

Domestic violence is often misunderstood to be only about instances of physical assault, but it encompasses a wide range of behaviour that also includes, sexual, emotional, psychological and financial abuse.

### **What to do if you encounter family violence**

#### **Contact Emergency Services**

You should contact the police, ambulance or emergency services immediately if you are facing a serious threat to your life or health. Dial 000 for emergency assistance.

#### **Apply for an Apprehended Domestic Violence Order**

You or the police can apply to the Local Court of NSW for an ADVO which sets out restrictions on the other person's behaviour so that you can feel safer. If you have children, the order will also protect them.

Generally, the Local Court will grant an ADVO if it is satisfied on the balance of probabilities that a person who has or has had a domestic relationship with another person ('victim' or 'protected person') has reasonable grounds to fear, and in fact fears, a personal violence offence or, intimidation or stalking from the other person.

#### **Family violence in family court matters**

Family violence can affect not only a person's safety, but also:

- their readiness to take action in a family law matter
- their willingness to come to the courts
- their ability to participate in court events, and/or
- their ability to achieve settlement of their dispute through negotiation.

The Family Court of Australia and the Federal Circuit court recognise the close connection between family breakdown and violence, and the detrimental impact on both adult victims and children living with family violence. Protecting family members, and particularly children, from the effects of family violence is central to all determinations of what is in a child's best interest. Ensuring the safety of all people engaged in the family law system, including when attending court, is also a high priority for the courts.

If you anticipate or already have family law proceedings on foot, then you can apply to the court for orders which take into account any domestic violence, including in orders for the children and property settlement proceedings.

### **Family Violence Orders**

The Courts have the power to make a family violence order (including an interim order) to protect a person from family violence.

Examples of behaviour that may constitute family violence include (but are not limited to):

- an assault; or
- a sexual assault or other sexually abusive behaviour; or
- stalking; or
- repeated derogatory taunts; or
- intentionally damaging or destroying property; or
- intentionally causing death or injury to an animal; or
- unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
- unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
- preventing the family member from making or keeping connections with his or her family, friends or culture; or
- unlawfully depriving the family member, or any member of the family member's family, or his or her liberty.

### **Advice about domestic violence and help at court**

[Women's Domestic Violence Court Advocacy Services \(WDVCAS\)](#) are locally based, independent services for women and their children seeking information and help about domestic and family violence and how to get protection from the court.

### **Telephone and online counselling**

[1800RESPECT.ORG](https://www.1800respect.org/) is a service open 24 hours to support victims of domestic violence. Their trained counsellors are guided by you, your needs and your feelings about what is right for you and your situation.

## Growing older – planning for yourself and taking care of others

Many women today are experiencing the 'sandwich effect' of still caring for young children, whilst trying to take care of the needs of their ageing parents and simultaneously doing paid work.



## The importance of having a will

Women are more likely than men to not have a will.

A lawyer can assist you in preparing a will that is valid and advise you generally in relation to the advantages and disadvantages of structuring your will to reflect your wishes and optimise the benefit to your beneficiaries.

### **What makes a will valid?**

A will must be in writing, signed and witnessed by two adults. The testator (person making the will) must be over 18 years of age and must have capacity.

### **Who will receive my estate if I die without a will?**

If a person dies without a will, they die intestate. The estate (their money, assets and possessions) is distributed in accordance with a strict formula.

### **How is capacity determined?**

This is a complex question and the fact that someone is very old, is of ill health or suffering from dementia does not automatically mean they lack testamentary capacity. Whether or not a person has testamentary capacity must be considered in the context of a legal test.

Capacity is best determined by a geriatrician or a general practitioner. Lawyers and doctors often disagree about the test for capacity. so, this issue needs to be very carefully determined.

### **What happens if the testator lacks capacity?**

A Court – on application by someone who wants to challenge the will – may alter or revoke a will.

### **Who should I appoint as my executor?**

Your executor takes on the responsibility of administering and distributing your estate after your death.

A grant of probate or letters of administration needs to be obtained so the estate can be distributed.

Before you appoint an executor, you should be sure that they are willing to take on the role.

You can appoint one or more individuals to be your executor – this could be a family member of a close family friend or a professional advisor. Another option is a trustee company, or the NSW Trustee and Guardian (or similar state government agency).

Information about what is involved in the role of executor can be found [here](#).

### **Can I alter my will?**

You can revoke (or cancel) your will at any time so long as you have testamentary capacity. It is best to have a new will drawn up rather than just changing part of it.

## How often should I review my will?

You should review your will regularly to make sure that it reflects your current circumstances and wishes. Reviewing your will every time a significant life event happens is recommended. Such life events include:

- a change to your relationship – separation, remarriage or re-partnering
- the birth of a child or grandchild
- the death or changed circumstances of a beneficiary
- the death of your executor or if he or she no longer wishes to act as your executor
- acquiring or disposing of assets (this could be a business, real estate, or even a piece of jewellery that has sentimental value).

## What happens if I marry or divorce?

Generally, a will is revoked on marriage.

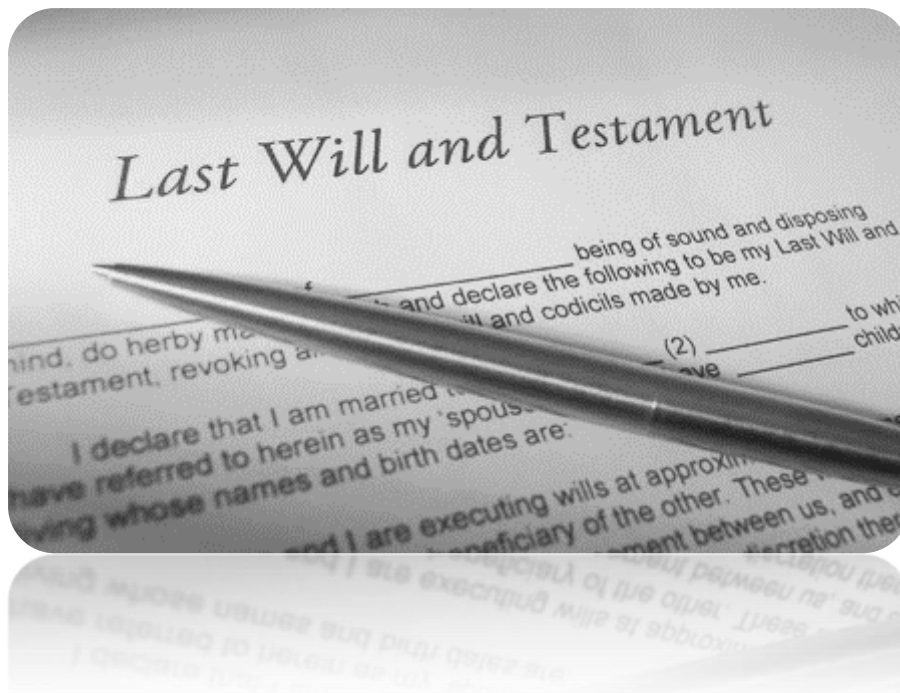
Similarly, certain provisions of your will become void on your divorce, such as the naming of your former spouse as a beneficiary and executor. You should prepare a new will as soon as possible following separation.

## More information

[Review your estate planning](#)

[Mental capacity and signing wills](#)

[What does an executor of an estate need to do?](#)



## How to contest a will

When someone close to us dies, it can come as a shock to be completely left out of a will or to be left a small amount of money. It is possible to contest the will.

### **Who can contest a will?**

Only an 'eligible person' can challenge a will. An example of an 'eligible person' is a spouse of the deceased, a child of the deceased and step children who have lived in the same household as the deceased at some time and been dependent upon the deceased at some time.

There are a number of different factors taken into account by the Court when deciding what provision a claimant should receive. One of the main factors is the financial circumstances of the claimant, and their need to receive provision or further provision from the estate.

### **How long do I have to contest a will?**

The general rule is 12 months from the date of death but it is possible in narrow circumstances to obtain an extension of time. However, action should be taken before the executor has a chance to distribute the estate to the beneficiaries.

### **How long will it take to contest a will and what steps are involved?**

A contested estate matter is commenced in the Supreme Court of NSW and as a general rule takes six months to two years from the date of filing. Many contested estate cases are resolved by mediation.

### **More information**

[Can I contest my step-parent's will?](#)

[Deliberate exclusion from a will](#)

[Can you disinherit an estranged child?](#)



## Substituted decision making

As we get older, it is important to think about putting arrangements in place so that someone we trust can make important decisions for us about our finances, property and health if we lose capacity to make decisions for ourselves.

The key documents to consider are a **Power of Attorney** and a document appointing someone as your **Enduring Guardian**.

### **What is a Power of Attorney?**

A Power of Attorney can be general or limited to specific transactions. It may endure for a defined period.

### **What is an Enduring Power of Attorney?**

An Enduring Power of Attorney continues even if you become ill or unable to make your own decisions. So you need to carefully consider who and how you want your attorney to act.

### **What are the risks of an Enduring Power of Attorney?**

Changes in relationships over time are generally the biggest risk. A relationship which was once one of love and trust may, after a long period of time, have deteriorated and you may wish to revoke the Enduring Power of Attorney.

### **What can I do to manage some of the risk?**

It is advisable to take action when well and able to make your own decisions and review your Enduring Power of Attorney arrangements on a regular basis.

### **What is the role of an Enduring Guardian?**

An Enduring Guardian is able to make decisions on your behalf about medical treatment.

You can either tell your Enduring Guardian what you would want ahead of time or include directions in the document of appointment or leave all decisions up to them.

An Enduring Guardian cannot make a will for you, manage your finances or override your objections to medical treatment.

### **Should I also have an Advance Care Directive?**

Sometimes known as a 'living will', an advance health care directive is a written statement of your wishes about future medical treatment in the event that you lose your capacity to make these decisions.

There is as the date of writing no specific legislation covering advance health care directives in NSW unless it is part of the document appointing an Enduring Guardian.

It is generally considered that doctors are obliged to take an advance health care directive into account as an expression of a person's wishes so long as it is reasonably up to date.

Make sure a copy of your advance care directive is provided to your GP, your family and possibly close friends.

You should review and update your directive regularly. That way any doctor will be sure that it truly represents your recent wishes.

### **What happens in the absence of a Power of Attorney or Enduring Guardian?**

If you become unable to consent to your own medical treatment, the doctor concerned must get the consent of your 'person responsible'.

If you do not have a 'person responsible', an application may have to be made to the Guardianship Tribunal for consent to health treatment or for a guardian to be appointed to make decisions for you.

Your 'person responsible' will normally be your husband or partner. Sometimes a close personal friend will be regarded as the 'person responsible'.

Health practitioners are obliged to give your 'person responsible' the same information they would have given you if you had been able to give consent yourself.

### **More information**

[What happens if something happens to me? Finance](#)

[What if something happens to me? Health](#)

[Do I need to appoint an enduring guardian if I already have a power of attorney?](#)



## Accommodation and women: growing older

Older single women are particularly vulnerable to housing difficulties later in life. This is due to the high cost of housing and having less wealth at retirement resulting from the gender pay gap and differences in workforce participation.

The following factors can put older women at risk of homelessness.

- Women are likely to live longer
- The high cost of housing
- Domestic violence, relationship breakdown, financial difficulty and limited superannuation.

You may be negotiating accommodation for an ageing parent or relative. There are three main accommodation types for older people.

1. Retirement villages or serviced units
2. Residential aged care facilities (government funded)
3. Private homes (privately or government funded).

### **Retirement villages**

A retirement village is different to a nursing home, hostel or caravan park. It is a complex containing residential premises predominantly or exclusively occupied by retired people who have entered into village contracts. In NSW, the relevant legislation is the Retirement Villages Act Proper citation.

Before you sign a contract, you should be given a Disclosure Statement, free of charge. This statement should show things such as:

- the size, location and services available in the village
- the proximity to key services such as hospitals, shops and public transport
- details about the ownership and management of the village including contact details for the operator and residents' committee
- the village's compliance with legislation and safety procedures.
- a proposed annual budget.

That contract should be in plain English and describe the condition of the premises and a copy of the village's rules. You have 14 days to sign the contract. You can terminate the contract at any time within 90 days.

You can only be evicted following an order made by the NSW Civil and Administrative Tribunal (NCAT) for reasons such as medical grounds, breaching the village rules or causing damage to property, or upgrade to the property.

Your rights and obligations when leaving a village (refund or sale) depend on the type of contract you have signed. That is why it is so important to get independent legal advice. You should check if you have the right to set the sale price of the unit, appoint a real estate agent or sublet the unit. Charges may apply if you terminate early, a new resident moves in or the operator buys the unit.

### **More information**

[Homeless older women](#)

## Negotiating aged care accommodation

### **What is an ACAT assessment?**

Before entering an aged care facility an assessment needs to be conducted by the Aged Care Assessment Team (ACAT). If ACAT determine that you are eligible for a place in a residential aged care facility, and if the Australian Government has nominated the facility that you plan to move into as an approved provider, you may qualify for subsidised care.

### **What are the types of care?**

The types of care are residential aged care, home care, flexible care and respite care.

### **How to choose a facility?**

When selecting a facility, it is important to consider:

- location and amenities
- how to structure any accommodation payment
- affordability and the fees charged by the facility.

### **Paying for aged care**

Residential aged care is expensive but the Government pays a large part of the cost if the residential facility is an approved provider.

You are responsible for paying an accommodation payment and a basic daily care fee.

The amount you have to pay depends on your circumstances. Your income and assets must be declared during the assessment.

You have the option of paying a lump sum, a daily fee or a combination of both.

If you do not receive the Age Pension, you must also pay a refundable accommodation deposit (RAD).

### **What about the family home?**

A common question is whether your house is taken into account as an asset when aged care fees are calculated or when eligibility for the Aged Pension is considered.

In relation to the pension, your house is exempt if your spouse lives there or exempt for the first two years if no spouse lives there.

Estate planning and other advice is essential when you are moving into an aged care facility.

### **Residential communities (manufactured homes)**

Residential communities include manufactured home estates, caravan parks, camping grounds and movable dwellings. Such accommodation can provide low maintenance living as well as access to community facilities and a support network. Legally, these communities are governed by the Residential (Land Lease)

Communities Act 2013 and Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Movable Dwellings) Regulation 2005. You may purchase a manufactured home from a current home owner, the park operator or direct from the manufacturer.

There is no standard form of contract for the sale of a manufactured home. You should make an agreement with the seller of the home that the purchase is subject to entering into a site agreement with the park operator. You can request a site agreement prior to the purchase of a home. This agreement specifies your rights and obligations. It is always good to get independent advice before signing the agreement. When considering a manufactured home, you need to be sure that it is a practical retirement strategy and not a poverty trap. Consider things such as the cost of the home, site fees and how often site fees are likely to increase.

### **More information**

[Comprehensive assessment with an ACAT](#)



## Making a complaint about an aged care facility

### **What standards must aged care facilities maintain?**

The Charter of Care Recipients' Rights and Responsibilities - Residential Care provides that all residents of aged care facilities are entitled to:

- quality care appropriate to the care recipient's needs
- respect and dignity
- a living environment without discrimination or victimisation
- a safe, secure and homelike environment
- individualised treatment and acceptance.

From 1 July 2019, the new single set of standards, called the Aged Care Quality Standards will apply to all care services including residential care, home care, flexible care and services under the Commonwealth Home Support Programme.

### **Who is responsible for maintaining these standards?**

The Aged Care Quality and Safety Commission – established on 1 January 2019 - is responsible for approval, accreditation, assessment, monitoring, compliance and complaints management for all Australian Government subsidised aged care providers.

### **Who can you complain to about alleged abuse or lack of standards at an aged care facility?**

Family members and/or residents can complain direct to the facility or to the Aged Care Quality and Safety Commission.

Bringing an action in negligence against an aged care facility is also possible. Such litigation can be an effective deterrence.

Evidence of poor care can be obtained via photographs of injuries, CCTV footage and medical records of the facility and the GP visiting the aged care facility.

### **Aged Care Royal Commission**

In 2018 Prime Minister Scott Morrison announced the Terms of Reference for the Royal Commission into Aged Care Quality and Safety.

Public hearings started in February 2019. The Commission will hear about key features of the aged care, quality, safety and complaints system, about how that system works in practice and at a general level.

Follow Catherine Henry Lawyers' Royal Commission into Aged Care Quality and Safety blog [here](#).

### **More information**

[Aged Care Quality and Safety Commission – making a complaint](#)

[Should nursing home doors be locked?](#)

## Financial elder abuse

Statistics show that women are significantly more likely to experience financial loss through the actions of their loved ones.

One of the areas where women are increasingly suffering financial elder abuse is in Granny Flat Arrangements.

Although communal generational living can be effective and successful, there are many pitfalls – legal and financial – which tend to occur when accommodation arrangements are not properly thought through and documented.

Many of these problems are exacerbated for women, who tend to live longer, and may often live alone.

### **How do I document the accommodation arrangement with family members?**

A lawyer can help you not only cover situations and eventualities which you may not have considered but also manage expectations.

A written agreement should cover the:

1. financial arrangements
2. expected care arrangements
3. rules for terminating the agreement
4. process and rules for disagreements.

When there is no documentation in place that covers these issues, you may find yourself in a very vulnerable financial position, living with family who are no longer taking care of your needs and unable to move to more suitable accommodation.

A granny flat arrangement could potentially impact on your eligibility for the pension. Centrelink has some very strict, and often unusual, rules when it comes to means testing. If your granny flat arrangement has been drafted properly, it may be possible to have the granny flat treated the same as your home, so that it may not affect your pension, or your ability to claim certain discounts or reduced care rates. Ideally, you should have a lawyer draft the agreement, and have a financial planner check over the agreement to ensure that it is in your best interests now, and that it won't affect your future rights.

### **More information**

[Top 10 tips for older people to avoid elder abuse](#)

[Common stories of financial elder abuse](#)

[World elder abuse awareness day](#)

# Women, Health and the Law

Women use the health system more than men. They report more episodes of ill health, consult doctors and other health professionals more regularly and take more medication than men.

Women live longer and spend more time in hospital – not only for reproductive reasons but for other gynaecological complaints.

The implications of ill health can be particularly serious for women. Besides the pain and suffering of the medical condition, as a major provider of emotional support for family members, a woman may struggle to care for her family and perform domestic duties. Ill health will often result in a woman struggling to hold down a job. Maintaining close relationships will also suffer. The resultant loss of confidence and self-esteem can add to her problems.

You have a right to safe, well-considered medical treatment performed by qualified, ethical professionals. If you have suffered from inappropriate or negligent treatment, resulting in your physical or psychological harm, you may be entitled to legal redress and compensation.





# Accessing Medical Records

## **What are medical records?**

Medical records include not only the clinical notes made by a doctor or hospital staff concerning a patient but also x-rays, test results, reports, and correspondence to and from other doctors and treating specialists.

## **How confidential are my medical records?**

Information from the records should not be given to third parties (such as insurers, pathologists or other medical practitioners) without a patient's written permission. In a hospital setting, the multidisciplinary nature of care generally requires that your records are readily available to all healthcare professionals involved in your care.

If your records are required at court, a subpoena must be issued before they are released, otherwise than with your consent.

## **Who owns the medical records?**

Medical records are the property of the doctor, practice or hospital but the patient has an enforceable right of access to the information – see the Health Records and Information Privacy Act 2002 (records held by private facilities) and in the case of public health institutions such as hospitals the Government Information (Public Access) Act 2009.

## **Why don't I own my medical records?**

The records are the notes the doctor or hospital staff makes to assist with treatment. They are made by the doctor or healthcare professionals and are the property of the doctor or hospital. X-rays are generally considered the property of the patient as the patient has paid for the examination.

## **What happens when a doctor or hospital receives my request for medical records?**

A doctor is required to respond to a HRIPA (Health Records and Information Privacy Act) request within 45 days.

A NSW hospital must generally decide whether or not to provide access to documents within 20 working days of receiving an application.

The request for access to medical records is often best handled by a solicitor as the law is complex.

## **Does it cost any money?**

Most doctors or hospitals will charge a fee for handling and copying records reflecting the administrative costs involved.

## **When might my application for access be refused?**

If the doctor or healthcare professional believes releasing the records might harm the patient, due to very confidential or distressing information, access may be denied. This decision is subject to challenge.

The patient can request the damaging records be released to another doctor of their choice.

### **What happens when a practice changes hands?**

The doctor disposing of the practice should make reasonable efforts to ensure records are maintained by giving them to the patient or another doctor identified by the patient.

### **What if my doctor dies?**

If your doctor dies, a patient or their lawyer can approach the estate and ask for the records to be sent to another doctor.

### **How long is a doctor required to keep my records?**

Records must be kept for seven years (adults) or 25 years (for children).



# My Health Record

## **What is My Health Record (MHR)?**

Personal health records and data for each Australian citizen is being created as part of the My Health Record initiative.

My Health Record allows doctors and hospitals to access your personal health data at any time. A Shared Health Summary may contain information saved by you, Medicare or your treatment providers.

The Australian Government extended the period for opting out of the new My Health Record (MHR) system to January 31, 2019:

## **What is meant by 'opting out'?**

You were required to opt out by 31 January 2019.

If you did not opt out, then a My Health Record (MHR) has been created for you. This means that the record remains in the system but is made 'unavailable' so that health providers are unable to access it. The government is pushing to amend the legislation to allow individuals to permanently delete their record from the system.

If you have dependent children on your Medicare card and you did not opt out on their behalf, then an MHR has been created for them too.

## **Can you change your mind about opting out?**

You can manage your MHR – or that of a dependent child - by calling the Australian Digital Health Agency on 1800 723 471 or by logging into your myGov account.

You can also register your child for a My Health Record online [here](#).

## **More information**

[Managing a child's My Health Record in a blended family](#)

[The ins and outs of My Health Record](#)

[Personal health records: Third party sharing and opting out](#)

# Access to abortion

Abortion is a widely practiced medical procedure in Australia – one in every four pregnancies ends in a termination.

Medicare funding is available for abortions.

Contemporary surveys have consistently shown that about 81% of Australians believe that the decision about whether to have an abortion is a decision between a woman and her doctor.

There are so many questions why abortion is the only medical procedure included in criminal statutes in NSW. NSW is now the only state in Australia to retain abortion offences in its criminal code.

## **How available are abortion services in NSW?**

Contrary to popular opinion, abortion is not available to women in NSW as of right or “on demand”.

A woman seeking an abortion in NSW must show that continuing the pregnancy is a danger to her physical or mental health – this includes the women's socio-economic circumstances.

A medical practitioner is required to provide her/his opinion about the risks of the woman continuing the pregnancy.

## **Can a woman be charged with a criminal offence following an abortion?**

Yes, a woman (and the doctor performing the abortion) can be charged with the criminal offence of “procuring an unlawful abortion” - see sections 82 and 83 Crimes Act 1900 (NSW).

## **Are there moves to change the law in NSW?**

The law has been settled – but precarious – since 1971. It relies on the ruling given to a jury by a District Court Judge in a criminal trial.

A Private Members Bill seeking to decriminalise abortion was introduced by an Upper House MP (Greens) in 2016 but not passed.

In 2018, legislation was introduced by an Upper House MP (ALP) to introduce safe access zones around freestanding abortion clinics. This legislation was passed and it is now a criminal offence for protesters to come within 150 metres of an abortion clinic. There is a pending appeal to the High Court challenging this legislation.

## **Where has the law been changed to legalise abortion?**

All states and territories except NSW no longer regard abortion as giving rise to a criminal offence. The last state to decriminalise abortion was Queensland in 2018.

## **More information**

[Abortion: law and practice](#)

# Compensation for personal injury

Women can suffer injuries as a driver or passenger on the road, at work, as a result of exposure to dust diseases, as a result of defective products and as a result of negligent medical treatment. Unfortunately, wherever a woman has suffered an injury, the law does not always recognise the full impact of that injury on the woman's life, focussing as it does on calculating loss in purely economic terms. This is particularly true in the case of injuries involving women's sexual needs, in stark contrast to the seriousness with which such injuries sustained by men are regarded by the courts.

## **Making a motor vehicle claim**

For motor vehicle accidents after 1 December 2017, compensation is available for most people even if they were the driver of the vehicle at fault.

To access the full benefit it is important to:

- see your doctor
- report the accident to the Police within 28 days
- lodge a claim for benefits within 28 days to get payments backdated to date of accident (and otherwise at least within three months).

Most people will get their medical and treatment expenses covered and a percentage of their loss of income for the first six months. After that time, you may still get continuing benefits if the other vehicle was at fault and your injury is not "minor." You may be able to make a claim for lump sum compensation.

Insurers may make very important decisions about your claim in the first six months and it is therefore very important to get legal advice as early as possible. You can also get some assistance with through CTP Assist on 1300 656 919 or by visiting the [website](#) but you should still seek legal advice to assist with your ongoing claim.

## **Making a worker's compensation claim**

If you are injured at work, you should notify your employer as soon as possible after the injury. Generally, workers injured at work may be entitled to receive weekly payments, medical and treatment expenses, domestic assistance, lump sum compensation if they have a permanent impairment of 15% or more and their employer was negligent.

It is important to seek legal advice if you have any difficulties in dealing with the employer or insurer or if you want to explore your full rights. Your lawyer will seek a grant of funding, similar to Legal Aid, through the Workers Compensation Independent Review Office (known as "WIRO") so you won't be out of pocket for your legal costs.

WIRO also handles inquiries and complaints about insurers directly. Their number is 13 94 76 or you can visit their [website](#).

### **Making a dust diseases claim**

You may be able to make a claim for dust diseases compensation if you were:

- exposed to asbestos through your work or as a result of the negligence of a manufacturer or supplier of asbestos products
- an occupier of premises and you have been diagnosed with an asbestos-related illness or a specified dust related illness.

You might be entitled to a pension, payment of medical expenses and other benefits. You may also have a claim if you are a relative of a person who has died from a dust disease.

It is advisable to seek legal advice as quickly as possible if you or a loved one has been diagnosed with an asbestos-related illness, to protect your rights.

### **Making a product liability claim**

If you buy a defective product which causes you to suffer an injury, or even if you didn't buy the product but you are injured because of it (for example, in a public place or a business), you may be able to bring a claim against the retailer, manufacturer, importer or owner of the product.

Faulty household appliances, gym equipment, bikes, chairs, barbecues, or bunk beds are examples of equipment that might cause injury if defective.



# Making a medical negligence claim

When ill health has been caused by the medical treatment or the behaviour or neglect of the very health professionals from whom we seek help, it is especially traumatic.

When a woman's right to safe, well-considered medical treatment performed by qualified, ethical professionals has been denied, resulting in physical or psychological harm, you may be entitled to seek legal redress and compensation for the damage caused and loss of capacity.

## **What kind of incidents might give rise to a medical negligence claim?**

Examples of some of the actions which can give rise to medical negligence claims based on the provision of substandard care include:

- failing to conduct surgery with appropriate care and skill
- misdiagnosing a condition or disease
- providing the wrong type or dose of drug
- providing unsuitable or inadequate post-operative care
- incorrectly reporting or failing to act on test results.

## **How can you prove negligence?**

To prove negligence in a health setting, you must be able to prove the:

1. health care professional owed you a duty of care
2. health care professional breached their duty of care (proved by independent medical evidence)
3. alleged negligence has caused you harm
4. harm or 'damage' that you have suffered.

Damages or compensation may be payable for such things as pain and suffering, medical expenses, and loss of income.

## **How soon do I have to make a claim?**

In general, a claim for medical negligence must be commenced within three years of the cause of action becoming discoverable by you. A cause of action will be discoverable on the first date you know, or ought to know, you have been injured, your injury was caused by the fault of the defendant and the injury is sufficiently serious enough to warrant the bringing of an action.

## **What losses can be compensated?**

Damages or compensation may be payable for such things as:

- pain and suffering
- loss of earnings, both past and future
- medical and treatment expenses, both past and future
- costs of care provided on a gratuitous basis
- cost of future care.

### **Are all claims worth litigating?**

No. The Civil Liability Act 2002 (NSW) effectively prevents smaller claims from proceeding. The legislation stipulates that where a person's claim for pain and suffering is less than 15% of a most extreme case, that person is not entitled to any damages for their pain and suffering.

### **Is compensation ever difficult to recover?**

Yes. There are circumstances where, despite a successful claim, compensation is not forthcoming. For example, where the doctor's indemnity insurer has exercised its discretion not to fund the claim. These instances may include:

- where the doctor had an inappropriate relationship with the patient
- when a doctor dies before the action is finalised
- if a doctor has been declared bankrupt.

In such cases, unless the doctor personally has sufficient assets, you may not recover the money you are owed.

### **More information**

[Resolving a medical dispute – is litigation your only option?](#)

[Breast augmentation - waking up during the operation](#)

[Birth trauma](#)

[Neonatal births and still births](#)





# Making a health care complaint to the HCCC

## What is the role of the Health Care Complaints Commission (HCCC)?

The Health Care Complaints Commission (HCCC) is a NSW Government body that acts to protect public health and safety by assessing, resolving, investigating and prosecuting complaints about health care.

You can make a complaint direct to the HCCC or engage a lawyer to assist you.

The following links provide specific information about lodging a complaint against a:

- [medical practitioner](#)
- [nurse or midwife](#)
- [psychologist](#)
- dentist
- [chiropractors](#)
- [pharmacists](#).

At the end of an investigation into the conduct of a registered health practitioner, the Commission must consult with the relevant NSW Health professional council before deciding what action to take. The Commission may decide to:

- refer the complaint to the professional council
- make comments to the health practitioner
- terminate the investigation (take no further action)
- refer the complaint to the Director of Proceedings where it involves serious conduct.

The Director of Proceedings must reach their own decision about whether or not to prosecute, taking into account:

- the protection of the health and safety of the public
- the seriousness of the alleged conduct the subject of the complaint
- the likelihood of proving the alleged conduct
- any submissions made by the health practitioner concerned.

## Steps involved in prosecution

If the Director of Proceedings decides to prosecute, he or she will:

1. draft the complaint
2. refer it to the relevant disciplinary body\*
3. present the HCCC's evidence
4. prosecute the complaint before the disciplinary body.

\*For doctors, nurses and midwives - a Professional Standards Committee. For all other practitioners - an Inquiry of the relevant NSW Health Professional Council or the New South Wales Civil and Administrative Tribunal (NCAT).

## **Nature of the proceeding**

A health disciplinary proceeding will take place before a four-member panel or tribunal generally made up of one legally qualified member, one community member and two members of the same health profession as the health care practitioner.

The hearing is usually in public and decisions are usually publicly available.

As with more formal Court processes, witnesses may be called and cross-examined and orders may be made requiring documents to be produced.

## **Outcomes following prosecution**

There are a range of outcomes that may occur following successful prosecution.

1. Cancellation of registration – only for NCAT matters
2. Suspension of registration – only for NCAT matters
3. Prohibition order to ban/limit practice in a related health service – only for NCAT matters
4. Caution
5. Reprimand
6. Conditions on registration
7. Imposition of fine.

## **More information**

[HCCC complaints](#)

[HCCC complaints processes](#)

# Making a complaint following sexual misconduct

Whilst the majority of health professionals practise appropriate behaviour with their patients, cases of sexual abuse are not uncommon, particularly involving practitioners in the fields of psychiatry and psychology.

Sadly, many therapists who have sexually abused patients are habitual offenders. In some cases, medical authorities have been unaware of unwilling to step in. Their victims may feel helpless to put a stop to the behaviour or to overcome the trauma caused.

Victims already suffering mental health, marital or social problems are highly vulnerable to inappropriate suggestions and advances.

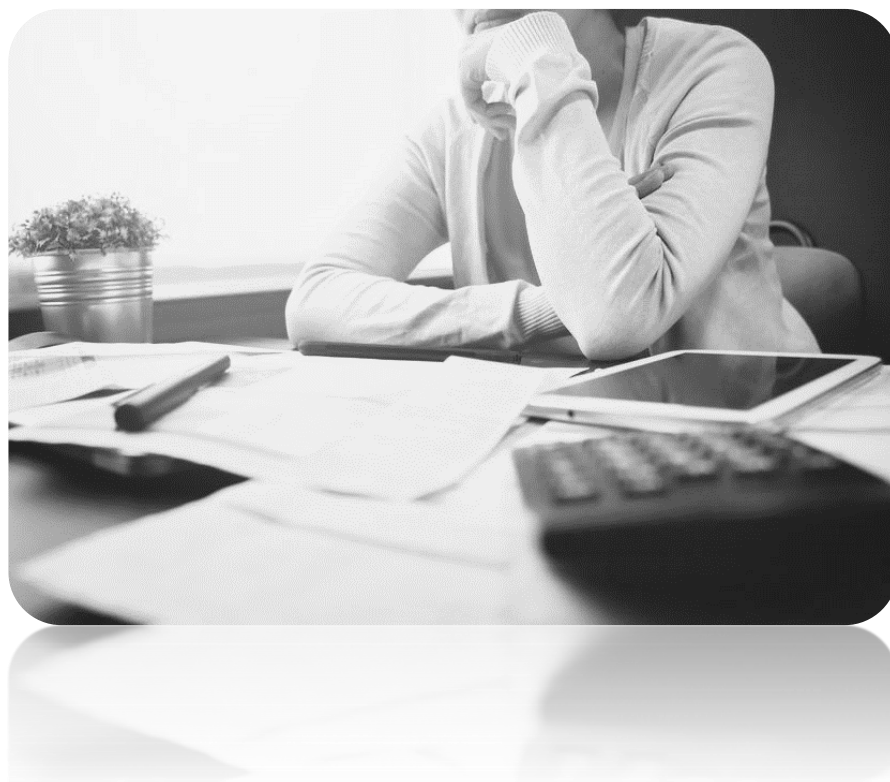
Those who act for therapists can fail to appreciate the power imbalance in the relationship with patients, with the relationship then often seen as consensual, rather than as one involving a gross abuse of trust.

A lawyer who is experienced at exploring the often sensitive, painful issues associated with establishing whether grounds exist for legal action and in bringing such cases to justice is essential in these cases.



# Women, Money and the Law

The highest rate of increase in homelessness and poverty in Australia today is being experienced by women over 55 years of age. Knowing how to protect and maximise your assets is key to not being part of these statistics.



# Superannuation, SMSFs and Trusts

Superannuation was made compulsory in Australia to help Australians to better financially prepare for a retirement.

We are living longer but our financial planning has not kept up with the advances in our medical health, meaning that there is often a strain on finances in later years. The increasing divorce rate, especially amongst retirees is also reducing women's net worth at a time in their lives when they no longer have the earning capacity to rebuild their wealth.

This makes superannuation very important, in two ways.

1. If you are separating from your partner. Make sure that you get advice on your entitlement to superannuation as it will become very important to you in your later years.
2. You need to think about management and control of your superannuation in your later years.

If your superannuation is held with a large retail fund, then most of the day to day management of your account will be done by a professional trustee. You should ensure that you nominate a beneficiary (or multiple beneficiaries) in case something happens to you, or else the professional trustee will make that decision for you.

If your superannuation is held in a Self-Managed Super Fund (SMSF), then most of the day to day management of the fund is your responsibility. In that case, you should consider – in advance – what will happen if your partner dies, or you become ill or unable to manage the SMSF yourself. For example, most SMSFs will require two trustees, so if something happens to your partner, that may mean that one of your children (or perhaps one of your partner's children) are appointed as a trustee instead. That may mean that the child then has a significant amount of control over your superannuation and may potentially alter how much is paid, to whom and when.

SMSFs are legally 'trusts' so if the trust in the relationship breaks down, then the control and operation of the SMSF may also break down or not continue to operate how you had expected it would.

If you would like to plan in advance for how your SMSF might operate if something happens to yourself or your partner, then you should speak with your lawyer, and potentially change the provisions of the trustee company regarding control and decision making or put in place corporate powers of attorney for the trustee company. Alternatively, you may decide to move your superannuation to a retail fund if something happens to yourself or your partner.

# Avoiding STDs – “sexually transmitted debts”

Even if you have been very sensible with your money, most women at some point or another have been affected by poor financial decisions made by their partner. In the worst situations, women can become liable for their partner's financial debts. We call this a Sexually Transmitted Debt (an STD).

STDs, depending on the details of each situation, can actually require you to repay debts of your current or former partner, even if you do not have the benefit of the money or the asset that was associated with the debt.

Here are three of the best ways to avoid STDs.

## **1. Ensure you understand the significance of providing a financial guarantee**

A guarantee is a legally binding agreement to another party (usually a bank) which commits you to repaying someone else's debt (often your partner's debt). That means that if for whatever reason your partner cannot or does not repay that debt, the bank may come to you and require you to repay the debt. It doesn't matter if you never saw the money or you never used the asset, if you signed the guarantee, then you are probably liable for your partner's debts. There may be some exceptions but it is more common that you will remain liable for the debt.

## **2. Ensure you understand your duties as a company director and take them seriously**

If you happen to be a director of a company with your partner, or perhaps you are also a trustee of your SMSF with your partner, then you have duties to that company or trust. That means that you must understand what your duties are, because you may be liable for anything the company or trust does or should have done. It is not an excuse to say that you didn't know what you were signing.

## **3. Take legal advice before signing anything financial which is related to your partner or their business**

If you are concerned about asset protection, then you should consider speaking with a lawyer about how best to 'structure' your wealth and your partner's wealth. In many cases, it may be that only one of you holds risky positions (e.g. as a director or trustee) and that the other one of you holds key assets. If this situation is suitable for your circumstances, it means that you should probably not guarantee loans of your partner, and that you should probably not be a director or a trustee.

# Women, Work and the Law

We all have workplace rights that we need to protect, but women in the workplace often face challenges that do not confront their male colleagues, particularly on the issues of wage disparity and discrimination due to pregnancy and family responsibilities.



# Wage disparity and discrimination at work

## **“Equal pay for equal work!”**

It was not too long ago that women were routinely paid less than men for performing the same work. These days, legislation provides that men and women must be paid equally for the same work and that wages offered for a role cannot discriminate on the basis of the gender of the person performing that role.

Yet wage disparity between men and women still persists, especially in more executive, non-award positions where staff negotiate their salary. The Fair Work Ombudsman outlines steps that employers should take to ensure that there is gender pay equity for their employees, and employers who flout the law can be prosecuted.

## **Pregnancy**

The time when women are most likely to suffer discrimination in the workforce is during their childbearing years.

The Sex Discrimination Act 1984, the Fair Work Act 2009 and other state and territory laws all ensure that women cannot be treated unfairly just because of pregnancy. This includes, for example, that a woman cannot be fired, made to work shorter hours, given more menial tasks or not given training or promotion.

Indeed, it is important for women to know that the law says women have every right to apply for a promotion while they are pregnant, on the cusp of going on maternity leave, or even during maternity leave, and that overlooking a woman for promotion because of any of these reasons alone is illegal in Australia. Many women are sadly unaware of this and miss out on career advancement as a result.

## **Family responsibilities - obligations on employer**

For families with young children to care for, the task of trying to balance work and childcare commitments or caring for ageing relatives more often than not falls to women.

The Fair Work Act says that an employer must assist an employee to achieve a better work and family balance.

If an employee wishes to ask an employer to allow for more flexible work arrangements, the Fair Work Act outlines that the request must be made in writing.

Employers have no obligation to approve the request if they can show, for example, that:

- the new working arrangements requested by the employee would be too costly for the employer
- there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee



- it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee
- the new working arrangements requested by the employee would be likely to result in significant loss of efficiency or productivity
- the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

Employees who have their request for flexible working arrangements refused, can get support from the Fair Work Ombudsman to help resolve the issue.

### **More information**

[Fair Work Ombudsman – gender pay equity](#)

[Fair Work Ombudsman – flexible working arrangements](#)

[Fair Work Ombudsman – workplace discrimination](#)



# About Catherine Henry Lawyers

Many women prefer to consult other women professionals, particularly when it comes to their health and medical needs.

Yet getting the right advice from someone who understands your perspective and needs is just as important when dealing with a host of other issues involving the law.

Catherine Henry Lawyers' team of women lawyers have an impressive range of skills and experience in dealing with many of the legal issues that confront women.

- Family and relationship breakdown
- Medical negligence and health disputes
- Estate planning and wills
- Structuring and business succession
- Retirement and aged care accommodation advice
- Debt recovery
- Discrimination
- Crime and traffic matters

Our team understands the specific issues faced by women in regional and remote Australia. You can trust us to understand and fight for your rights, justice or compensation. We care about your legal issue but also about you. We have a supportive network of other professionals to whom we regularly refer.

Our lawyers are well recognised for their advocacy for women and women's issues as well as their legal expertise. Principal, Catherine Henry, and Senior Associate, Lucy Wilks, have been recognised in the prestigious Doyle's list of NSW's top 16 medical negligence plaintiff lawyers.

We support the advancement of women lawyers and women more broadly. Our firm has signed up to the Australian Law Council's Equitable Briefing Policy which requires signatories to make all reasonable endeavours to brief or select women barristers.

The majority of our staff and executive are women and we have flexible work practices for male and female staff members.

In addition to providing work placements for female law students we also support the University of Newcastle's Empower program for women and women lawyer groups.

To discuss how we can help you visit [www.catherinehenrylawyers.com.au](http://www.catherinehenrylawyers.com.au) or call (02) 4929 3995.