

# Separation under one roof



This fact sheet summarises the Ask LOIS webinar on this topic, presented by Alex Davis on 19 November 2015. This webinar can be viewed for free at [www.asklois.org.au/webinars/past-webinars](http://www.asklois.org.au/webinars/past-webinars).

This factsheet looks at:

- What is separation under one roof?
- What is the impact of separation under one roof
- Proving separation under one roof in Family Law and Centrelink

## What is separation under one roof?

- Relationship has broken down irretrievably
- Intention by at least one spouse to end relationship
- Sufficient implementation of that intention
- Parties continue to live together but separately
- Question of fact in each individual case

## Why do people stay separated under one roof?

- Financial hardship
- Children
- Scared if leave, other will get property
- Domestic violence
- Stubbornness
- Sentimentality
- Functionality (eg, close to work)
- Temporary arrangement
- Arrangement is workable

## What is the impact of separation under one roof?

- Identifying next of kin for will / super
- Impact on Child Support (need to take child support action within 13 weeks)
- Impact on when can file for divorce
- Impact on property settlement time limits for de facto couples
- Impact on Centrelink payments and eligibility
- Impact on immigration / visas

## Separation under one roof in Family Law

### **Family Law Act 1975 (Cth)**

#### **Section 48 - Divorce**

(1) An application under this Act for a divorce order in relation to a marriage shall be based on the ground that the marriage has broken down irretrievably.

(2) Subject to subsection (3), in a proceeding instituted by such an application, the ground shall be held to have been established, and the divorce order shall be made, if, and only if, the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for the divorce order.

(3) A divorce order shall not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed.

#### **Section 49 - Meaning of separation**

(1) The parties to a marriage may be held to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of one only of the parties.

(2) The parties to a marriage may be held to have separated and to have lived separately and apart notwithstanding that they have continued to reside in the same residence or that either party has rendered some household services to the other.



- At least one person makes decision to separate
- Irretrievable breakdown of relationship
- Intention to separate communicated to other person & acted upon
- Impact on time limits:
  - If a married couple separate (including where separated under one roof), they must be separated for 12 months before they can apply for a divorce
  - Once a divorce is made final, the parties have a time limit of 12 months to initiate property proceedings to split any assets or debts in family law
  - For de facto couples, once they have separated (including where separated under one roof) the parties have a time limit of 2 years from the date of separation to initiate property proceedings to split any assets or debts in family law

#### Evidence required in family law for divorce where separated under one roof

##### Sole application for divorce

- Affidavit of applicant
- At least one supporting affidavit of person who can assist proving separated

##### Joint application for divorce

- Affidavit of applicant and respondent
- Affidavit of supporting person prudent but not required

##### Proving separation under one roof for family law:

- No set formula
- Show change in marriage / overt separation
- Examples:
  - Sleeping arrangements
  - Reduced shared activities
  - Household duties
  - Financial arrangements
  - Who else knows
  - See the below factors used by Centrelink for further ideas

#### What goes in affidavits?

##### Supporting persons:

- Observations of living arrangement, social activities and when/how found out separated

##### Applicant:

- Date of separation
- How 'separated' (see Centrelink list below for further ideas) with descriptions
- Why still living under one roof
- Intentions of changing situation
- Government departments informed

##### **Case study:** *Marriage of S & T Batty* (1986) 10 Fam LR 688

- H & W married 15 yrs
- W files for divorce saying last year they started sleeping in separate beds & stopped having sex & she stopped cooking, cleaning & washing for him
- W's friend filed an affidavit saying when they visited the house, it appeared there were separate sleeping arrangements
- When the matter was being heard, H turned up with a lawyer disputing the day W wrote as the separation date
- Held no separation at date W stipulated



**Did you know?** When counting a separation date, you can get back together for up to 3 months without having to reset the separation period entirely.

For example, if Bob & Maggie are married. Bob tells Maggie it's over in **January 2015**. They start sleeping in separate rooms in the same house & living separate lives. In **September**, they reconcile, move back into the same bed & try to make it work. Two months later in **November**, it's all over again. They can file for divorce 12 months + 2 months from initial separation (March 2016) because their reconciliation period was less than 3 months.

### Centrelink: 'Member of a couple'

- Whether someone is a member of a affects their rate of payment
- Coupled rate is lower, plus partner's income and assets further reduce rate of payment
- Effects eligibility for Child Support
- Tell Centrelink if circumstances change within 14 days to avoid a debt

### How does Centrelink look at separation under one roof?

- Same criteria used to see if 'member of a couple'
- Whole picture - no set formula or checklist
  - Relationship completely broken down; and
  - One or both parties form the intention to sever or not resume the relationship and act on that intention
- Five indicating factors looked at under *Social Security Act 1991* (Cth) section 4(3)
  1. Financial aspects of relationship
  2. Nature of household
  3. Social aspects of relationship
  4. Presence of sexual relationship
  5. Nature of commitment

The following are the sorts of questions Centrelink will consider in making a decision whether a couple are separated under one roof (this list is also useful of factors to consider if drafting an affidavit for a divorce):

#### 1. Financial aspects

- Home jointly owned?
- Bills split/shared?
- Accounts joined?
- Stated as couple on tax?
- Beneficiaries in will/super?
- Initiated property settlement?

#### 2. Nature of the household

- Parties share living spaces?
- If property rented, is one party regarded boarder/sharer?
- Do parties do own shopping, cooking, cleaning or have a roster/similar?
- How care of children shared?

#### 3. Social aspects

- Family friends aware of relationship breakdown?
- Parties go out socially together?
- Parties invited places as a couple?
- Holidays/special occasions together?
- Continuing to hold selves out as a couple?
- Any AVOs restraining contact?
- Cultural/religious reasons for suppressing separation?

#### 4. Presence of sexual relationship

- Has sexual relationship ceased?



- Any new sexual relationships with other people?

#### 5. Nature of commitment

- Parties withdrawn intimacy/companionship?
- Parties have joint plans for future?
- Parties share information/communicate?
- Parties would help each other in crisis?
- Parties would assist other if fell ill?
- Parties taken action for divorce?

#### Evidence Centrelink requires

- Need proof separated permanently and indefinitely
- Fill out form
- Centrelink may interview one or both people
- Centrelink may investigate further
- Statutory declaration from one or more independent persons (those of friends, family not given much weight) may be required
- Supporting documentation or additional evidence may be required
  - Should take into consideration where domestic violence, culturally diverse backgrounds or potential of 'outing' for LGBTIQ clients

#### Appealing Centrelink determination

- Appeals can be done over the phone, in person or using Centrelink's appeal form
- Client's should ensure they receive a receipt number for lodging the appeal
- Different stages of appeal may have differing time limitations
- Refer to Welfare Rights Legal Centre for advice: **9211 5300** or **1800 226 028**

#### What if a person wants the other person to leave the home?

1. AVO with exclusion order
  - Reasonable grounds to fear
  - Circumstances to indicate necessary & appropriate to protect person's safety
1. Exclusive/sole occupancy order through Family Law Courts

#### Further resources

- Guide to Social Security Law:
  - [2.2.5.30 – Determining separation under one roof](#)
- Family Law Courts website
  - Factsheet: [separated, but living under one roof?](#)
- Ask LOIS webinars & factsheets:
  - [Divorce](#)
  - [Centrelink & Domestic Violence](#)
  - [Does she have to leave? Women's rights to stay in the home after violence](#)