

Can I use documents disclosed in my family law matter for other purposes?

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In family law proceedings, parties are required to provide full and frank disclosure. This often includes private financial and personal information, such as bank statements, tax assessments and returns, asset valuations, psychological and/or medical reports, school reports, and more.

Documents that you receive or produce in family law proceedings must **only be used for the purposes that they were provided**, not for any other ulterior purposes. This is a longstanding legal practice called the Harman undertaking and applies to most court proceedings (e.g. criminal law), not just family law.

What is the Harman undertaking?

The Harman undertaking takes its name from the English case of *Harman v Secretary of State for Home Department* [1983] 1 AC 280. It was expressed as an implied undertaking in Australia by the High Court in the case of *Hearne v Street* (2008) 235 CLR 125 as follows:

> *'Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence.'*

It is considered an 'implied' undertaking because it is an unspoken promise to the court that you will not use the documents outside of that court case, rather than you giving an express promise.

An ulterior purpose generally refers to a purpose not related to the litigation/proceedings for which the documents were produced. The Harman undertaking is intended to protect parties' confidentiality, encourage full and frank disclosure in litigation and prevent the use of the court process for ulterior motives.

When does the Harman undertaking apply in family law proceedings?

As expressed in *Hearne v Street*, the types of documents that the Harman undertaking applies to include:

- documents inspected after discovery;
- answers to interrogatories;
- documents produced on subpoena;
- documents produced for the purposes of taxation of costs;
- documents produced pursuant to a direction from an arbitrator;
- documents seized pursuant to an *anton piller* order (that is, a search order allowing the applicant's lawyers to enter property and seize evidence where there is a risk it may be destroyed or tampered with)
- witness statements served pursuant to a judicial direction;

The undertaking may also apply to documents that are produced voluntarily as part of court proceedings, where those documents could have been obtained compulsorily had they not been voluntarily provided.

The undertaking applies to **anyone who receives documents** that are part of family law proceedings, who is aware that they were produced as part of court proceedings. So, third parties such as witnesses and experts also have this obligation.

Are there any exceptions to the Harman undertaking?

Yes. You can still disclose these documents to your lawyer for the purposes of the court proceedings because your lawyers will themselves also be bound by the undertaking.

Further, the Harman undertaking generally no longer applies when the documents are because the document will then be accessible to the public.

There are also situations where a person who holds documents subject to the Harman undertaking can be compelled to produce them in another legal proceeding. In this situation, the Harman undertaking will yield to the requirements of court processes and legislation.

It is important to remember, however, that if none of the above applies, the undertaking will still continue even if your family court matter concludes. However, in some circumstances, you can be released from the Harman undertaking.

Release from the Harman undertaking

Only the court can release you from the Harman undertaking, not other parties. If you want to use the documents for another purpose, you will need to seek permission from the court to which the obligation is owed.

A court will have discretion whether to release you from the undertaking or not. It is required to consider whether special circumstances exist that justify a release. The court should be satisfied that there is a *'special feature of the case which affords a reason for modifying or releasing the undertaking and is not usually present'*.

While there is no exhaustive list of factors the courts may consider in determining whether special circumstances exist, it includes:

- the nature of a document;
- the circumstances in which the document came into existence;
- the attitude of the author of the document and any prejudice of the author;
- whether the document pre-existed litigation or was created for that purpose and therefore expected to enter the public domain;
- the nature of the information in the document (in particular, whether it contains personal data or commercially sensitive information);
- the circumstances in which the document came into the hands of the applicant for leave;
- the likely contribution of the document to achieving justice in the second proceeding.

Reference: *Springfield Nominees v Bridgelands Securities* [1992] FCA 720.

What happens if I breach the Harman undertaking?

If you breach the Harman undertaking:

- you may be found in contempt of court (an offence which could result in you being fined or even imprisoned);
- you may be ordered to pay the other party's legal costs; and/or
- the court may strike out parts of your case or issue an injunction requiring you to do something, or not do something, before your case can continue.

Breaches of the Harman undertaking are taken very seriously because of the personal nature of the information that is often disclosed in court proceedings. Therefore, it is important that you do not use documents disclosed in your family law matter for any other purposes.

How a family lawyer can help

Smith Family Law can advise you as to your disclosure obligations and discuss potential options to resolve your matter. We recommend obtaining professional advice early to make sure you have all the information you need to negotiate a fair outcome in

your family law matter.

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