Vexatious litigation in family law and coercive control: Ways to improve legal remedies and better protect the victims

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The Victorian Royal Commission into Family Violence suggested that vexatious litigation may share similar characteristics with violent behaviour, namely coercion and control. In this article, through drawing on the insights of a sample of family law practitioners and the narrative of a domestic violence survivor, we seek to explore how vexatious litigation in family law matters may contain elements of such violence. We also see how vexatious litigation can consume significant court resources, and cause financial and emotional hardship upon the other party. Noting that there are more vexatious litigants in the Family Courts than all other jurisdictions in Australia combined, we examine whether the current family law legislation and family court processes adequately protect the other parties, and assist lawyers in dealing with this type of litigator. We also present a number of legislative and non-legislative suggestions for how responses could be improved, with the caveat that any change to better protect parties from vexatious behaviour must maintain a balance with allowing access to justice.

INTRODUCTION

The right to seek legal redress in court is a key feature of democratic societies governed by the rule of law.[1] In most court systems, there are still a small number of people who abuse this right by repeatedly bringing vexatious litigation (VL) against the same person or targeting different people.[2] In this article we see how vexatious litigation and intimate partner violence (IPV) may share both coercion and control. Through the observations of a sample of legal practitioners and one IPV survivor's experiences of vexatious litigation, we look at the types of VL, its effects, the adequacy of family law legislation and court processes to protect the other parties and make suggestions for improvement.

VEXATIOUS LITIGATION AND COERCIVE CONTROL

Recent research suggests that vexatious litigants may share similar characteristics with domestic violence offenders, namely coercion and control.[3] Examples of these behaviours include: repetitively instigating proceedings, or trying to take control during already existing proceedings, by applying for access to children, property and pets, and refusing to mediate, accumulating court costs.[4] As Behrens points out:

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[1] Law Reform Committee (LRC), Parliament of Victoria, *Inquiry into Vexatious Litigants Final Report* (2008) 1–6, 111–137, 139–152.

[2] N Kirby, "When Rights Cause Injustice: A Critique of the Vexatious Proceedings Act 2008 (NSW)" (2009) 31 *Sydney Law Review* 163.

[3] Victoria, Royal Commission into Family Violence (VRCFV), *Summary and Recommendations* (2016) 19.

[4] P Parkinson, J Cashmore and J Single, "Post-separation Conflict and the Use of Family Violence Orders" (2011) 33 *Sydney Law Review* 73; M Kaye, J Stubbs and J Tolmie, "Domestic Violence, Separation and Parenting: Negotiating Safety Using Legal Processes" (2003) 15 *Current Issues in Criminal Justice* 73.

> Women whose former partners engage in controlling violence may find the family law system can be used as another tool to attempt to continue to control and abuse them. In extreme cases, this can involve multiple applications to court on the most trivial of matters.[5]

One of our aims in this article is to explore the various types of vexatious litigation that take place in family law matters, looking at how coercion may play a role and at the possible effects both on the legal system and the other (non-initiating) party. Men are statistically more likely to be perpetrators of violence and also to be vexatious litigants, and women are more likely to be the other party.[6] Accordingly, this article seeks to give a "voice" to the female non-initiating party.

CURRENT FAMILY LAW RESPONSE

A vexatious proceedings order is available under s 102QB(2) of the *Family Law Act 1975* (Cth) (FLA). Part XIB of the FLA covers vexatious proceedings, with s 102QG(4) providing that, once such an order is made, the court may only grant leave if it is satisfied the proceedings are not vexatious, creating a positive obligation on the court to turn its mind to preventing vexatious litigation. The following three tests to establish vexatious proceedings set by Justice Roden in *Attorney-General v Wentworth*[7] are reflected in that sub-section, s 102QD of the FLA and other Commonwealth legislation:

(1) instituted with the intention of annoying or embarrassing the person against whom they are brought;

(2) brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise;

(3) irrespective of the motive of the litigant, the proceedings are so obviously untenable or manifestly groundless as to be utterly hopeless.

The Federal Circuit Court also has the power to summarily dismiss vexatious proceedings under s 17A of the *Federal Circuit Court of Australia Act 1999* (Cth) and r 13.10 of the *Federal Circuit Court Rules 2001* (Cth). For s 17A, the Court must be satisfied that the other party has no reasonable prospect of successfully defending the proceeding or part of the proceeding, and this need not be hopeless or bound to fail. Similarly, under r 13.10, the Court may order that a proceeding be stayed, or dismissed generally or in relation to any claim for relief in the proceeding, if satisfied that there is no reasonable prospect of success, the proceeding is frivolous or vexatious, or an abuse of process.

Section 118 of the FLA is another commonly cited provision in this context as it allows judges or a majority of judges in a proceeding to prevent, terminate, dismiss or make other orders considered just in relation to vexatious proceedings, including preventing a person from instigating proceedings. In addition, under s 114 of the FLA, injunctions can be issued to protect a party from threatened abuse and mental harm resulting from such proceedings, and to prevent undue interference by one party with the other, or the children. *In Marriage of Wilmoth*[8] is a leading case that demonstrates the potential for that section to be construed liberally, including to protect a party from abuse or threatened physical or mental harm, and also to prevent undue interference with a party or the children. In that case, at the final hearing of the wife's application – while there were nine other applications from the husband before the Family Court for determination – the Judge stated that allowing any further proceedings by the husband regarding access to the children would be plain abuse of the process of the Court. The husband was restrained from instituting any application unless he obtained the leave of the Court.

[5] J Behrens, "Women and Family Law", in P Easteal (ed), *Women and the Law in Australia* (LexisNexis, 2010) 195.

[6] According to VRCFV, n 3, 7 and LRC, n 1, 34, these women are statistically more likely to be victims of violence.

[7] *Attorney-General v Wentworth* (1988) 14 NSWLR 481.

[8] *In Marriage of Wilmoth* (1981) 51 FLR 62; 6 Fam LR 807; [1981] FLC 91-030.

As we discuss later though, this kind of ruling is a rarity. It would appear though that despite these legislative provisions, the FLA is not effective at limiting VL – the Family Court has the highest rate of vexatious litigants compared to any other jurisdiction in Australia,[9] with three times the number of all other superior courts combined.[10]

Recognition of such a high occurrence of VL has translated into recommendations that the Court should be more robust in declaring a party to be vexatious unless the best interests of the child require otherwise.[11] Our other primary aim in this article then is to further examine this issue and assess the adequacy of the legislative response and the existing family law practitioners' tools and methods to manage and/or prevent VL. We are also interested in how these could be improved.

METHODOLOGY

To gain insight into family law practitioners' experiences and observations of VL, we advertised a survey in mid-2016 through the women's legal centre e-network and among several family law firms in the Canberra region. The survey questions were open-ended, seeking the lawyers' experiential knowledge concerning the nature and effects of VL behaviours and their assessment of the existing legal response and ideas for improvement. Ten respondents completed the survey. Eight had observed a total of 42 family law-related proceedings where they believed vexatiousness was present. The other two lawyers did not specify how many vexatious proceedings they had observed as they each had over 40 years' experience of litigation.[12]

Responses were compiled and analysed thematically[13] to identify the most relevant issues. These are reflected in the structure of this article.

In addition to the survey respondents, "Eleanor" recounted her story of escaping domestic violence and a vexatious ex-partner, and her attempts to get redress from the justice system. She was one of several women who had contacted one of the authors in the years preceding the research asking to be "heard" in any relevant research projects. She wrote:

> The voice of Eleanor has enabled me to speak on the behalf of those who have no voice who are unable to fight for change as they are fighting too hard to survive each day.

The inclusion of this experiential narrative was an ideal additional methodology as it provides a voice to women who have been survivors of both family violence and vexatious litigation.[14]

CONTROLLING BEHAVIOURS

Controlling behaviours can be "indirect, subtle and psychologically traumatic, involving threats of harm, humiliation and insults, and financial or legal abuse".[15]

Family violence is often characterised by one party attempting to control the other party and stalking by one party attempting to have contact with the other against their wishes. Similarly, a key feature of at least some vexatious litigation is an attempt to control the other party or maintain contact

[9] G Lester and S Smith, "Inventor, Entrepreneur, Rascal, Crank or Querulent? Australia's Vexatious Litigant Section 75 Years On" (2006) 13 *Psychiatry, Psychology and Law* 17.

[10] M Hosiosky, "Vexatious Litigants and Family Law Proceedings in Australia", *Family Law Express*, 29 July 2014 <http://www.familylawexpress.com.au/family-law-brief/legal-proceedings/vexatious-litigant/vexatious-litigants-family-law-proceedings-in-australia/2756/#fn-2756-30>.

[11] M Barnett, "For the Sake of the Kids" (1995) 67 *Australian Law Reform Commission Reform Journal* 54.

[12] A small sample size is adequate for this study as we were not looking at issues of frequency, causality, or correlation that would require a larger number of respondents for validity and reliability.

[13] See C Grbich, *Qualitative Data Analysis: An Introduction* (Sage, 2012) 12, 32; G Guest, A Bunce and L Johnston, "How Many Interviews Are Enough? An Experiment with Data Saturation and Variability" (2006) 18 *Field Methods* 59. See further R Kaspiew, "Empirical Insights into Parental Attitudes and Children's Interests in Family Court Litigation" (2007) 29 *Sydney Law Review* 131.

[14] Both the survey and victim narrative methods were approved by the University of Canberra Human Ethics Committee: HREC 16-20.

[15] VRCFV, n 3, 8.

with them through persistent litigation. It appears that some vexatious litigants appear to be using the system as a vehicle for control and harassment of the other party.[16]

Indeed, litigious actions may be attempts by the man to regain control as the relationship pre-separation may have been marked by other controlling behaviours:[17]

> I left him that Saturday morning and his last words to me as I drove out of the drive way were "I'm going to take you for everything you've got". He tried and the system enabled him in many ways … It had never been about the children … it was about using the system to be able to wield his power over me. And the system gave it to him [*Eleanor's narrative*].

This pattern of re-exerting control through bringing action was observed by several respondent lawyers; each suspected that IPV had been an antecedent in almost all the VL cases they had observed:

> Unneeded Court proceedings were used to cause the father additional legal expenses and prolong court proceedings. Additionally the orders being sought were not reasonable [*Respondent 3, male, 1–3 years' experience*].
>
> Witnessed proceedings issued against various parties associated with the non-vexatious party, and that the vexatious party was trying to control family time and financial assets, including using children as hostages [*Respondent 9, gender unspecified, 1–3 years' experience, violence observed in almost all cases*].
>
> They are a form of control. Control = violence [*Respondent 8, female, 1–3 years' experience, violence suspected in both cases*].

Using persistent litigation

Respondents had observed the following proceedings or applications that they suspected were vexatious:

- trying to gain access to a child, where it was suspected the person had sexually abused them;
- using the proceedings to gain the "upper hand" regarding custody of the child;
- trying to stall property settlement and hiding employment earnings;
- over 80 unsubstantiated applications being made by the same person;
- numerous unmeritorious applications;
- endless appeals, filing, ongoing delays and aborted final hearings;
- continuous rejection of just and equitable property settlement offers and making the client "fight" for settlement;
- persistent application for time with the children when psychologists advised against it;
- multiple applications to precipitate a mental health episode to benefit the father's application for residence.

The last six illustrations in the list have a common trait – repetition:

> I was the solicitor for the mother for over six years. During that time we went to three trials and three contravention hearings all filed by the father. We eventually filed a vexatious litigant application which we were not successful in, notwithstanding the sheer volume of litigation over the past six years… [In another case] the father made approximately 20 applications varying from contraventions to urgent applications to have the child removed, with no basis … our client was successful in the vexatious application and he was injuncted from filing another application without leave of the court [*Respondent 2, female, over 10 years' experience, violence suspected in both cases*].
>
> The vexatious party issued over 130 proceedings against various parties including the child's school, the wife's employer, her friend, and the wife. Complaints were also made about the wife to her professional body, and to her psychologist's professional body [*Respondent 6, female, more than five years' experience, violence suspected in the one case*].

These examples also included litigation without basis:

[16] Women's Legal Service Victoria (WLSV), Submission to the Victorian Law Reform Committee, *Inquiry into Vexatious Litigants* (July 2008) 1.

[17] A Ferrante, D Morgan, D Indermaur and R Harding, *Measuring the Extent of Domestic Violence* (Hawkins, 1996) 67.

> [Case 1] involved both property and children. The father brought many applications against the mother to deny her time with the children, on no objectively reasonable evidentiary basis. In [case 2] unneeded court proceedings were used to cause the father additional legal expenses and prolonged court proceedings … the orders being sought were not reasonable [*Respondent 3, male, 1–3 years' experience, violence suspected in almost all ten cases*].

Using cross-examination

In Australia people have the right to be represented by counsel,[18] but no right to be provided with counsel at the expense of the public.[19] This means that in situations where violence is a factor, or where controlling behaviours are suspected in litigation, survivors may be forced to deal with their self-represented alleged perpetrators directly. Eleanor's re-traumatisation exemplifies that these protections are not sufficient, describing the ordeal of being crossed by her former violent partner:

> I was sick to discover on day one of the hearing that he had become a self-litigant and was going to be directly cross-examining me … That day I stood on the stand and the Federal Court allowed him to directly cross-examine me. This was a massive slap in the face. How could they give my rapist his power back over me? He asked questions I was forced to answer … Having your rapist stand only meters from you asking intimate and personal questions about your relationships, parenting, social media accounts, every aspect of your personal life – is invasive, disempowering and cruel. This person does not deserve the right to directly cross-examine their victim [*Eleanor's narrative*].

Currently, the only protections are the rules of evidence,[20] the judicial officer, the legal representation involved and the ethical rules they are bound by.[21]

> The most harmful and unstoppable conduct is by a party who is representing him/herself, cross-examining the other party. Sometimes there is a sense of glee that is perceived by those in the court room. Yet so long as the questions are on relevant matters, such cross-examination can be suspended to allow the other party to regain composure, but it cannot be stopped until it becomes pointless or repetitive [*Respondent 1, male, over 40 years' experience*].

One respondent reported that self-represented litigants appear to be on the increase, and that in some instances the justice system may not have sufficient protections for already traumatised parties:[22]

> Self-represented litigants are an increasing feature with some unwelcome outcomes. First, there is cross-examination of the other party, which must be a hurtful and humiliating experience even if the questions are appropriate at law … There is a perception that Judges favour them because the Judges are seen to explain things to them and that way appear to be favouring [them] … The self-represented party is not incurring the cost of [their] case, whereas the other side is facing high costs. [They] are often self-assured, confident and successful. They conduct themselves from a position of strength. I cannot think of a way to prevent these consequences [*Respondent 1, male, over 40 years' experience*].

EFFECTS

Emotional costs

VL can be very distressing for the other party.[23] Respondents to the survey had observed a plethora of negative effects including: serious psychological stress,[24] increased legal costs,[25] children being

[18] *R v Dietrich* (1992) 177 CLR 292; 64 A Crim R 176.

[19] *McInnis v The Queen* (1979) 143 CLR 575; P Fairall, "The Right Not to be Tried Unfairly Without Counsel: Dietrich v The Queen" (1992) 4 *Bond Law Review* 1.

[20] See *Family Law Act 1975* (Cth); *Evidence Act 1995* (Cth)

[21] See, eg, *Legal Profession Uniform Law Australian Solicitor's Conduct Rules 2015*, rr 3, 5, 19, 26, 29, 33.

[22] M Robertson, J Giddings, "'Informed Litigants with Nowhere to Go': Self-help Legal Aid Services in Australia" (2001) 26 *Alternative Law Journal* 184.

[23] WLSV, n 16, 1.

[24] Respondent 1, male, over 40 years' experience; Respondent 2, female, over 10 years' experience; Respondent 3, male, 1–3 years' experience; Respondent 5, female, five years' experience; Respondent 6, female, more than five years' experience; Respondent 8, female, 1–3 years' experience.

exposed to harmful environments,[26] feelings of depression and oppression,[27] hopelessness and despair,[28] triggering of mental health episodes,[29] and a loss of faith in the justice system.[30]

> He uses extremely long emails to recount telephone conversations the parties have about the child. Essentially recreating the content to benefit him. Very intimidating [*Respondent 9, gender unspecified, 1–3 years' experience, violence observed in almost all cases*].

> The litigation was conducted as a way of causing stress and anxiety to the wife. Particularly given the vexatious party targeted those close to the wife. It cost all parties a considerable amount in legal fees, little of which will be recovered given the vexatious litigant is now bankrupt [*Respondent 6, female, 5–10 years' experience, violence suspected in the one case*].

Respondent 5 reported that "the other party is affected much the same as the very worst domestic violence. They often lose their employment, can't engage lawyers, and doubt their sanity. They are mentally distressed and often get physically sick continually. It's horrible."

Eleanor similarly explained that "[the spouse] had effectively exhausted me emotionally physically and financially, and had used every system at his disposal to inflict as much trauma and pressure on me that he could." This was epitomised by the effects of cross-examination:

> I was able to identify [this] as a major flaw and obstacle in my recovery from trauma … As I stood there the flashbacks of him raping me, of violently kicking me with his steel capped boots, him screaming at me that he could not stand the smell of me. This was all I could hear. His questions to all around would have seemed standard or very mildly intrusive, but for me standing there being forced to answer him each time he spoke to me, was soul wrenching.
>
> I ran from the room, hyperventilating consumed in trauma. I could not breathe, I could not think, I could only feel him all around me. His voice in my head, his hands around my throat his complete hatred of me. I was saturated in him. Again … and the Judge allowed it to happen [*Eleanor's narrative*].

Legal costs

By reducing finances, VL may translate into limited access to support, counselling, and legal advice for the other party:

> It is a particularly insidious method of control. It can be used to interrupt the ability to earn a living, require them to be in Court on a regular basis, force them to incur legal costs, which leaves them in financial distress. [*Respondent 5, female, five years' experience, violence suspected in all five cases*].
>
> They are using the court processes to continue the harassment emotionally and financially with excessive legal bills … Often they are self-represented so they are not spending money on their garbage applications but the other party still has to receive legal advice and defend the application [*Respondent 2, female, over 10 years' experience*].

Practitioners may stop acting for the other party as the vexatious litigator sometimes targets threats towards legal counsel:

> In one of the cases I was aware of, five separate practitioners had refused to act for the wife because of this. The challenge is that the notion of everyone having a right to a day in Court makes it impossible to deal with this [*Respondent 5, female, five years' experience, violence suspected in all five cases*].

[25] Respondent 1, male, over 40 years' experience;; Respondent 3, male, 1–3 years' experience; Respondent 5, female, five years' experience.

[26] Respondent 1, male, over 40 years' experience; Respondent 3, male, 1–3 years' experience.

[27] Respondent 4, female, 5–10 years' experience.

[28] Respondent 3, male, 1–3 years' experience.

[29] Respondent 2, female, over 10 years' experience.

[30] Respondent 3, male, 1–3 years' experience.

LIMITS IN PROTECTION OF OTHER PARTIES

Despite the important precedent of *In Marriage of Wilmoth*, another case – *Marsden v Winch*[31] –exemplifies the high threshold that is required to declare a litigant as vexatious. This matter involved litigation from 2004 to 2013, where a father was repeatedly denied contact with his child on the basis of unacceptable risk, due to allegations of public indecency involving young children. When considering whether the father should be declared a vexatious litigant, the trial judge noted that as a result of the persistent litigation, the mother, as the primary caregiver, had experienced substantial psychological impact.[32] The trial judge concluded that in light of the effect the proceedings had on the respondent, this case was one of the few with clear evidence that a finding could be made that the applicant was vexatious under s 118 of the FLA.

In appealing that decision, the previous proceedings were assessed and because none of those proceedings were declared to be vexatious, this informed the view that the trial judge erred in declaring the present proceedings as vexatious. Those orders were set aside; the appeal against the substantive order was dismissed while the appeal against the s 118 order was upheld. Therefore, although the order of no contact remained after this case, it stands that the father was not precluded from initiating further proceedings. Decisions like this may act as precedence and preserve unjust decisions into the future, and equate to a further lack of protection for victims.

Several of the lawyer respondents mentioned similar deficiencies that they had encountered with the existing legal framework:

> There is legislation in place to deal with vexatious litigants, but it is not an easy process to obtain an order and will often incur significant legal fees to obtain … The vexatious party has probably already cost the non-vexatious party considerable time and sums of money before an order is able to be made [*Respondent 6, female, 5–10 years' experience, violence suspected in the one case*].

> It is extremely rare to see a display of behaviour that proves a vexatious intent … Save for vitriol in affidavit or oral evidence, there is rarely enough proof that the underlying motive was vexatious. I have sometimes felt that a clever manipulative litigant will hide any vexatious intent, but the thrust of his or her evidence can be more devastating than in cases of overt displayed hostility. … Rarely is it identified and mentioned before judgment. Sometimes it is put in cross-examination, but that is usually denied. Most often it is at the stage of a costs application. By that time the applicant for costs can find support for such an argument from the judgment itself. So there is a degree of boot-strapping to sustain a submission that the other party brought the unmeritorious application ″vexatiously″. Until findings of actions that are consistent with vexatious conduct are pronounced, it will be difficult for a judge to do anything in the course of the hearing, as any adverse finding would probably risk an application for recusal [*Respondent 1, male, over 40 years' experience*].

Respondents reported negative or ambivalent legal experiences in trying to help the non-vexatious party. These included judges reportedly not following the legislation; failing to make vexatious litigant orders;[33] the difficulty in having a party declared as a vexatious litigant;[34] the costs involved in obtaining an order making it financially unviable to apply for such orders;[35] and the inability of the courts to communicate with each other, resulting in litigants having to be declared as vexatious across federal and State and Territory jurisdictions.[36] Further, some pointed out that the Court is unable to prevent the vexatious litigant from conducting proceedings, particularly in matters concerning children, as the best interests of the child are paramount[37] and are also a separate consideration to

[31] *Marsden v Winch* (2013) 50 Fam LR 409; [2013] FamCAFC 177.

[32] *Marsden v Winch* (2013) 50 Fam LR 409; [2013] FamCAFC 177, [82].

[33] Respondent 7, female, over 20 years' experience.

[34] Respondent 3, male, 1–3 years' experience.

[35] Respondent 1, male, over 40 years' experience.

[36] Respondent 6, female, more than five years' experience.

[37] *Family Law Act 1975* (Cth) s 60CA.

vexatiousness:[38]

> The legal system cannot entirely bar a litigant where children are involved. The best interests of the child are paramount and the Court is forced to take note of allegations that directly impact on the child [*Respondent 10, female, over 20 years' experience*].

SUGGESTIONS TO BETTER PROTECT THE NON-VEXATIOUS PARTY: LEGISLATIVE

Marsden v Winch, as discussed above, demonstrates that even in the small percentage of cases where a vexatious litigant is declared, and a profound effect on the other party is acknowledged, the legislation at times still does not provide adequate protections. Although the right to appeal is reserved for all individuals, this example suggests that the right should be controlled proportionately when there is a risk of harm to the other party; and that where it is clear that a party has experienced severe mental health issues or suffering from the litigation, that legislative safeguards should be improved or better used to prevent litigation and further appeals.[39] We note however that any proposed reform must maintain a balance between allowing access to justice[40] and protecting vulnerable parties from vexatious behaviour.[41]

Lowering the standard to declare a vexatious litigant

One potential reform pathway was the *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015* (Cth) which proposed a new s 45A, to replace s 118 of the FLA, to clarify and modernise the powers of courts to summarily dismiss unmeritorious applications.[42] This Bill did not proceed due to the Parliament's prorogation on 17 April 2016, and dissolution on 9 May 2016. Subsection 45A(3) would have lowered the standard set by previous case law by empowering the court to dismiss the proceedings, and that they need not be hopeless or bound to fail. Subsection 45A(4) also would have empowered the court to dismiss all or part of the proceedings if they are frivolous, vexatious or an abuse of process.

Another potential area for statutory change is to introduce provisions that lower the standard for a person to be declared as vexatious *specifically* where a history of violence exists or the vexatious-like behaviour is such that it can be considered coercive or violent in itself, with a FLA amending provision that recognises VL in exceptional circumstances as an expression of violence or coercive control. This would be based on a "precautionary principle" as in environmental law, where it is argued that action should be taken to protect the environment and biodiversity, and that a lack of evidence that harm has or will be done cannot justify inaction.[43] Precaution is justified, as once the harm is done, it cannot be undone, or it is extremely difficult to reverse.[44] Such an approach is also supported by utilitarian theory.[45]

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[38] P Easteal and D Grey, "Risk of Harm to Children from Exposure to Family Violence: Looking at How it is Understood and Considered by the Judiciary" (2013) 27 *Australian Journal of Family Law* 59.

[39] R Alexander, "Moving Forwards or Back to the Future? An Analysis of Case Law on Family Violence Under the Family Law Act 1975 (Cth)" (2010) 33 *University of New South Wales Law Journal* 907.

[40] S Rares, "Is Access to Justice a Right or a Service?" (2015) 89 ALJ 777.

[41] P Bowden, T Henning and D Plater, "Balancing Fairness to Victims, Society and Defendants in the Cross-examination of Vulnerable Witnesses: An Impossible Triangulation?" (2014) 37 *Melbourne University Law Review* 539. The High Court has stated that a person's right to unimpeded access to the courts should only be taken away by express enactment (*Coco v The Queen* (1994) 179 CLR 427; 72 A Crim R 32, applying *Raymond v Honey* [1983] 1 AC 1).

[42] Explanatory Memorandum, *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015* (Cth).

[43] See, eg, R Rajepakse, "Perspectives on the Precautionary Principle edited by Ronnie Harding and Elizabeth Fisher" (2000) 15 *Asia Pacific Journal of Environmental Law* 197; P Mossop, "The Potential Use of the Precautionary Principle in Domestic Litigation" (1997) 1 *Australian Environmental Law News* 21.

[44] Rajepakse, n 43; Mossop, n 43.

[45] Mirko Bagaric, "A Utilitarian Argument: Laying the Foundation for a Coherent System of Law" (2002) 24 *Melbourne University Law Review* 163.

Further, the precautionary approach is consistent with the eggshell skull rule in criminal law, in that the survivor should be taken as (s)he is found.[46] For example, a traumatised survivor of violence with a low income may have less tolerance and ability than someone of a different background or circumstances to deal with a vexatious party. The focus shifts to the hardship caused to the non-vexatious party.[47]

Adding vexatious litigation to s 60CC

To address the underlying assumption that harm caused to one parent is considered a separate issue to the best interests of the child (or, paradoxically, that the perpetrator parent having involvement with the child supersedes that harm), vexatious behaviour could be considered as a part of s 60CC(2)(b), allowing the court to take into consideration any effect that the litigation has on the child.

> This is not about stopping parents from seeing their children … it is not about stopping them from having the right to cross examine … it is about protecting victims of violence in order to assist them to recover and heal from their trauma and be the best parents they can be for their children [*Eleanor's narrative*].

If this change was made, in considering the best interests of the child, the court could take into account the indirect effects of the vexatious behaviour upon the victim-parent's parenting ability and therefore on the child. This at the least would act as a deterrent for litigants in cases involving children. By including a consideration of vexatiousness in the legislation, an active protection is put in place whereby courts can take action to prevent parties from coercive and controlling behaviour within the justice system.

Reform of cross-examination by self-represented litigants

> There are currently clauses that allow a judge to use their discretion as to whether this cross-examination occurs. This is not sufficient … real law changes need to happen. This man did so many cruel and hurtful things to me, criminal events … we need the law to firmly state that this should never happen [*Eleanor's narrative*].

Indeed, the FLA could be amended to introduce a provision that prohibits cross-examination by a self-represented party where violence is suspected.[48] However, the requirement should not be for violence to have to be *proven* since it is an acknowledged problem that violence is inherently difficult to prove. As with the willingness to accept some vexatious litigants in exchange for an open democratic system, a similar trade-off with a lack of corroboration could be accepted for the number of individuals it would protect. This is again consistent with the precautionary principle – the absence of evidence showing violence should not justify a lack of protection or action.

Legal representation for non-vexatious parties could be appointed for the purpose of cross-examination only, or for any procedure that includes direct contact with the vexatious party. In this way, victims might be better protected from perpetrators' exertion of control, which can manifest in ways in addition to face-to-face contact, including by telephone or videoconference during cross-examination.[49]

Another way that is used in Norway to preclude cross-examination by a self-represented party is to have the cross-examination conducted and video-recorded in advance of the trial by a suitable third

[46] C Thompson, "Vexatious Litigants – Old Phenomenon, Modern Methodology: A Consideration of the Vexatious Proceedings Restriction Act 2002 (WA)" (2004) 14 JJA 279.

[47] Thompson, n 46.

[48] Bowden, Henning and Plater, n 41; A Cossins, "Is There a Case for the Legal Representation of Children in Sexual Assault Trials?" (2004) 16 *Current Issues in Criminal Justice* 160; The Honourable Justice Margaret Wilson, "Expert Evidence, Self-represented Litigants and the Evidence of Children" (Speech delivered at the Queensland Industrial Relations Commission, Brisbane, 2 September 2005) [2005] *Queensland Judicial Scholarship* 65; I Barker, "The Dangerous Art of Cross-examination" (2013) 84 *Bar News: The Journal of the New South Wales Bar Association* 28. Note that, in July 2017, the Commonwealth Attorney General released an Exposure Draft – Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 <https://www.ag.gov.au/Consultations/Pages/Family-violence-cross-examination-amendments.aspx>. The aim of this amendment is to better protect victim witnesses from direct cross-examination where there are allegations of family violence.

[49] R Field, "Family Law Mediation: Process Imbalances Women Should be Aware of Before They Take Part" (1998) 14 *Queensland University of Technology Law Journal* 23.

party who is not necessarily a lawyer.[50] Such a model does not require transformation to an inquisitorial system but allows the benefits of non-adversarial examination to be achieved.[51] This has particular merit in the family law space, which has been said to be inquisitorial within the adversarial system.[52]

Not unexpectedly, there are counter-arguments to these different suggestions. Appointing legal representation for the purpose of one part of the process may mean that parties are disadvantaged by having legal representation who may not be across all issues of the case. Others argue that it is the role of judicial officers, to a degree, to assist self-represented litigants in court.[53] However, the judge's help does not protect vulnerable parties from the re-traumatisation that may result from being directly questioned by their alleged perpetrator.

And, some might contend that allowing any of these processes to happen where violence is alleged and not necessarily proven may unfairly prejudice the court against the alleged perpetrator. To avoid this actual or perceived prejudice, the judicial officer could make a direction to the court that the alternative procedure acts as a protection to alleged survivors of violence, and does not in any way assume or suggest guilt on behalf of the alleged perpetrator, until that fact is substantiated in evidence.

SUGGESTIONS FOR BETTER PROTECTING THE NON-VEXATIOUS PARTY: COURT PROCESSES

Administrative court staff, judicial officers and registrars do have a role to play in shielding individuals from vexatious proceedings; however, concerns have been articulated concerning the adequacy and the resourcing of the systems necessary for this role to be actualised.[54] When respondents reported how satisfied they were with the information, tools and methods available to manage VL, they gave a mean rating of 4.8, with 10 being the most satisfied and 1 the least. They provided numerous suggestions, outlined next, on how to improve family court procedures to better protect the non-vexatious party.

Case management

Approaches to managing vexatious litigants must be coordinated from a number of perspectives so that dealings with litigants by judicial officers and legal practitioners as well as mental health professionals can be consistent. More streamlined case management could facilitate this synchronicity. It is therefore important for legal practitioners to know what case management options are available.[55] Some respondents referred to the need for increased human resourcing such as appointing more family law judges and/or having case managers to advise and assist in issues such as the following:

- lack of merit;[56]
- applications for a summary dismissal;[57]
- applications for leave to appear personally with no appearance by the client;[58]
- adverse costs orders and the intent to seek such orders;[59]

[50] Bowden, Henning and Plater, n 41.

[51] Bowden, Henning and Plater, n 41.

[52] F Nagorcka, M Stanton and M Wilson, "'Stranded between Partisanship and the Truth': A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice" (2005) 29 *Melbourne University Law Review* 448; A Nicholson, "Future Directions in Family Law" [2000] *Federal Judicial Scholarship* 4; J Gutman, "The Reality of Non-adversarial Justice: Principles and Practice" (2009) 14 *Deakin Law Review* 29.

[53] I Coleman, "Unrepresented Litigants and Family Court" (1998) 73 *Australian Law Reform Commission Reform Journal* 41.

[54] LRC, n 1, 176.

[55] J Astor and R Croucher, "Fractured Families, Fragmented Responsibilities – Responding to Family Violence in a Federal System" (2010) 33 *University of New South Wales Law Journal* 854.

[56] Respondent 1, male, over 40 years' experience.

[57] Respondent 1, male, over 40 years' experience.

[58] Respondent 5, female, 3–10 years' experience.

[59] Respondent 3, male, 1–3 years' experience.

- submissions to the Court that the proceedings are without merit;[60]
- reliable witnesses to provide the court with credible information;[61]
- non-engagement with the vexatious litigant;[62]
- evidence of patterns that are used in the proceedings, as they often reflect patterns of behaviour in the relationship; [63]
- the creation of a barrier between the client and the vexatious litigant so the client is only involved where absolutely necessary;[64] and
- arrangements that provide minimal involvement with the other party.[65]

Such case management techniques could better protect and empower non-vexatious clients (who may have also experienced other violence).[66]

Improved communication between (and within) courts

Almost all respondents (1, 2, 3, 5, 6, 8 and 9) reported that of the vexatious proceedings observed, they were aware of concurrent litigation proceeding in other courts or tribunals. An example of this was one vexatious litigant who had instigated proceedings in the Queensland Civil and Administrative Tribunal, Magistrates Court, District Court, Supreme Court, Court of Appeal, Social Security Appeals Tribunal, Federal Magistrates Court, Federal Court, Full Court of the Family Court and the High Court.

There may be scope to save court resources if there were better communication between different courts, by declaring litigants as vexatious across multiple jurisdictions. Once a litigant was declared as vexatious, that person could be required to seek leave of the court in other jurisdictions to be able to instigate proceedings. This approach would mean that they wouldn't automatically be barred from instigating other proceedings, as that would not be appropriate. It would act as a "barrier" to draw attention to the court that the litigant had previously been vexatious. It would be a matter for each jurisdiction to determine how this was used in future proceedings. A possibility is a "three strike" approach.

Enhanced communication could also protect survivors from what took place for Eleanor:

> I was granted an intervention order on the grounds it was not safe to have my perpetrator near me … A week later I was back in that same courtroom for family law proceedings [*Eleanor's narrative*].

To complement this, legal practitioners would need to be diligent in identifying coercive and controlling behaviour, including where a party may be targeting other people that are close to the survivor party, and to make this known to the court.[67] A possible solution is that rather than simply dealing with the situation under general vexatious orders, the court could take into account that this was occurring in the context of the other connected litigation, and for there to be legislative reforms that allow for the court to take this into account when making orders relating to the litigant.

Reform of costs orders

Respondents provided quite a few suggestions concerning costs. These included: making severe costs orders with an uplift for exemplary costs (noting that this could run the risk of more appeals, where it might be possible to demonstrate lack of merit);[68] more liberal use of adverse costs orders and parties

[60] Respondent 1, male, over 40 years' experience.

[61] Respondent 4, female, 5–10 years' experience.

[62] Respondent 5, female, 3–10 years' experience.

[63] Respondent 9, gender unspecified, 1–3 years' experience.

[64] Respondent 10, female, over 20 years' experience.

[65] Respondent 5, female, 3–10 years' experience.

[66] Behrens, n 5, 196.

[67] As suggested by Respondent 6, female, more than five years' experience.

[68] Respondent 1, male, over 40 years' experience

not bearing their own costs;[69] and the removal of filing fee exemptions for vexatious litigations.[70] Respondent 1 pointed out though that by the time it is appropriate to apply for a vexatious litigant order, the non-vexatious party has already incurred substantial costs so it may not be financially viable to apply for those orders. A solution to this could be parties being allowed to apply for leave from the court to seek vexatious litigant orders with those costs borne by the vexatious party, if successfully declared as such. Note this could be quite effective if the standard were lowered, reducing the difficulty of declaring a party as vexatious.

We suggest that these orders could be at the discretion of the judicial officer. More information, training and guidance would increase efficacy. For instance, a judicial officer needs to know if the party applying for those orders is in financial hardship, with orders only granted if satisfied that the party may be put under further financial strain if the orders are not granted.

Other process changes

Respondent 2 suggested that the court needs to provide clearer limits and sanctions:

> The system needs to change and there needs to be specific limits on how someone can make a contravention or urgent application … the legislation needs to change to be more specific as opposed to its current vagueness. What does "frequently" mean exactly? And judges must mandatorily have penalties assigned if they find the specific number of times has been exceeded without reasonable excuse [*Female, over 10 years' experience, violence suspected in both cases*].

We would add that court processes could be further improved nationally by adopting recommendations made to the Victorian Royal Commission into Family Violence including: that prospective cross-applicants should be required to seek leave of the court to make a cross-application;[71] the prohibition of cross-applications by consent; and a requirement for family law registrars to assess the merits of an application more thoroughly before filing it.[72] Family violence intervention order application case management could be improved to ensure that applications are complete and properly prosecuted.[73]

Facilitating positive change: Training

Research has suggested that while the FLA requires that attention be given to family violence, courts are reliant on the evidence that is brought before them. This means family lawyers play an integral role in identifying and adducing the evidence.[74]

Lawyers need to understand that some victims of family violence might be reluctant to disclose it, or disclose it in detail, unless the demeanour of the lawyer is such as to give them confidence, or unless the lawyer asks specific questions. Lawyers, and judicial officers, and perhaps others, might learn to become more sensitive to the impact of their manner, and way of speaking, on people who have been exposed to violence, especially those from non-mainstream communities.[75]

Better screening tools and approaches to deal with violence are required to educate family law practitioners[76] and judicial officers with professional development programs that include understand-

[69] Respondent 3, male, 1–3 years' experience

[70] Respondent 6, female, more than five years' experience.

[71] VRCFV, n 3, 125.

[72] VRCFV, n 3.

[73] Victorian Ombudsman, "Reporting and Investigation of Allegations of Abuse in the Disability Sector: Phase 2 – Incident Report" (December 2015) 136–137.

[74] P Parkinson, A Webster and J Cashmore, "Lawyers' Interviews with Clients about Family Violence" (2010) 33 *University of New South Wales Law Journal* 929.

[75] R Chisholm, *Family Courts Violence Review* (Attorney-General's Department (Cth), November 2009).

[76] Australian Institute of Family Studies, *Evaluation of the 2012 Family Violence Amendments: Synthesis Report* (October 2015) <https://aifs.gov.au/publications/evaluation-2012-family-violence-amendments>.

ing coercive control.[77] This could be facilitated by amending the Legal Profession Uniform Law to add IPV education requirements which all practitioners are mandated to complete as a part of their continuing legal education (see, eg, *Legal Profession Uniform Conduct (Barristers) Rules 2015*; *Legal Profession Uniform Law Australian Solicitor's Conduct Rules 2015*, etc). Such training could also examine how to identify vexatious-like behaviour, the remedies available, and appropriate referrals for support services.

Education is also important for the perpetrators of coercive control-type VL. They must have these behaviours explained to them and remedial action taken. Mental health issues may be evident and so a properly qualified professional, such as one that is trained in domestic violence, can teach concepts such as proportionality, reasonableness and acceptance to this type of vexatious litigator.[78] However, a challenge remains that the professional will need to have extensive knowledge of the court system and the case itself in order to gently show the perpetrator that the behaviour is disproportionate to the circumstances (as research has shown that some vexatious litigants are unable to recognise the disproportion).[79]

CONCLUSION

Some academics regard vexatious litigants as "a small but bearable price that society has incurred for itself and should be willing to tolerate for the sake of certain democratic values … that the cases will never go away, and are just a cost of democracy."[80] Others consider that the public cost of democracy is truly borne by the public justice system alone, and not by the individual aggrieved parties.[81] This view serves to normalise coercive behaviour, and implies that the cost of being traumatised in exchange for a democratic system is one that the community is willing to bear. Further, it removes the accountability and responsibility of perpetrators, assuming that taking advantage of another is something inherent to democracy.

This begs the question concerning what improvements can be made to the system so it is more resilient against being used as a means of coercive control. For example, by characterising some extreme cases of vexatiousness as violence, the coercive behaviour can be taken into account when considering the best interests of the child. Perhaps this approach could play a role both in preventing vexatiousness through deterrence, as well as in creating real consequences for litigants who abuse their right to access the courts.

There is a contextual caveat though. The issues presented here concerning VL are reflective of the current state of the family law system, where issues of power imbalance can tip either end of the scale. It stands that all efforts should be made to strike the right balance between protecting vulnerable parties and providing access to justice with a requisite amount of evidence required before a party is barred from litigation, or before their contact with their children is affected. The system must avoid unfairly demonising innocent parties, for example, based on a lack of evidence. Appreciating that the perfect balance cannot be struck in each case, the court should err on the side of caution and follow a precautionary principle, founded on utilitarian theory, that it is better to act to protect parties from vexatious litigation than it is to justify inaction based on a lack of evidence. Indeed, it is inherently better to protect a vulnerable party from harm, even where the evidence may be unclear, than it is to allow the possibility of harm.

[77] J Faulks, "Condemn the Fault and Not the Actor? Family Violence: How the Family Court of Australia Can Deal with the Fault and the Perpetrators" (2010) 33 *University of New South Wales Law Journal* 818.

[78] P Mullen and G Lester, "Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour" (2006) 24 *Behavioural Sciences and the Law* 11.

[79] Mullen and Lester, n 78.

[80] Lester and Smith, n 9, 17.

[81] Kirby, n 2.