

## Your details

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## 1. Should direct cross-examination only be automatically banned in specific circumstances?

No – needs to be broader circumstances to protect those individuals who have experienced Intimate Partner Violence (IPV) but have not made formal allegations. Also need to protect those who have had difficulty ‘naming’ their experiences as violence yet could find cross-examination by ex- partner particularly triggering as the abuses may have been primarily emotional/verbal.

From Emma Fitch and Patricia Eastal, “Vexatious Litigation in Family Law and Coercive Control: Ways to Improve Legal Remedies and Better Protect the Victims” (2017) 7 Fam L Rev (forthcoming)

We describe how there is currently a lack of protection.

‘Currently, the only protections are the rules of evidence,<sup>1</sup> the judicial officer, the legal representation involved and the ethical rules they are bound by.<sup>2</sup>

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 an increasing feature, and that in some instances the justice system may not have sufficient protections for already traumatised parties:<sup>3</sup>

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*].’

We also describe in that article the effects of being crossed by violent ex partner -

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<sup>1</sup> See *Family Law Act 1975* (Cth) (*FLA*); *Evidence Act 1995* (Cth)

<sup>2</sup> See, eg, *Legal Profession Uniform Law Australian Solicitor’s Conduct Rules 2015*, regulations 3, 5, 19, 26, 29, 33.

<sup>3</sup> Robertson M, Giddings J, “‘Informed Litigants with Nowhere to Go’: Self-Help Legal Aid Services in Australia” (2001) 26 *Alternative Law Journal* at 184.

how the ordeal in Court may be yet another manifestation of control and why/how the injury outweighs the right to direct cross-examination.

### Using Cross-Examination

In Australia people have the right to be represented by counsel,<sup>4</sup> but no right to be provided with counsel at the expense of the public.<sup>5</sup> This means that in situations where violence is a factor, or where control 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*].

### Emotional costs

Vexatious Litigation (VL) can be very distressing for the other party.<sup>6</sup> Respondents to the survey had observed a plethora of negative effects including: serious psychological stress<sup>7</sup>, increased legal costs,<sup>8</sup> children being exposed to harmful environments,<sup>9</sup> feelings of depression and oppression,<sup>10</sup> hopelessness and despair,<sup>11</sup> triggering of mental health episodes,<sup>12</sup> and a loss of faith in the justice system.<sup>13</sup>

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*].

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<sup>4</sup> *R v Dietrich* 1992 HCA 57.

<sup>5</sup> 143 CLR 575 *v The Queen* 1979; Fairall P, "The Right Not to be Tried Unfairly Without Counsel: *Dietrich v The Queen*" (1992) 4 *Bond Law Review* 1.

<sup>6</sup> WLSV, 2008, p. 1.

<sup>7</sup> 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.

<sup>8</sup> Respondent 1, male, over 40 years' experience; ; Respondent 3, male, 1-3 years' experience; Respondent 5, female, five years' experience.

<sup>9</sup> Respondent 1, male, over 40 years' experience; Respondent 3, male, 1-3 years' experience.

<sup>10</sup> Respondent 4, female, 5-10 years' experience.

<sup>11</sup> Respondent 3, male, 1-3 years' experience.

<sup>12</sup> Respondent 2, female, over 10 years' experience; 5, 10)

<sup>13</sup> Respondent 3, male, 1-3 years' experience.

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*].'

## **2. Should direct cross-examination be banned in each of the specific circumstances set out in the new proposed subsection 102NA(1)?**

Yes but these sub-sections are confusing. In your description, it says one of these subsections but the exposure draft legislation reads **and, and**.

## **3. Should direct cross-examination be banned in any additional circumstances not referred to in the new proposed subsection 102NA(1)? For example, in the courts' Notice of Risk/ Notice of Child Abuse, Family Violence or Risk of Family Violence.**

Yes. As we say above, there needs to be a broader ban which should include Notice of Risk etc where a party alleges violence has occurred but has not gone down a legal protection pathway, as many victims do not.

This is particularly the case when the violence is primarily

emotional/mental/psychological and also particularly the case with vexatious litigation and crosses by the unrepresented party. Litigation and the opportunity to cross-examine the victim witness may be a further manifestation of this type of violence.

From Emma Fitch and Patricia Easteal, “Vexatious Litigation in Family Law and Coercive Control: Ways to Improve Legal Remedies and Better Protect the Victims” (2017) 7 Fam L Rev (forthcoming)

“...USING THE SYSTEM TO WIELD HIS POWER OVER ME”<sup>14</sup>

‘...As a Vehicle for Control...’

Controlling behaviours can be ‘indirect, subtle and psychologically traumatic, involving threats of harm, humiliation and insults, and financial or legal abuse’.<sup>15</sup>

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 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.<sup>16</sup>

Indeed, litigious actions may be an attempt to regain control as the relationship pre-separation may have been marked by other controlling behaviours:<sup>17</sup>

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

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<sup>14</sup> Eleanor quoted further below.

<sup>15</sup> VRCFV, 2016, p. 8.

<sup>16</sup> Women’s Legal Service Victoria (WLSV), Submission to the Victorian Law Reform Committee, *Inquiry into Vexatious Litigants*, (July 2008), 1.

<sup>17</sup> Ferrante A, Morgan D, Indermaur D and Harding R, *Measuring the Extent of Domestic Violence* (Hawkins, 1996) p 67.

[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].'

Also from Emma Fitch and Patricia Easteal, "Vexatious Litigation in Family Law and Coercive Control: Ways to Improve Legal Remedies and Better Protect the Victims" (2017) 7 Fam L Rev (forthcoming)

Yes. There needs to be a broader ban in which violence does not have to be proven for protections to be available, on the basis of the precautionary principle – it is better to protect on the basis of preventing often irreversible harm.

#### **Reform of Cross-Examination by Self-Represented Litigants**

There are currently clauses that allow a Judge to use their discretion as to whether 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 *FVA* could be amended to introduce a provision that prohibits cross-examination by a self-represented party where violence is suspected.<sup>18</sup> 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. However, if such a protection is in place, it is also important that it is made clear to the court that the alleged perpetrator is not subject to unfair bias on the basis of unproven allegations.

#### **4. Should any ban on direct cross-examination apply to both parties to the proceedings asking questions of each other, or only to the alleged perpetrator of the family violence asking questions of the alleged victim?**

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<sup>18</sup> Bowden P, Henning T and Plater D, "Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?" (2014) 37 *Melbourne University Law Review* at 539; Cossins A, "Is There a Case for the Legal Representation of Children in Sexual Assault Trials?" (2004) 16 *Current Issues in Criminal Justice* at 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) *Queensland Judicial Scholarship* 65; Barker I, "The Dangerous Art of Cross-Examination" (2013) 84 *Bar News: The Journal of the New South Wales Bar Association* at 28.

Yes – to protect a victim from further trauma, they should not have to be in the same physical ‘space’ as the perpetrator. A person with coercive control background is able to manipulate the victim verbally.

**5. Should the discretionary power only be exercised on application by the alleged victim, or by the courts’ own motion, or should the alleged perpetrator also be able to make an application to prevent direct cross-examination?**

Only by the judge and the victim.

**6. Which people would be most appropriate to be appointed by the court to ask questions on behalf of a self-represented person? For example, a court employee not involved in the proceedings, other professionals, lay people.**

From Emma Fitch and Patricia Easteal, “Vexatious Litigation in Family Law and Coercive Control: Ways to Improve Legal Remedies and Better Protect the Victims” (2017) 7 *Fam L Rev* (forthcoming)

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.<sup>19</sup>

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 party who is not necessarily a lawyer.<sup>20</sup> Such a model does not require transformation to an inquisitorial system but allows the benefits of non-adversarial examination to be achieved.<sup>21</sup> This has particular merit in the family law space, which has been said to be inquisitorial within the adversarial system.<sup>22</sup>

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

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<sup>19</sup> Field R, “Family Law Mediation: Process Imbalances Women Should be Aware Of Before They Take Part” [1998] 14 *Queensland University of Technology Law Journal* at 23.

<sup>20</sup> Bowden P, Henning T and Plater D, “Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?” (2014) 37 *Melbourne University Law Review* at 539.

<sup>21</sup> *Ibid*

<sup>22</sup> Nagorcka F, Stanton M, and Wilson M, “‘Stranded Between Partianship and the Truth’: A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice” (2005) 29 *Melbourne University Law Review* at 448; Justice Nicholson A, “Future Directions in Family Law” (FamCA) [2000] *Federal Judicial Scholarship* 4; Gutman J, “The Reality of Non-Adversarial Justice: Principles and Practice” (2009) 14 *Deakin Law Review* at 29.

assist self-represented litigants in court.<sup>23</sup> However, the judge's help does not necessarily wholly protect vulnerable parties from the re-traumatisation that may result from being directly questioned by their alleged perpetrator.'

**7. What qualifications, if any, should the court-appointed person have?**

Legal practitioner, preferably with an understanding of coercive control and domestic violence.

**8. Should any requirements regarding who the court can appoint and their qualifications be included in the Family Law Act?**

Either in the FLA or in the Rules, there needs to be requirement for family violence training by all practitioners including judicial officers.

**9. Should any further information about the scope of the role of the court-appointed person be included in the Family Law Act? For example:**

Yes – as much specificity as possible – perhaps in the Rules.

- **how the court-appointed person obtains questions from a self-represented party**
- **the level of engagement the court-appointed person should have with a self-represented party on whose behalf they are asking the questions**
- **whether the court-appointed person should be present in court for the whole of the proceedings or just during cross-examination**
- **what discretion the court-appointed person can exercise (if any) in relation to asking the questions they have been provided by a self-represented party**
- **whether the court-appointed person can ask any questions of their own (not provided by the self-represented party) during cross-examination**
- **whether they are under a duty to cooperate with other parties to the proceedings such as an Independent Children's Lawyer appointed in a case, and**
- **the intersection between the court-appointed person's role and that of the judicial officer. [Response here]**

**10. Should a self-represented person be allowed to nominate the person who is appointed by the court to ask questions on their**

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<sup>23</sup> Coleman I, "Unrepresented litigants and Family Court" (1998) 73 *Australian Law Reform Commission Reform Journal* at 41.



## **behalf?**

We agree that the self-represented party could be allowed to nominate someone. However, we would add a caveat that the person needs to be a current legal practitioner as we are concerned that a batterer could 'use' their appointee to ask certain questions that he knows will be emotional triggers for the victim witness .

### **11. Do you have any concerns about the court-appointed person model?**

Primary concern is discussed above.

### **12. Should the court only grant leave for direct cross-examination to occur if both parties to the proceedings consent? i.e. where an alleged victim consents to being directly cross-examined or consents to conducting direct cross-examination, should the alleged perpetrator's consent also be required?**

No the perpetrator's consent should not be required.

Re the alleged victim consenting - we are concerned about possible duress imposed by the perpetrator. If the alleged victim meets the criteria for not being directly cross-examined, we believe that there should not be an option for it to take place.

### **13. Should the court only grant leave for direct cross-examination to occur if it has considered whether the cross-examination will have a harmful impact on the party that is the alleged victim of the family violence?**

A decision concerning potential harms requires a very real understanding of both coercive control in general and the specific dynamic and manifestations experienced by the specific alleged victim.

This test should go a step further – leave for direct cross-examination by the perpetrator should only be granted if there is no doubt that there will be no harmful impact on the other party.

### **14. Should the court only grant leave for direct cross-examination to occur if it has considered whether the cross-examination will adversely affect the ability of the party being cross-examined to testify under the cross-examination, and the ability of the party conducting the cross-examination to conduct that cross-examination?**

The consideration itself is not enough. Granting leave for direct cross-examination

where it is found that the cross-examination will not cause harm to the other party is assuming that the Court is equipped with an understanding of coercive control, its effects on its survivors including denial and minimising and its other harms.

**15. Are there any other issues the court should be required to consider before granting leave for direct cross-examination to occur?**

Screening for IPV by specially trained staff.

From Emma Fitch and Patricia Easteal, “Vexatious Litigation in Family Law and Coercive Control: Ways to Improve Legal Remedies and Better Protect the Victims” (2017) 7 *Fam L Rev* (forthcoming)

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.<sup>24</sup>

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.<sup>25</sup>

Better screening tools and approaches to deal with violence are required to educate family law practitioners<sup>26</sup> and judicial officers with professional development programs that include understanding coercive control.<sup>27</sup> This could be facilitated by amending the Legal Profession Uniform Law to add IPV education requirements with all practitioners 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.

**16. Should the amendments apply to proceedings started before**

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<sup>24</sup> Parkinson P, Webster A, and Cashmore J, “Lawyers’ Interviews with Clients about Family Violence” (2010) 33 *University of New South Wales Law Journal* at 929.

<sup>25</sup> Chisholm R, *Family Courts Violence Review* (Attorney-General’s Department (Cth), November 2009).

<sup>26</sup> 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>>.

<sup>27</sup> Faulks J, “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* at 818.

**the law comes into effect, or should they only apply to proceedings started after the law comes into effect?**

Yes should apply to any proceeding that have begun.

**17. Should any changes be made to the proposed amendments to ensure that all parties receive a fair hearing?**

From Emma Fitch and Patricia Eastal, “Vexatious Litigation in Family Law and Coercive Control: Ways to Improve Legal Remedies and Better Protect the Victims” (2017) 7 Fam L Rev (forthcoming)

‘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.’

‘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 [declared as vexatious], or [for example] 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.’

**18. Should any changes be made to the proposed amendments to ensure that the courts can be satisfied that any cross-examination of the parties that occurs through a court-appointed person will enable the judicial officer to accord procedural fairness to the parties?**

As per the response to q17, there should be processes in place to prevent unfair bias on alleged perpetrators while still protecting victims.

**19. Should any changes be made to the proposed amendments to ensure that the courts are able to make informed decisions?**

If family law practitioners and judicial officers are obligated to complete training on family violence and coercive control, this could assist the court in identifying and preventing family violence.

**20. Should any changes be made to the proposed amendments to ensure that they do not have any unintended consequences for**

**victims of family violence?**

As above.

**21. Any general comments.**