Systems abuse

The Family Law Amendment Bill 2023 (Cth) is currently before Parliament.

The Bill amends *Family Law Act 1975* to introduce 'harmful proceedings orders' and extend the 'overarching purpose of family law practice and procedure' and the accompanying duty to all proceedings instituted under the *Family Law Act 1975*.

More information can be found here:
www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7011

Australian and international bench books alert judicial officers to various forms of systems abuse or abuse of processes that may be used by perpetrators in the course of domestic and family violence related proceedings to reassert their power and control over the victim. The *National Plan to End Violence against Women and Children 2022-2032* [National Plan 2022] observes that perpetrators of domestic and family violence may manipulate legal and other systems to control, threaten and harass a current or former partner. More broadly, as identified in the Western Australian Court of Appeal decision *Baron v Walsh* [2014] WASCA 124, recourse to legally available processes, when used by a party with improper intent or purpose, could amount to malicious prosecution, abuse of process or a criminal offence.

Research has also recognised that a party to proceedings in domestic and family violence related cases may use a range of litigation tactics to gain an advantage over or to harass, intimidate, discredit or otherwise control the other party [Kaspiew et al Synthesis 2015]. These tactics may be referred to in legislation and other bench books and by judicial officers as malicious, frivolous, vexatious, querulous, or an abuse of process.

Perpetrators of domestic and family violence who seek to control the victim before, during or after separation may make multiple applications and complaints in multiple systems (for example, the courts, Child Support Agency, Centrelink [Cameron 2014] child protection [Douglas & Fell 2020]) in relation to a protection order [Reeves 2020], breach, parenting [Kaspiew 2005], divorce, property, child and welfare support and other matters with the intention of interrupting, deferring, prolonging or dismissing judicial and administrative processes, which may result in depleting the victim's financial resources and emotional wellbeing, and adversely impacting the victim's capacity to maintain employment or to care for children [National Plan 2022]. In the court system, this tactic is sometimes known as 'burning off', and is prevalent where, on the one hand, a victim lacks the financial resources to engage legal representation (and is therefore forced to self-represent), and on the other hand, the perpetrator is either financially well-resourced or prepared to incur significant debt (and is therefore able to engage solicitors and counsel, and fund multiple actions over extended periods) [Hover: ALRC 2019]. Where the perpetrator is aware that the victim may be in a financial position to engage legal representation, the perpetrator may use a different tactic known as 'conflicting out', which involves seeking preliminary advice from multiple lawyers (this is a particular concern in regional, rural and remote communities) so as to deny the victim access to legal representation on the basis of conflict of interest.

Although there is a widespread belief in the community that mothers frequently fabricate allegations to influence family law proceedings, the research to date indicates that it is more likely that they will be reluctant to raise allegations for fear of having their motives questioned [Laing 2010], and that the making of false allegations is much less common than the problem of genuine victims who fail to report abuse, and the widespread false denials and minimisation of abuse by perpetrators [Jaffe et al 2008]. A 2015 evaluation [Kaspiew et al Synthesis 2015] of the 2012 Family Violence Amendments to the *Family Law Act 1975* (Cth) recognises that parties to proceedings in the Family Court of Australia may use those proceedings as a means of perpetuating harassment of the other party. For example, a parent who is also a perpetrator of domestic and family violence may use this tactic, while the perpetrator or their lawyer states to the court that they 'just want to see their children'. [Laing 2010]

Cross applications for domestic and family violence protection orders may be used by some perpetrators to intimidate the victim into withdrawing their application, resulting in mutual withdrawal and an end to proceedings. This tactic may also be seen as an extension of the violence itself [Wangmann 2010]. Perpetrators in these circumstances may seek a cross order to neutralise the effect of the victim's order (or order obtained on the victim's behalf) on the operation of the presumption/exemption. While some cross applications may be genuine where both parties face a threat of violence and are equally in need of protection from one another, those that constitute intimidation may have the effect of trivialising or silencing the victim's claims for protection. The consequent risk is that dangerous behaviour may be misinterpreted or overlooked by the court, and the victim may be left unprotected [Douglas & Fitzgerald 2013].

Victims from culturally and linguistically diverse backgrounds who may be unfamiliar with Australian legal systems, have limited or no English literacy skills and uncertain or contested immigration status, may be particularly vulnerable to further abuse by the perpetrator through judicial processes. Some commonly reported examples include the perpetrator: failing to appear in court; repeatedly seeking adjournments; appealing decisions on tenuous grounds; obtaining a protection order against the victim and misleading the victim into breaching the order; objecting to or refusing to consent to the victim's application for divorce; and giving false evidence to the court that the victim's motivation in applying for a protection order is to obtain an advantage in the immigration/visa process [JCCD, Path to Justice (CALD) 2016].

Research indicates that a court's failure to respond adequately or appropriately to a victim's allegations of domestic and family violence may constitute a form of abuse that is secondary to that already being experienced by the victim. In the context of judicial proceedings, a victim may feel intimidated, isolated or neglected by, for example: having to sit in proximity to the perpetrator and their family and friends in the courtroom; experiencing condescending, reproachful or diminishing language or demeanour from defence lawyers or judicial officers; feeling unable to effectively advocate on behalf of children in their care; or enduring the ongoing economic impact of being a party to judicial proceedings [Hover: ALRC 2019]. In these circumstances, judicial officers may need to weigh up and assess the requirements for procedural fairness and access to justice against protection of the victim from further abuse through the perpetrator's exploitation of the justice system.

Systems abuse may be one aspect of a complex pattern of behaviours engaged in by perpetrators in order to control another person, sometimes referred to as coercive control.