How International Jurisdictions Address Systems Abuse in Their Family Courts

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An overview of how international jurisdictions address systems abuse in Their Family Courts and what steps are taken to protect vulnerable families

Introduction

Legal systems abuse presents a pressing issue to the Family Law system, as practitioners and courts alike are faced with clear incidents of litigants seeking to manipulate the legal system to inflict further harm upon their victims.

Broadly, in the context of family law, legal systems abuse refers to the bad faith misuse of the legal process by perpetrators of family violence, in order to maintain or exert control over, threaten, or harass a former partner[1]. In essence, it is conduct which seeks to maintain financial or social control of the other party, or instead a method of harassment. Those subject to legal systems abuse may experience feelings of being worn out or emotional distress, leading them to agree to a less favourable outcome than they are entitled to, just to end the prospect of further litigation. In some cases, those committing legal system abuse may be driven by the desire to financially deprive the other party of either receiving a favourable property settlement or causing them to incur significant and unnecessary legal fees. In this way, the court processes being abused provide an opportunity for the perpetrator to expand their repertoire of coercive and controlling behaviours post separation.

Legal practitioners have a duty to their clients but also have a duty to the Court to ensure the efficient and proper administration of justice. However, legal practitioners may inadvertently facilitate systems abuse by encouraging further litigation, by providing their clients with advice of grounds of appeal, or by advising other avenues of pursuit towards the other side, such as advice regarding social services infrastructure. Systems abuse represents a significant ethical issue where lawyers must be vigilant not to enable systems abuse while also acting in accordance with their duty to their client.

This edition of the IAFL AsPacEd provides an opportunity to compare how international jurisdictions seek to protect vulnerable litigants against systems abuse, and to determine if the current response ought to be strengthened in order to prevent the prevalence of this kind of abuse. We do not present this article as a complete thesis covering the international jurisprudence on systems abuse – more as a starter for a wider (and important) conversation on the legal, social and ethical issues and perhaps, as a genesis for change. In this way, it is an expression of our passion for change and enthusiasm to protect our vulnerable.

What type of conduct can be classified as systems abuse?

The methods used by a litigant which constitute legal systems abuse may include any of the following (non-exhaustive) conduct:

- Vexatious litigation, which involves the perpetrator persistently pursuing meritless claims to harass or cause financial hardship to the other party who has to defend and/or respond to their applications.
- Exploiting the corporate veil to hide assets or even to make applications against a former partner in multiple jurisdictions or by multiple third parties through the abuse of court processes.
- Refusing to disclose documents to prolong or frustrate the proceedings and in turn increase costs for the other party.

- Making false reports of abuse or neglect to child protection agencies or making complaints in multiple jurisdictions such as the Family Law Courts, the Children's Court and the Magistrates Court which deals with Family Violence Intervention Orders.
- Lodging cross applications for domestic and family violence protection orders to intimidate the victim into withdrawing their genuine application.
- The litigant seeking preliminary advice from multiple lawyers so as to deny the victim access to legal representation on the basis of conflict of interest.
- Making multiple applications and complaints in multiple systems (for example through the family and local Courts and social welfare systems) in relation to a wide range of legal issues ranging for parenting to property with the intention of using those systems to erect consistent blocks and challenges to reaching final outcomes thus depleting the other party's financial resources and emotional well-being, ability to parent and maintain employment.

The current legal mechanisms in place to prevent abusive litigation – the Australian position

Predominantly, jurisdictions around the world have only dealt with one 'element' or manifestation of systems abuse, which is 'vexatious litigation'.

For instance, in Australia, Part XIB of the *Family Law Act 1975* (Cth) covers vexatious proceedings. Under these powers[2], the Court may declare a person to be a 'vexatious litigant' and once that declaration is made, that person may not institute proceedings without the prior permission of the Court. An application to have a person declared a 'vexatious litigant' can be made by several parties including the Court itself, a Court official, a person who has sufficient interest in the matter, a person against whom the person has instituted or conducted vexatious proceedings and others. Such a declaration may be made if the vexatious party is litigating 'without reasonable grounds[3]', to (amongst others) abuse court process, use the litigation to annoy, frustrate, harass, cost another person, cause delay or otherwise for wrongful purpose

The vexatious litigation doctrine does not provide the protection that victims and survivors of systems abuse need.

It is of note that systems abuse is slightly nuanced and is therefore distinguishable from vexatious litigation in the strict sense. There is a clear gap between the protection offered by the doctrine of preventing vexatious litigation and what is needed to put an end to systems abuse. As systems abuse covers a range of scenarios and conduct which are intended to intimidate or control the victim in the legal system, having a former partner declared a vexatious litigant may exacerbate the violence and may not actually stop or limit the abuse.

It is the view of Nicholes Family Lawyers that wholesale reform at a legislative, regulatory and policy level is needed to protect victims and survivors from systems abuse. The Family Court in Australia, along with other organisations such as various Legal Practice Boards (the bodies that regulate lawyers) are working on reform to remedy these issues. One example is the National Plan to End Violence Against Women 2022-2032. We hope, as a result of this work, to see vulnerable litigants protected from systems abuse through mechanisms embedded in national practice guidelines, legislation, ethical rules, practice directions and others. Recognising systems abuse as being a form of family violence is a great place to start.

As legal system abuse is a form of family violence, is it opportune to consider broader family violence reforms when assessing the need for systems abuse reform. In December 2022, the Australian Federal Government introduced law reform under which allegations of family violence

can be considered by the Courts before making return orders for children under the *Hague Convention on the Civil Aspects of International Child Abduction (1980 Convention)*. This reform is based on the concern that family violence may be relevant, in deciding whether to return a child to their country of habitual residence is at 'grave risk' of physical or psychological harm– and is therefore an exception to the making a return order. Through allowing Courts to take into account family violence when determining return orders, this reform may help protect children from ongoing exposure to family violence. Given victim-survivors of family violence are also in danger of experiencing systems abuse, it is arguable that a similar victim-centric approach should be taken towards system abuse reform in order to protect vulnerable family law litigants

A snapshot of what select other jurisdictions are doing to protect victims and survivors of systems abuse

As demonstrated below, there are many protections regarding vexatious litigation but seemingly few which deal with systems abuse conceptually beside Australia. Furthermore, systems abuse remains to be an under-researched, and under reported instance of family violence as its recognition continues to evolve. As such, there is minimal data on the experiences of victims who experience family violence by a perpetrator's manipulation of the legal system.

Even at a headline level, it seems that few jurisdictions offer robust mechanisms to protect against the risks posed by even a narrow definition of systems abuse.

We welcome comment and input from lawyers in the jurisdictions flagged below – and indeed others – on the positions and reform agenda in your own countries.

Country	Is systems abuse defined in that country?	Are there rules that seek to prevent systems abuse? When do they apply?	Are lawyers ethically constrained from advising clients to pursue litigation?	How are rights of the vulnerable protected in the family court regime?
Australia	The 2022 National Domestic and Family Violence Bench Book recognised systems abuse as a form of family violence. The process is described as: '*the manipulation of legal and other systems by perpetrators of family violence, done so in order to exert control over, threaten and harass a current or former partner. 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, Centrelink) in relation to a protection order, breach, parenting, 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 well-being, and adversely impacting the victim's*	Australian Solicitors Conduct Rules (2015): • A solicitor must not act as a mere mouthpiece of the client (Rule 17.1). • A solicitor must not, in the course of, or in connection with, legal practice or their profession, engage in conduct which constitutes… any other form of harassment (Rule 42.1.3).	Australian Solicitors' Conduct Rule 21.1.3: a solicitor must take care to ensure that the solicitor's advice to invoke the coercive powers of a court is not given principally in order to harass or embarrass a person. In Queensland, The Supreme Court can declare someone a vexatious litigant and prohibit them from starting proceedings, or a certain type of proceedings, under the *Vexatious Proceedings Act 2005* (Qld). In Victoria, the Attorney-General may apply to the Supreme Court for a general litigation restraint order prohibiting someone from continuing a proceeding without leave and/or commencing a proceeding or any other order that the Court considers appropriate, under the *Vexatious Proceedings Act 2014* (Vic). In New South Wales, the Supreme Court may make a vexatious proceedings order prohibiting a person from	The Federal Circuit and Family Court of Australia has committed to piloting the 'Lighthouse Project', an innovative approach whereby the Court screens for risk of family violence (including evidence of systems abuse), with a primary focus on improving outcomes for families. In the 2022 Budget, this pilot was extended to cover all Family Courts across Australia. The process undertaken involves an online confidential questionnaire being completed when an Application or Response to parenting orders is filed. A specialist team will then assess and review the level of risk present and direct the case into the most appropriate case management pathway. This will shape the allocation of resources and urgency given to such cases and improve the safety of litigants and their children. The Supreme Court Registrar also maintains a list of vexatious

	capacity to maintain employment or to care for children."		instituting proceedings, an order staying all or part of any proceedings already instituted or any other order that the Court considers appropriate, under the *Vexatious Proceedings Act 2008* (NSW). In South Australia, the Attorney-General may prohibit someone who instituted vexatious proceedings from instituting further proceedings without permission or may stay the proceedings already instituted, under the *Supreme Court Act 1935* (SA). In Western Australia, the Court may stay proceedings or prohibit a person from instituting proceedings without leave if the person has instituted vexatious proceedings or is likely to, under the *Vexatious Proceedings Restoration Act 2002* (WA). In the Northern Territory, the Court may make an order staying the proceedings of a vexatious litigant, prohibit the person from instituting proceedings or another order the Court considers appropriate, under the	litigants which includes the names of persons against whom a Vexatious Proceedings Order has been made pursuant to the *Vexatious Proceedings Act* 2005 (Qld).

			Vexatious Proceedings Act 2006 (NT). In Tasmania, if the Court makes a vexatious proceedings order, the person may not institute proceedings in Tasmania without leave and another person may not, acting in consort with the vexatious litigant, institute proceedings without leave, under the *Vexatious Proceedings Act 2011* (Tas). In the Australian Capital Territory, if the court declares a person to be a vexatious litigant, the person, or a person acting in consort, shall not institute or continue proceedings without leave and any proceedings at the time of the declaration are stayed, under the *Supreme Court Act 1933* (ACT).	
United States	Although American Professional Conduct Rules adopt an objective test for determining Attorney conduct, the term 'frivolous' remains undefined. However, the accompanying Comment to the Rules states that an act is frivolous only if:	Rule 3.1 of the American Bar Association *Model Rules of Professional Conduct.* A lawyer shall not bring or defend a proceeding… unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.	Rule 3.1 is the most closely applicable here.	The Judicial Council of California maintains a Vexatious Litigant List which contains the names of individuals and corporations who have been deemed vexatious.

	• The client's motive of the action is to harass or maliciously injure a person. • The lawyer is unable to make a good faith argument on the merits of the action.			
Canada	Perpetrators who repeatedly engage legal systems (family courts, appeal courts, child protection agencies, police, civil protection systems, access to information processes) in the crusade to maintain contact and to coerce, control, harass, undermine and dominate their intimate and former intimate partners.	Section 40 of the *Federal Court Act* and in Ontario Section 140 of the *Courts of Justice Act*, restrict the ability to introduce or continue proceedings for those who have instituted vexatious proceedings or conducted proceedings in a vexatious manner.	Section 40 of the *Federal Court Act* and Section 140 of the *Courts of Justice Act* are most closely applicable here.	The Alberta Court of Queen's Bench's Civil Practice Note No. 7 ('CNP7') created a new tool for litigants, including regulators, to deal with vexatious litigation. Under CPN7, a legal proceeding that appears to be frivolous, vexatious, or an abuse of process can be brought to the Court's attention. No formal court application or court appearance is necessary, and the process is conducted entirely in writing. All that is required is a letter asking the Court to review the legal proceeding under CPN7.
United Kingdom	The Courts of England and Wales define vexatious litigants as individuals who persistently take legal action against others in cases without any merit, who are forbidden from starting civil cases in courts without permission.	In England and Wales there are two methods to control vexatious litigants: • Civil restraint orders (made by the courts themselves on the application or their own initiative); • The Courts in England and Wales have the means of escalating sanctions against a litigant who makes applications to the court that are 'totally	The Solicitors Regulation Authority Code of Conduct for Solicitors: Rule 2.6: do not waste the Court's time.	His Majesty's Courts and Tribunals Service maintains a vexatious litigants list and those subject to a civil restraint order. Section 42 of the *Senior Courts Act* 1981 provides the High Court with the power to make an order restricting the ability of a person to undertake litigation without the leave of the High Court.

		without merit' – the Court can forbid an application; and • Vexatious litigants orders (made by the High Court under section 42 of the *Senior Courts Act* 1981 on the application of HM Attorney-General). The High Court can make an order restricting the ability of a person to undertake litigation without leave of the High Court.		
South Africa	"Vexatious" may refer to proceedings instituted by a litigant which is designed to frustrate and harass a defendant or proceedings instituted to cause annoyance to a defendant. In ***Marib Holdings (Pty) Ltd v Parring NO and Others***[4]*,* when examining the meaning of frivolous, vexatious or without merit, the High Court of South Africa reiterated that 'frivolous' usually refers to a contemptuous attitude adopted by a litigant and the use of intemperate language during proceedings, or gross impertinence.	Vexatious Proceedings Act 3 of 1956. ('The Act') provides that an applicant can seek an interdict against any person who has persistently and without any reasonable ground instituted legal proceedings against another person. However, an applicant must prove that the legal proceedings are 'persistent' and 'without reasonable ground' on 'a balance of probabilities'. In addition, an applicant must prove that the legal proceedings are 'frivolous, vexatious or without merit'. The Court may order that they shall institute no legal proceedings against any person in any Court, or any inferior Court without that Court's permission, or any Judge or inferior Court as the case may be.	South African Code of Conduct for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities: Rule 3.10: solicitors must advise their clients at the earliest possible opportunity on the likely success of such client's cases and not generate unnecessary work, nor involve their clients in unnecessary expenses.	If a litigant is declared vexatious under the Vexatious Proceedings Act No 3 of 1956, the effect of this is that the litigant can no longer institute legal action in any court against the applicant without leave of the court. The court will only grant such leave if it is satisfied that the legal action is not an abuse of the court process and that there are prima facie grounds for the proceedings.

		The Court will not grant such approval unless satisfied that the proceedings are not an abuse of the process of the Court and that there is a prima facie ground for the proceedings. The Act further provides that the Court may issue an order obtained under the Act for an indefinite period or such period as the Court may determine. However, on good cause shown, a Court may rescind or vary any Order so issued.		
New Zealand	Section 88(b) of the *Judicature Act* 1908 defines a vexatious litigant as someone who is persistently and without reasonable ground instituting vexatious legal proceedings.	In New Zealand a person may be declared a vexatious litigant by a High Court Judge on the application of the Attorney-General. A vexatious litigant must then apply to a High Court Judge for leave to commence any action. A decision by the High Court whether or not to grant leave cannot be appealed (Section 88B of the *Judicature Act* 1908)	Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008: Rule 10.3 A lawyer must not engage in conduct that amounts to 1 or more of the following: (a) bullying: (b) discrimination: (c) harassment: (d) racial harassment: (e) sexual harassment: (f) violence.	The District Court or the Family Court may dismiss any proceedings before it under the Family Proceedings Act 1980 if it is satisfied that they are frivolous or an abuse of procedure of the Court.

Future reform

While many jurisdictions do not deal with systems abuse in the strict sense, there is some protection in that almost all jurisdictions (examined in this article) to enforce a vexatious litigation regime that applies to the family courts exists. However, it is our view that there is more that can be done.

For example:

- Incorporating the concept of systems abuse into legislative or practical working definitions of family violence
- Including specific ethical guidelines or conduct rules surrounding the prevention of systems abuse on the part of practitioners
- Screening family law matters for risk elements where systems abuse might be present

Indeed, the way that the Courts and family law infrastructure approach and deal with litigants who take action that may be vexatious in more than one jurisdiction is also worthy of future consideration.

Conclusion

Systems abuse commonly results in depleting the victim's financial resources and emotional wellbeing, and adversely impacts the victim's capacity to manage their family law matter, maintain employment or to care for children. The victim may also feel de-legitimised and denied protection from an abuser. In this way, systems abuse not only involves a commission of family violence by a perpetrator manipulating the various limbs of the justice system, but a lack of response from legal practitioners, the police, and Courts who may fail to recognise systems abuse when it is before them. This may have adverse implications for the reputation of our justice systems and erode the faith that the communities we serve place in the legal profession and in the justice system as a whole.

As understanding of family violence progress and evolve, it is important that this type of coercive and controlling violence is not left undetected by the justice system. It is necessary that whatever infrastructure is put in place is able to flex and bend to accommodate the very individual circumstances of families but also the ever-changing outcomes of research in this field.

In our view, it is necessary that the international community takes steps towards recognising systems abuse in a way which protects vulnerable litigants who may be in harm's way due to the operation of the very system that was designed to protect them.

We look forward to working with the international community to help protect our vulnerable today and into the future.

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[1] See for example the definition provided in the Australian National Plan to End Violence Against Women 2022 – 2032, page 133: Systems Abuse 'Refers to the manipulation of legal and other systems by perpetrators of family violence, done so in order to exert control over, threaten and harass a current or former partner. 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, Centrelink) in relation to a protection order, breach, parenting, 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 well-being, and adversely impacting the victim's capacity to maintain employment or to care for children.' [Attorney-General's Department, Australasian Institute of Judicial Administration, University of Queensland, University of Melbourne, National domestic and family violence bench book, Australian Government, 2022.]

[2] See for example the relevant Australian legislation at Section 102Q of the *Family Law Act* 1975 (Cth)

[3] *Jabbar* v *Gade* (No 22) [2019] FCCA 2186

[4] Marib Holdings (Pty) Ltd v Parring NO and Others (22058/2019) [2020] ZAWCHC 74