

2025

FAMILY LAW CPD SUPER DAY

SESSION 4: *'VEXATIOUS OR HARMFUL LITIGANTS? IDEAS TO PREVENT SYSTEMS ABUSE'*



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Vexatious or Harmful Litigants?

Ideas to Prevent Systems Abuse

27 MARCH 2025 - BETH WARNOCK



Movement Break

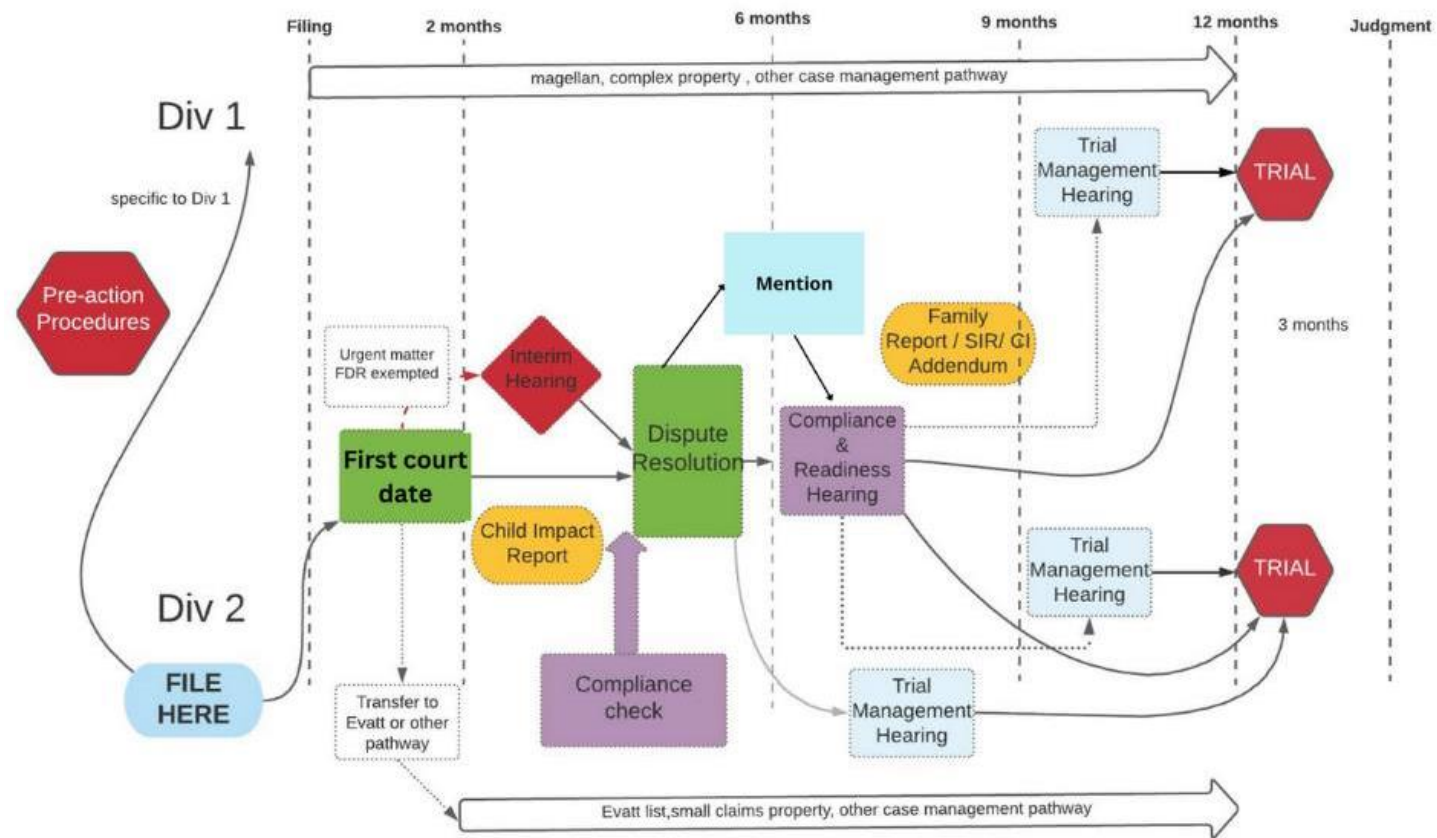


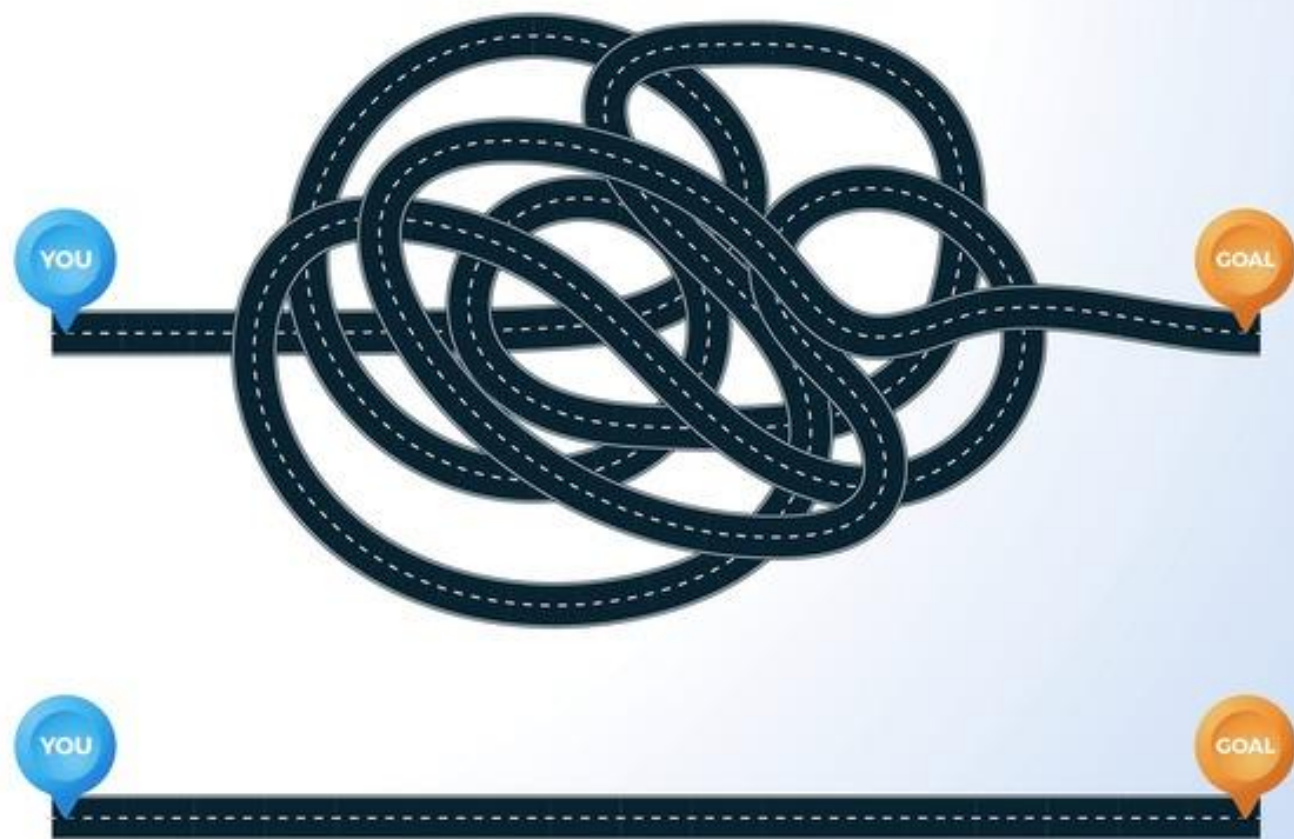


What do I mean by Vexatious or Harmful Litigants?

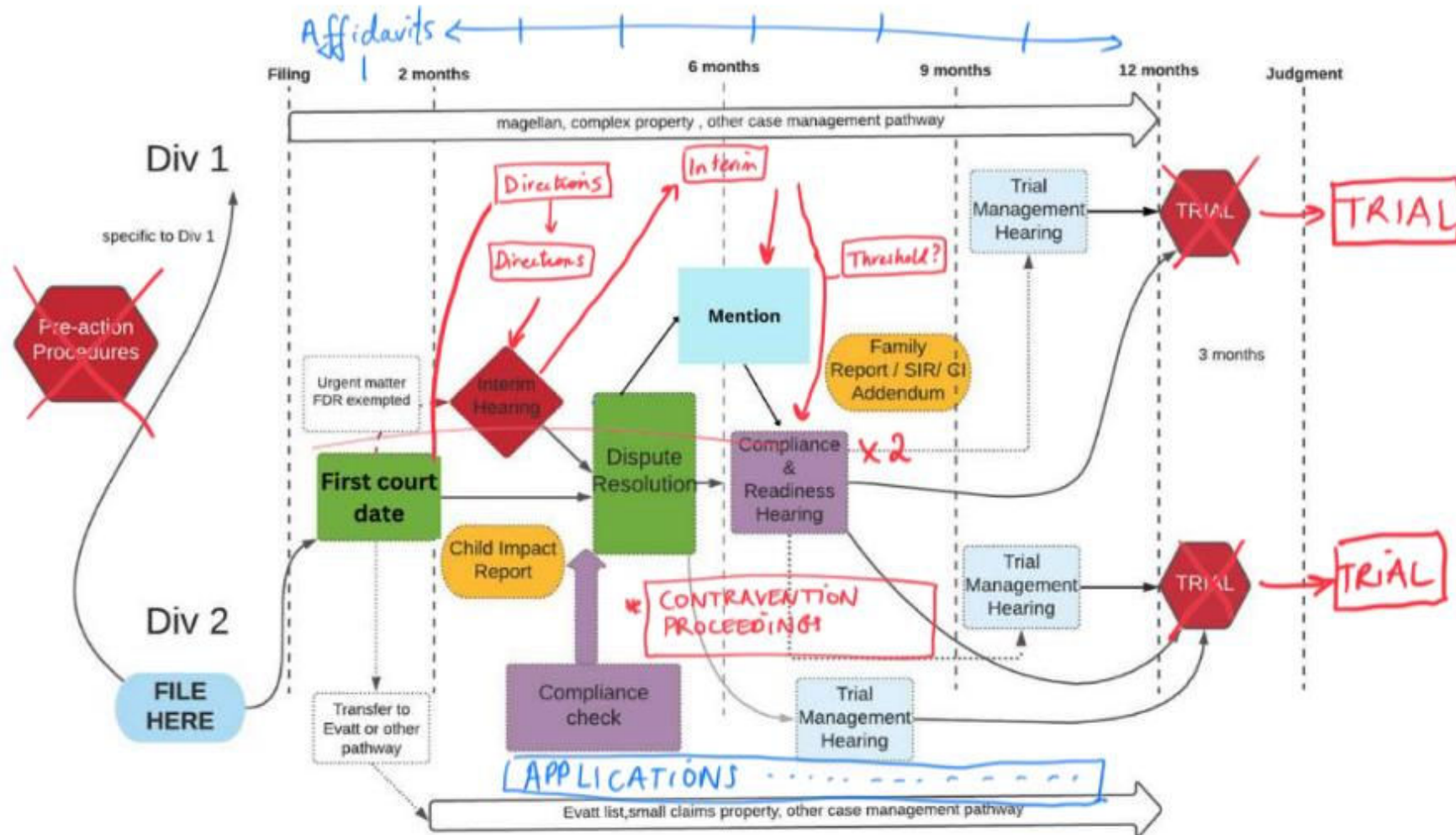


ROADMAP





ROADMAP ??



What is Systems Abuse?

Definition?

“The manipulation of legal processes by perpetrators of family violence, in order to maintain or exert control over, threaten, or harass a former partner”

Broad definition recognised by the Court:

Using a range of litigation tactics to:

- Gain an advantage OR
- Harass, intimidate, discredit or otherwise control the other party¹”

Spotting Systems Abuse

What to look out for

History of Litigation	Interactions with other Courts
Current Litigation – pattern of behaviours	Interactions with other agencies
Changes in representation	Intervention Orders
Self-represented litigants	67ZBD + 67ZBE material
Obstructive behaviours	Subpoena material
Lack of child focus	Information from client
Child support issues	

REMEMBER: If acting for a party exhibiting FV or System Abuse behaviours
→ **don't be a mouthpiece or puppet for the client¹**

What can we do?

There are tools available to us, sometimes we forget or alternatively remember, but only when it's too late.

Costs Applications	Summary Decrees	Undefended Hearing
102NA order	Harmful Proceedings Order	Application for dismissal
s 68B & 114: Injunctions	Vexatious Proceedings Order	s 65DAAA
Security for costs	Summary Disposal	Default judgement
Orders for disclosure	Freezing Orders	Other procedural orders

Harmful Proceedings Orders (HPO)

What do HPO's do?

Prohibit a party to proceedings from instituting proceedings (under FLA) against another party, **without leave of the court** (under s102QAG)

Note: 102QAC (7) & (8): Court **must** also make an order regarding notification to the other party and must have regard of the other party's wishes.

Note: not introduced to limit the court's other powers (including those re: vexatious proceedings or summary dismissal under section 102QAB.²

Power to order HPO: s102QAC (1)

s 102QAC(1) Test

A court *may* make a harmful proceedings order *if*:

- Satisfied that there are **reasonable grounds to believe** that:
 - **further proceedings would be harmful to the other party**, if the first party instituted further proceedings; OR
 - the **child** subject to proceedings **would suffer harm if the first party instituted proceedings** against the other party (in 'child related' proceedings under Part VII).

Power to order HPO: s102QAC (1) - continued

What = Reasonable Grounds?

Babic and Taccini [2024] FCWA 203 - Justice O'Brien – Family Court of Western Australia

- Proof that other party/child would suffer harm is not required
- Court needs to be satisfied there are **'reasonable grounds' to believe they *would* suffer harm.**

Referred to facts must be sufficient to induce that belief in the mind of a reasonable person (*George v Rockett* [1990] HCA 26)

Objective circumstances necessary to find 'reasonable grounds to believe' must point sufficiently to the subject matter of that belief, but **need not be established on the balance of probabilities** (Prior v Mole [2017] HCA 10; [73])

Power to order HPO: s102QAC (1) - continued

What = “Proceedings”

s 4(1) “a proceeding in a court **whether between parties or not**, and includes cross-proceedings or an incidental proceeding in the court of or in connection with a proceeding”

Note: Orders can be made against any party and the person being restrained by the order is known as the 'first party'.⁴

What = 'harm': s102QAC (2)



Harm *may* include, but is not limited to:

- Psychological harm or oppression
- Major mental distress
- A detrimental effect on the other party's capacity to care for a child
- Financial harm

Is a non-exhaustive list – see explanatory memorandum⁵

Examples of Harm and Evidence

- Sheffield & Almond [2024] FedCFamC1F 785 (div 1)
- Lamport & Garside [2024] FedCFamC2F 1007 (Div 2)

⁵ Paragraph 325: Prescriptive definition was not included to avoid the risk of narrowing the scope of what constitutes harm. Paragraph 326: In effect, what constitutes harm will depend on the individual circumstances of each case as determined or assessed by the court, having regard to any or all matters including those in new subsection 102QAC(3.)

When can a HPO be made: s102QAC(4)

The court has the power:

- On its own initiating
- Or on application; AND
- **At any time while proceedings are on foot**
 - See para 53 – Explanatory Memorandum
 - See Lamport & Garside [2024] FedCFamC2F 1007

Note (6): regardless of when made, a HPO is a final order.

- **Important:** Only a judge has the power to make an order, not a delegated power.

Limitation = Procedural Fairness (5)

- Must not make order “without hearing the person or giving the person an opportunity of being heard”

What the court considers: s102QAC(3)

Considerations

In determining whether to make an order, the Court *may have* regard to:

- History of proceedings under *FLA* between the parties; and
- Whether ‘first party’ has ‘frequently instituted or conducted proceedings against the other party in any Australian court or tribunal⁶
- Cumulative or potential cumulative effect of any harm resulting from above.

Not intended to be an exhaustive list – see explanatory memorandum⁷

⁶ Note: This includes proceedings etc before the section was introduced.

⁷ Paragraph 328: Court may have regard to any other factor relevant to the matter, including where there have been proceedings in other courts that relate to the matter, interactions with agencies, for example in relation to child welfare or child support, and any other relevant factor.

What orders to seek?

Drafting ideas

Example: HPO Order

“Pursuant to section 102QAC, “*X party*” shall be prohibited from instituting proceedings under this act against “*Y party*”, without first obtaining leave of the court.

Note: 102QAC(7)

If HPO is made, the court must also make order as to what the court will do if the first party makes an application for leave under 102QAE.

The court must make an order as to whether it notified the other party of either/both of the following:

- That an application has been made; and/or
- If that application has been dismissed

Drafting ideas - continued

Example: Notification Order

“Upon “X party” making an application under s 102QAE for leave to bring an application, “Y party”:

- Shall be notified by the court of the application being made;*
- Shall not be notified by the court of the application being made, however shall be notified of any application made upon said application/s being subsequently being dismissed.*
- Shall not be notified of any application made or the outcome of said application.*

Vexatious Proceedings Orders (VPO)

What do VPO's do?

s102QB(2): Orders available?

The court *may* make any/all of the following orders:

- Staying or dismissing all/part of any proceedings in the court, already instituted by the person;
- Prohibiting a person from instituting proceedings (or proceedings of a particular type) under *FLA* (in a court having jurisdiction);
- Any other order the court considers appropriate in relation to the person

Examples from section:

- Order directing person may only file documents by mail
- Order to give security for costs;
- Order for cost

Power & VPO test: s 102QB(1)

Two part test =

Court (with jurisdiction) must be satisfied

- Person has **frequently instituted or conducted**
- **Vexatious proceedings** in **Australian Courts or tribunals** or
- **Person acting in concert with someone who is subject to a VPO** has *frequently instituted / conduct vexatious proceedings ect.*

Note: 102Q: reference to ‘person acting in concert’ does not include a person who is acting as a lawyer or representative of the other person.

How to apply the test?

Rilak & Tsocas [2020] FamCA 49

Justice Gill – noted approach in:

- Cannon & Acres [2014] FamCA 104; and
- Pencious & Searle [2017] FamCAFC 210

What = Frequently instituted or conducted?

There is no definition of frequently in the Act.

- Note: previous test applied before 102QB (s118 of act) – approved by Full Court in Marsden & Winch [2013] FamCAFC 177 at para 81 =
 - “habitually and persistently” and
 - “without any reasonable ground”
- S 102QB (1) = frequently rather than habitually and persistently

Case Law

- Rilak & Tsocas [2020] FamCA 49 - Justice Gill:
- Wood & Muller [2020] FamCA 162 - Justice Johns:
- Pedrana & Roberts (No 2) [2015] FamCA 231 - Justice Cronin:

What = “Vexatious Proceedings”: s102Q

Definition =

- Proceedings that = **abuse of the process** of court or tribunal; and
- Proceedings **instituted and/or conducted** in a court of tribunal to:
 - Harass or annoy
 - Cause delay or detriment
 - Another wrongful purpose
- Proceedings instituted / pursued **without reasonable ground**; and

Note: definition is ‘inclusive’, not limited.

Case Law?

Pencious & Searle [2017] FamCAFC 210

What does
the court
consider?
s102QB(6)

Considerations

The Court *may* have regard to:

- **Proceedings instituted** (or attempted to be instituted) or **conducted** in any Australian court or tribunal; and
- **Orders** made by any Australian court or tribunal
- **Persons overall conduct** in proceedings conducted in any Australian court or tribunal (including the person's compliance with orders made by that court or tribunal);

Note: Including proceedings instituted (or attempted to be instituted) or conducted, and orders made, before the commencement of this section

When can an order be made?

102QB(3): The court has the power

- On its own initiating
- Or on application of:
 - The Attorney-General of the Commonwealth or of the State or Territory;
 - The appropriate court official
 - A person against whom another person has instituted or conducted vexatious proceedings;
 - A person who has a sufficient interest in the matter.

Limitation = Procedural Fairness 102QB (4)

- Must not make order “without hearing the person or giving the person an opportunity of being heard”

Note: 102QB(5): regardless of when made, a VPO is a final order.

- **Important:** Only a judge has the power to make an order, is not a delegated power.

Standard of Proof?

- Unlike HPO's, VPO's require a standard of proof of balance of probabilities
- Legislation does not prohibit order being made during proceedings, however likely court will only occur at a final hearing due to finding being required to be made.

HPO or VPO in place: what happens next?

DIVISION 2--VEXATIOUS PROCEEDINGS ORDERS

Subdivision A--Making vexatious proceedings orders

[102QB](#) Making vexatious proceedings orders

[102QC](#) Notification of vexatious proceedings orders

Subdivision B--Consequences of vexatious proceedings orders

[102QD](#) Proceedings in contravention of vexatious proceedings order

[102QE](#) Application for leave to institute proceedings by person subject to vexatious proceedings order

[102QF](#) Dismissing application for leave by person subject to vexatious proceedings order

[102QG](#) Granting application for leave by person subject to vexatious proceedings order

DIVISION 1B--HARMFUL PROCEEDINGS ORDERS

Subdivision A--Making harmful proceedings orders

[102QAC](#) Making harmful proceedings orders

Subdivision B--Consequences of harmful proceedings orders

[102QAD](#) Proceedings in contravention of harmful proceedings order

[102QAE](#) Application for leave to institute proceedings

[102QAF](#) Dismissing application for leave

[102QAG](#) Granting application for leave

Also see Rules:

- HPO's: Rule [10.24](#) – Application for Leave
- VPO's: [Rule 10.23](#) – Certificate under 102QC.

VPO VS HPO

Similarities:

- Both are final orders
- Both require procedural fairness – ie person affected by order to have opportunity to be heard
- Same definition of 'proceedings'
- When considering proceedings (past/present) – will both consider proceedings in all Australian courts/tribunals

Differences:

- **Focus:**
 - HPO: Impact
 - VPO: Intent
- **Purpose:**
 - HPO: protect 'other' person (not bound by order)
 - VPO: protect court process
- **Considerations:**
 - HPO:
 - history of proceedings b/w parties, 'frequently instituted', cumulative harm.
 - Non-exhaustive, 'any other factor relevant'
 - VPO: Proceedings instituted/conducted, orders made, person's overall conduct.
- **Test & Standard of Proof:**
 - HPO: reasonable grounds to believe (reasonable person test). Belief needs not be proven on balance of probabilities.
 - VPO: balance of probabilities

Summary Decrees

What to look for?

Party with no reasonable **prospect of success defending proceedings**

Power: s 102QAB

Test: No reasonable Prospect of Success

- (1) The court may make a decree for one party (first party) against another if:
 - First party: is prosecuting the proceeding or part of proceedings; and
 - Court is satisfied the other party has no reasonable prospect of successfully defending whole / part proceedings.
- (2) Same rule, but first party is defending proceedings

Important: SJR has the power to make a decree (see 31.1 of Schedule 3)

Summary Decrees 102QB continued

Clarification: 'No reasonable prospect of success?'

A defence or proceeding or part of proceeding need not be:

- Hopeless; or
- Bound to fail;

Case Law?

Stativa & Stativa [2015] FamCAFC 170:

- Full court summarised the High court (Kirby J) list of principles from *Lindon v Commonwealth of Australia (No 2)* [1996] HCA 14
 - See also - *McKellar v Container Terminal Manager Services Limited* [1999] FCA 1101 [18]

Summary Decrees 102QB continued

Test: Proceedings that are frivolous, vexatious or abuse of process

(4) Court may dismiss all/part of proceedings, **at any stage**, if satisfied proceedings or that part, is frivolous, vexatious or an abuse of process.

(5) Note - proceedings/a part of proceedings are not frivolous, vexatious or an abuse of process merely because an application (relating to that proceeding/part) is made and later withdrawn.

Costs?

If decree is made or court dismisses all/part of proceedings under this section:

- the court may make such order as to costs as the court considers **just**.

Other things to note:

- Decree – can be in relation to whole or any part of proceeding
- Decree can be made on the courts own initiative or on an application by a party to proceedings

Strategy: Concepts to consider

Access to Justice vs Procedural Fairness

All litigants have an equal right to access justice, and those experiencing family violence are not to be disadvantaged in the court system.¹¹

The Courts **will** take steps to ensure the requirements for procedural fairness and access to justice are met **while protecting a person from experiencing further abuse through the other party's misuse of these systems.**¹²

Section 69ZN: Principles for conducting child-related proceedings

If child-related proceedings: Consider principle 1, 2 & 3

¹¹ Family Violence Best Practice Principles

¹² Family Violence Best Practice Principles

*Strategy:
Concepts to
consider
continued*

Coercive Control?

See Family Violence Best Practice Principles:

Link between Systems Abuse & Coercive Control?

What = Coercive Control?

Course of conduct by one person aimed at dominating or exerting power over the other.

Can include a pattern of controlling and manipulative behaviours such as (but not limited to): emotional manipulation including humiliation and threats.

Behaviour of litigants asserting an experience of family violence?

Parents experiencing violence can behave in ways that may appear inconsistent with good parenting practice

*Strategy:
Concepts to
consider
continued*

Section 60D: Adviser's obligations in relation to best interests of the child

Legal practitioners, when giving advice/assistance to a person re: matters concerning a child **must**

- **Inform the person** that they should regard the best interests principles as paramount; and
- **Encourage the person** to act in the child's best interests by applying s 60CC(2)&(3).

Strategy: Practical Applications

Clients:

Identify issues early.

Trauma informed lense, book up on family violence theory

Material:

Consider evidence needed for each particular order:

Documentary?

Personal experience of litigant?

Expert Evidence?

Course of Conduct?

Case Management:

Consider options regarding court events

Case management pathway

Powers of Registrar's

Suggestion from Family Violence Best Practice Principles – same decision maker

Strategy: practical applications continued...

Applications & Orders

- Consider orders sought early
- What orders are available?
 - Example: Is the litigant vexatious or just the response/application?
 - Does the application have no reasonable likelihood of success or
 - In itself is Frivolous, vexatious or an abuse of process?
 - See Rule 10.09 and Section 102QA (SJR has delegated power under both – 31.1 & 31.2 Schedule 4)

Timing?

- Application/Response?
- Ammended Application/Response?
- Application in a proceeding?

Strategy: practical applications continued...

What orders?

Costs Applications	Summary Decrees 	Undefended Hearing
102NA order	Harmful Proceedings Order 	Application for dismissal
s 68B & 114: Injunctions	Vexatious Proceedings Order 	s 65DAAA
Security for costs	Summary Disposal	Default judgement
Orders for disclosure	Freezing Orders	Other considerations

Example: 102NA

Test =

1. Does a party intend to cross-examine the other?
2. Has there been an allegation of family violence?
3. If yes, then 1 of the following:
 - Is there a current final IVO between the parties? OR
 - Has either party been 'convicted' or facing charges of an offence involving violence or threat of violence?
 - Is there a 68B or 114 injunction protecting or directed against either party?
 - (1)(c)(iv) Has or WILL the court make an order that prohibits personal cross-examination under (2)? (discretionary power)

Exercise of discretion under (1)(c)(iv) – Guidance?

- First: go to explanatory memorandum and purpose of the section
- Note: it is not a code or an exhaustive list
- Then consider evidence available

Is there any Case Law?

- Example: *Naisby & Naisby (No 2)* [2024] FedCFamC1F 699

Other things to remember?

Once order is made?

Example:

Stays/Dismissals

Rule 10.26 & 10.27

Is a party in default?

- Compliance with court orders?
- Filing and Service compliance?
- Any other non-compliance?
- Have they failed to prosecute or defend with 'due diligence'?

Orders available include:

- Seek that all or part of the proceedings be stayed or dismissed
- Step be taken within time limit and if not – stayed or dismissed
- Court giving judgement

Test = what the 'court thinks just'

Note: SJR has the power.

Example:

Dismissal or undefended Hearing

Rule 1.33 & 1.34

Has there been a failure to comply with a legislative provision or order?

Orders available include:

- dismiss all/part of the proceeding;
- set aside a step taken or order made;
- determine proceeding as if undefended;
- Costs
- prohibit the party from taking a further step until occurrence of a specified event;
- any other order - court considers necessary (having regard to the overarching purpose)

Note: SJR has the power.

Other ideas

Correspondence

- Procedural Fairness
 - Record of putting party on notice of behaviour?
- Correspondence from other side?
 - In affidavit material? s 131 Evidence Act
 - Notice to admit – Rule 8.01 and 8.02
 - Disclosure obligations – Rule 6.05

Notations at court hearings

Amended Application/Response

Intervention Orders

Extended Litigation Restraint Orders

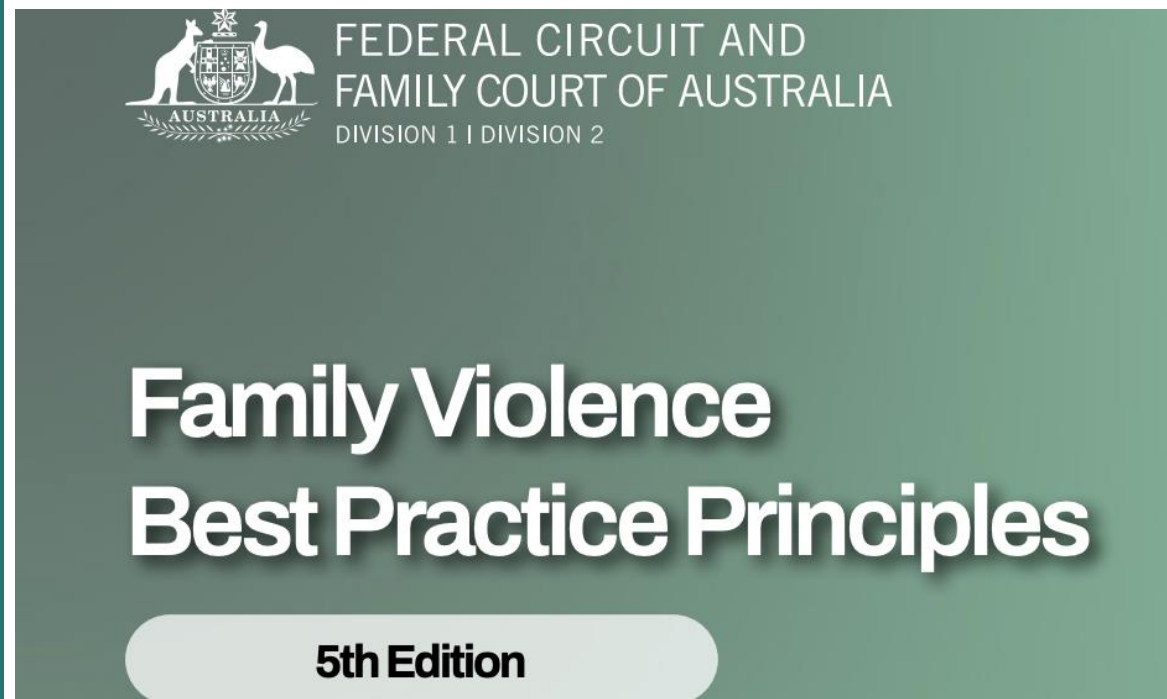
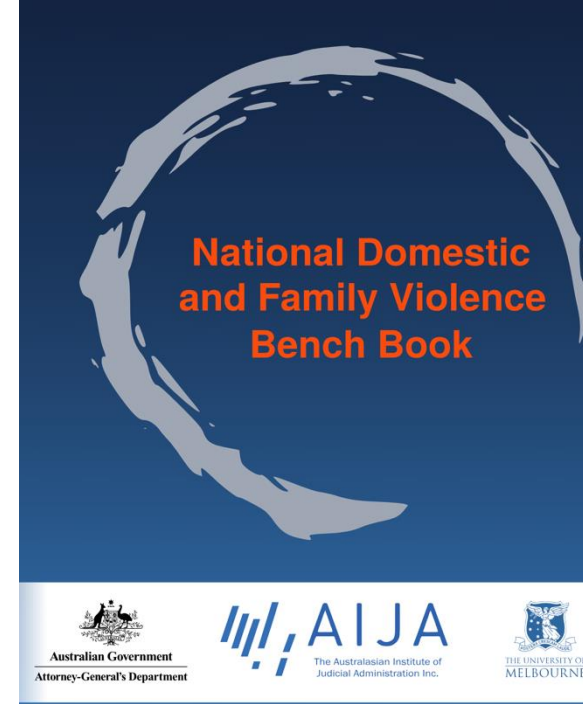
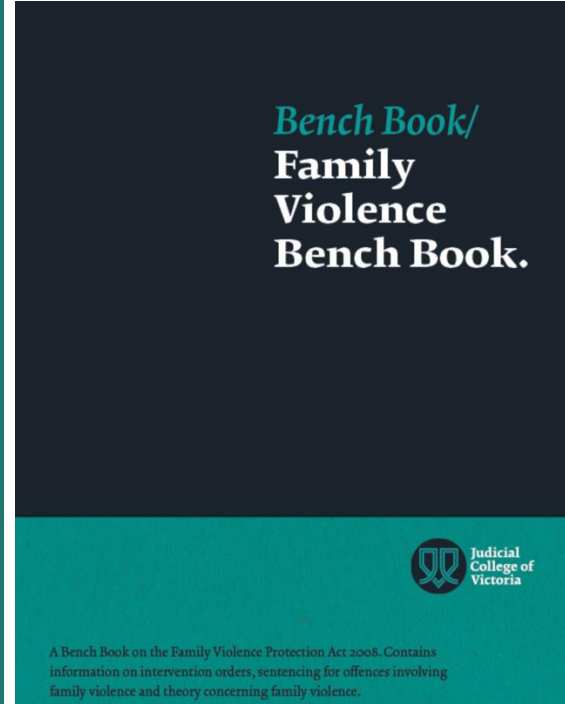
Resources

[National Family Violence Bench Book:](#)

[Judicial Collage: Family Violence Bench Book](#)

[Family Violence Best Practice Principles](#)

[Family Law Amendment Bill – Explanatory Memorandum](#)





Questions?