

## The unintended consequences of 'Costs' and mediation in the Civil jurisdiction in relation to Protection Orders.

### Domestic and Family Violence Protection Act 2012

The Domestic and Family Violence Protection Act 2012 is 'An Act to provide for protection of a person against violence committed or threatened by someone else if a relevant relationship exists between the persons'.<sup>1</sup>

The Act further recognises that 'Domestic violence is most often perpetrated by men against women with whom they are in an intimate partner relationship and their children; however, anyone can be a victim or perpetrator of domestic violence'.<sup>2</sup>

While I have quoted women as aggrieveds and men as respondents throughout this article I acknowledge that domestic violence can be perpetrated by anyone in a relevant relationship and that victims can be male, although the statistics state that one quarter of women in Australia have experienced at least one incident of violence by an intimate partner (ABS, 2017).<sup>3</sup> Research further states that "a man was most likely to experience violence in a place of entertainment and a woman was most likely to experience violence in her home."<sup>4</sup>

The Act operates within a costs jurisdiction. Part 5 Division 3 s157 ss(2) gives the court power to award costs<sup>5</sup>

- (1) Each party to a proceeding for an application under this Act must bear the party's own costs for the proceeding.
- (2) **However, the court may award costs against a party who makes an application that the court hears and decides to dismiss on the grounds that the application is malicious, deliberately false, frivolous or vexatious.**
- (3) In this section—  
**party** includes an aggrieved.

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<sup>1</sup> <https://www.legislation.qld.gov.au/view/pdf/2017-05-30/act-2012-005>.

<sup>2</sup> Ibid.

<sup>3</sup> <https://www.anrows.org.au/resources/>.

<sup>4</sup> ANROWS, 2012. Violence against women: Additional analysis of the Australian Bureau of Statistics Personal Safety Survey. Sydney.

<sup>5</sup> <https://www.legislation.qld.gov.au/view/pdf/2017-05-30/act-2012-005>.

In the context of this article, the Macquarie dictionary definition of the qualifications in No 2 are taken to mean<sup>6</sup>

Malicious to mean motivated by vicious, wanton, or mischievous purposes, as in malicious arrest, malicious injuries to persons or property, malicious prosecution, etc.

Frivolous to mean of little or no weight, worth, or importance; not worthy of serious notice

Vexatious to mean instituted without sufficient grounds, and serving only to cause annoyance.

Guidance for magistrates in awarding costs is found within in the Magistrates Courts Act 1921, Domestic and Family Violence Protection Rules 2014 Part 7.<sup>7</sup>

### **Principles for administering the Act are**

(1) This Act is to be administered under the principle that the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount.

(2) Subject to subsection (1), this Act is also to be administered under the following principles—

(a) people who fear or experience domestic violence, including children, should be treated with respect and disruption to their lives should be minimised;

(b) to the extent that it is appropriate and practicable, the views and wishes of people who fear or experience domestic violence should be sought before a decision affecting them is made under this Act;

(c) perpetrators of domestic violence should be held accountable for their use of violence and its impact on other people and, if possible, provided with an opportunity to change;

(d) if people have characteristics that may make them particularly vulnerable to domestic violence, any response to the domestic violence should take account of those characteristics;

*Examples of people who may be particularly vulnerable to domestic violence include*

- women
- children
- Aboriginal people and Torres Strait Islanders
- people from a culturally or linguistically diverse background
- people with a disability
- people who are lesbian, gay, bisexual, transgender or intersex

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<sup>6</sup> <https://www.macquariedictionary.com.au/>.

<sup>7</sup> <https://www.legislation.qld.gov.au/view/html/inforce/current/sl-2014-0322>.

- elderly people

(e) in circumstances in which there are conflicting allegations of domestic violence or indications that both persons in a relationship are committing acts of violence, including for their self-protection, the person who is most in need of protection should be identified;<sup>8</sup>

A letter of demand is usually received by an aggrieved woman from the respondent's lawyer threatening to sue for costs at Hearing. This could be for a malicious, frivolous or vexatious complaint. The aggrieved applicant who has filed a private application to the court for a protection order is often unable to afford a lawyer, is often ineligible for Legal Aid and the local Community Legal Centre is under-resourced and unable to provide representation in the court. This typical scenario is substantiated in the Victorian Law Reform Commission Civil Justice Review.<sup>9</sup> The review states that this may be due to the respondent controlling the family finances, or wanting to punish the victim further. Often, the aggrieved may withdraw her application due to the fear of having to pay for the respondent's legal costs if an adverse finding is made against her. As in all civil matters, the standard of proof required is based on 'the balance of probability'.

In accordance with the Victorian Law Reform Commission Civil Justice Review:

Self-represented litigants are not a homogenous group, but exhibit a wide range of very diverse needs for information, advice and direction as well as exhibiting a wide range of emotional states and responses to litigation ... By definition litigants in person lack the skills and abilities usually associated with legal professionals ... Commentators have observed that adversarial litigation in common law civil justice systems is designed on the assumption that litigants will be represented by competent legally trained professionals and that when people represent themselves conventional assumptions about how the case will be conducted do not apply because most self-represented litigants will have none of the attributes the system design assumes they will have - knowledge of civil procedure, advocacy, evidence and law and duties to the court.<sup>10</sup>

The review goes on to state that 'these difficulties have the tendency to hamper and prolong court proceedings and also create a risk that meritorious

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<sup>8</sup> <https://www.legislation.qld.gov.au/view/pdf/2017-05-30/act-2012-005>.

<sup>9</sup> Report 14, VLRC, March 2008 Chapter 9: Helping Litigants with Problems and Hindering Problem Litigants 564.

<sup>10</sup> Ibid.

claims brought by self-represented litigants may be obscured by or fail because of poor articulation, incoherence or procedural irregularity'.<sup>11</sup>

In my ten plus years as a court advocate for women applicants for a DVO, I have seen many, many instances where a woman has been too afraid to continue to a Hearing. This can be because the respondent is still intimidating her and making her fearful, using threats against her or the children, and generally continuing his power and control tactics against her.

This fear is also shown when mediation is requested. This is particularly difficult when the aggrieved is faced with a persuasive lawyer, and she has no representative.

The duties of solicitors are outlined in the Australian Solicitors' Conduct Rules June 2011 <sup>12</sup>

Fundamental duties of solicitors

3 Paramount duty to the court and the administration of justice.

3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

The Act identifies the person most in need of protection as being the primary concern in matters dealt with in the civil jurisdiction. This can be construed as a conflict when mediation or costs are requested.

The Act was designed to minimise the incidence of cross applications. Unfortunately this has not been evident in the number of aggrieveds being served with a DVA in response to their request for protection. Many of these had a significant prior history of victimisation.

In my experience supporting women in the DV Court, aggrieveds often had multiple issues affecting their ability to engage on an equal footing with the respondent. Apart from a history of abuse, they often had responsibility for children, had been forced from their home into a refuge, had their

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<sup>11</sup> Ibid 566.

<sup>12</sup> <https://www.lawcouncil.asn.au/policy-agenda/regulation-of-the-profession-and-ethics/australian-solicitors-conduct-rules>.

employment negatively affected, lost access to family finances and felt significantly afraid of the respondent.

Women who were from Aboriginal and Torres Strait Island backgrounds, from culturally and linguistically diverse backgrounds, affected by disabilities or who suffered from mental health conditions were unable to react assertively to the challenges of mediation or the threatened imposition of costs.

In addition, these women still have to face actions in the family court, which is also imbedded with the mediation concept and expectation of reaching an early resolution whilst attempting to protect their children, recover and continue with their lives.

Working on the front line as chair of the High Risk Team and as Women's Liaison officer with police I provide advocacy and support for female victims of domestic and family violence. In court I note that the magistrate reminds parties that this is a costs jurisdiction, which means that the process is closely related to either coming to an agreement in regard to cross orders (even though the Act stipulates that the court should make a finding of the person most in need of protection but cross orders may still be made) or the consequential withdrawal of an application for protection in fear of further negative consequences.

### **Mediation in Civil Procedure**

Civil procedure places a great emphasis on mediation between parties and their lawyers. This is specifically so if cross applications are in place. The pressure to achieve a resolution to avoid a trial places a precedent on lawyers to come to some sort of resolution and avoid trial. That should it go to trial and 'the person most in need of protection' is ill-identified complicates the matter and puts the aggrieved at further risk. As the courts still have the power to make cross orders and, if a finding is made using the categories of frivolous or vexatious applications then the applicant will have to pay the costs of the other party, which aggrieveds often cannot afford. This causes significant distress for the aggrieved and often results in them withdrawing their applications. The level of proof is reliant on the 'balance of probabilities' as a lot of this type of abuse happens behind closed doors where proof is unavailable. The behaviours which are unable to be proven often leave little evidence.

Additionally, the concern is elevated if the Briginshaw method of proof<sup>13</sup> is called upon. For instance what may only appear in an exchange of text messages which on the outside appear 'frivolous' but the victim is the only one who knows the calculated manipulation of a perpetrator and what they say or do brings on a traumatic reaction. This can also affect the credibility of the aggrieved as they appear on the stand and react with overt behaviours from a place of trauma and do not appear to be the 'perfect victim' people wish to see. Although I note there is a protected witness status which can be applied for under Part 5 Division 2 of the Act<sup>14</sup> and further s151 which allows a lawyer only and not the respondent to cross-examine the aggrieved.

Commentators have suggested that some kinds of power imbalance make mediation inappropriate. For example, mediation has been described as 'problematic' in situations involving domestic abuse or violence.<sup>15</sup> In my experience aggrieved women have reacted with significant fear when faced with a mediation session.

In Queensland the overriding philosophy is 'to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense'.<sup>16</sup> This relies on an awareness of issues when domestic abuse has occurred (and may be ongoing), and a willingness to achieve a just outcome. Costs sanctions can be imposed to deter parties from conducting their cases in an excessively adversarial manner.

The power to dispense with the rules of procedure enables the court to exercise its discretion to facilitate the attainment of justice and prevent the application of the rules from becoming a source of injustice.<sup>17</sup>

The following extract is provided from the Domestic and Family Violence Death Review and Advisory Board 2016–17 Annual Report.<sup>18</sup> It should be noted that this report is a discussion and assessment of people who have suicided or been murdered as a result of domestic violence.

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<sup>13</sup> <http://www.austlii.edu.au/au/journals/MULR/2003/13.html>.

<sup>14</sup> <https://www.legislation.qld.gov.au/view/html/inforce/current/act-2012-005#sec.150>.

<sup>15</sup> Stephen Colbran et al *Civil Procedure Commentary and Materials* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2019).

<sup>16</sup> Uniform Civil Procedure Rules 1999 (Qld) rule 5.

<sup>17</sup> Stephen Colbran et al *Civil Procedure Commentary and Materials* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2019).

<sup>18</sup> [https://www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0003/541947/domestic-and-family-violence-death-review-and-advisory-board-annual-report-2016-17.pdf](https://www.courts.qld.gov.au/__data/assets/pdf_file/0003/541947/domestic-and-family-violence-death-review-and-advisory-board-annual-report-2016-17.pdf).

## **Key Themes and Issues**

### ***Identification of the person most in need of protection***

All adult females in the cases reviewed had previously been identified as a respondent by services, even though some had a significant prior history of victimisation. This demonstrates the need for increased understanding of when, why and how victims may use violence, and highlights opportunities for enhancing the capacity of services to identify these underlying relationship dynamics.

Where a primary victim who uses violence as a reaction to prior abuse is listed as a respondent on protection orders, it can have wide-ranging and long-lasting ramifications, including in the way that services respond to that person. It can also impact on a victim's willingness to seek help in the future, and may increase their risk of further victimisation as it can validate and perpetuate a perpetrator's abusive actions.

## **The way forward**

So where to from here? One of the factors attributed to the application for protection orders originating in the civil jurisdiction is Parliament's acknowledgement that victims of domestic violence generally do not want prosecution of a criminal offence against their partner - they just want the violence to stop. Much controversy has surrounded this issue over time as to whether this process should remain in the civil jurisdiction (with all the above adversities discussed) or be placed immediately in the criminal jurisdiction and call it for what it is, criminal. For me, to weigh up the many pros and cons of this process 'the jury is still out'.