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HARMFUL PROCEEDINGS ORDERS: SECTION 102QAC *FAMILY LAW ACT 1975*

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BY STEPHEN PAGE[1]

INTRODUCTION

If it looks like a duck, flies like a duck and quacks like a duck, it's a duck. I can't help thinking that this section is instead of being called section 102QAC, should be called 102quack.

Section 102QAC enables the court to make what is called a harmful proceedings order. The ability to make a vexatious proceedings order is under section 102QB.

The case that illustrated the need for legislating s.102QAC: *Marsden & Winch*

The problem with making vexatious proceedings order was identified in the long-litigated matter of *Marsden & Winch*. After nine years of litigation, the matter came back before Watts J in *Marsden & Winch* [2012] FamCA 557. His Honour made a vexatious proceedings order against the father. In the words of Watts J:

> *"The father suffers from paraphilia. The father's previously sexually inappropriate behaviour arose from problematic attachments and his ability to be appropriately intimate."*

As he had done before, not surprisingly, the father then appealed that judgment. The Full Court accepted his Honour's findings as to the risks concerning the father but upheld the appeal as to the vexatious proceedings order, discharging that order. The Full Court comprised Byant CJ, Ainslie-Wallace and Ryan JJ.

Watts J said:

> *"So the father's risk assessment, which was high to moderate, has lessened but is still one which exceeds moderate risk."*

His Honour concluded about risk:

> *"However, ultimately this case turns on the mother's genuine fears which have seriously affected her psychological health. I have no difficulty finding that if the mother's psychological health is significantly compromised, then it would be a significant impediment to her capacity to parent and would in turn pose a significant risk to [the child's] psychological development. In the end, based on that alone, I have reached the conclusion that firstly, that circumstances have not significantly changed in the father's*

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favour for there to be a different outcome to the previous one, and secondly it is in [the child's] best interests to dismiss the father's most recent application. The mother is however, to provide [the child] with any appropriate communication that the father sends [the child] and to provide the father with regular reports on [the child's] school progress."

After referring to the terms of s 118(1)(c) of the Act [now s.102QB(4)], Watts J said:

"The present case involves protracted serial proceedings over many years, involving a child, in circumstances where that litigation itself has had a significant effect on the psychological health of the primary care giver of that child and potentially future litigation might have a far greater effect on the psychological health of the primary care giver to the extent that that person's parenting capacity might be seriously compromised. I accept that the mother has, inter alia, developed post-traumatic stress disorder, substantially as a result of the persistent litigation.

The question to be considered is whether or not the proceedings brought by the father, whilst not falling precisely within any particular description are nonetheless vexatious when considered in the light of the effect that the proceedings has had on the respondent in the proceedings.

It is my view that in a very narrow group of cases (of which this is one), where there is clear evidence upon which a finding can be properly made that:

- *the current proceeding is only the most recent proceeding in a long series of litigation about the same child or children; and*
- *the cumulative effect of serial proceedings and, in particular the current proceedings, has caused the primary carer considerable distress, worry, annoyance, irritation and unhappiness to the extent that it has had a profound effect on their psychological health and potentially their ability to continue to care for the child*

then it is open to the court to make a finding that the most recent proceedings can indeed be described as vexatious within the meaning of s 118 FLA."

Their Honours highlighted the statement by his Honour: *"in light of the effect that the proceedings has had on the respondent in the proceedings."*

Their Honours said:

"The policy considerations behind the enactment of s118 were identified in Zabaneh & Zabaneh [1986] FamCA 18; (1986) FLC 91-766. In that case, Evatt CJ (with whom Fogarty and Renaud JJ agreed) said at [75,586]:

> *(The purpose of these provisions) "...is to prevent multifarious overlapping applications between the parties, which amount in essence to a harassment of the other party, and an abuse of the process of the Court, and which involve enormous expense for both the parties and the legal aid office".*

The effect of s118 can be succinctly stated; it restricts a person's right to commence proceedings under the Act.

The Full Court in Bennett & Bennett [2001] FamCA 462; (2001) FLC 93-088 at [42] accepted what Kirby J said Re Attorney-General (Cth); Ex parte Skyring [1996] HCA 4; (1996) 135 ALR 29 at [323]:

> *...it is regarded as a serious thing in this country to keep a person out of the courts. The rule of law requires that, ordinarily, a person should have access to the courts in order to invoke their jurisdiction.*

Kirby J further said at [159] in Batistatos v Roads and Traffic Authority of NSW [2006] HCA 27; (2006) 226 CLR 256:

> *The common law has long been defensive of the right that all persons enjoy to have access to the courts and not to be denied such access save in the most exceptional of circumstances (251). So much is inherent in the rule of law which is a foundation of Australia's legal system, implied in the Constitution.*

The Full Court in Bennett at [33] enunciated two important principles to be considered when abrogating from this right. First, if a fundamental common law right or privilege is to be modified by statute, then the statute should make that intention unambiguously clear; and, secondly the right of a citizen to unimpeded access to the courts is a fundamental common law right.

The language of s118 makes it clear that Parliament intended the court to have, in defined circumstances, the power to deprive a litigant of the right to have access to the courts and only in accordance with the provisions of s118.

It is a course that should be reserved for the clearest of cases (see Vlug and Poulos (1997) FLC 92-778). At this point it is appropriate to express our disagreement with his Honour's sentiment at [176]. At [176], the trial judge said:

> *As Cronin J pointed out in Lindberg & Scott [2009] FamCA 465, an order under s118 FLA does not restrict the freedom of the father's access to the court. Rather, it means that the mother does not have to be involved in any further substantive litigation between herself and the father relating to [the child] until the court gives the father leave to institute further proceedings.*

As we will explain, an order pursuant to s 118 is a step not to be undertaken lightly and deprives a person subject to such an order of the same level of access to the Court as enjoyed by others.

The Full Court in Bennett further said:

> *It seems to us that the arguments against the proposition that s 68B(1) or (2) authorise the granting of an injunction restraining the institution of proceedings without leave in relation to a child, become more compelling when regard is had to the fact that in s 118 of the Family Law Act the Parliament has clearly defined the circumstances in and terms on which the court may order that a person who has instituted proceedings shall not, without leave, institute further proceedings.*

Bennett was considered recently in Theophane & Hunt [2013] FamCAFC 68. In Theophane & Hunt, the trial judge relied upon Division 12A of the Act for power to restrain the parties from commencing parenting proceedings without leave. As their Honours explained, Division 12A did not empower the trial judge to make the order. Consistent with what was said in Bennett, at [47], that power can only be exercised in

accordance with the limitations contained in the statute directed to that specific subject matter. Because his Honour relied on r 11.04(1) as an alternate source of power to that in s 118(1)(c), this is a matter of some significance.

Section 123 of the Act confers power on the judges of the Family Court to make rules for the Family Court and (excluding the Federal Circuit Court) any other court exercising jurisdiction under the Act, for and in relation to practice and procedure (and incidental thereto) or necessary or convenient for the conduct of court business (Harrington v Lowe (1996) 190 CLR 311 at [324]). Rule 11.04(1) is such a rule.

In Harrington v Lowe, the High Court at [324-325] held that the power conferred by s 123:

> *... does not authorise the making of regulations [or rules] which*
>
> *(i) vary or depart from, and thus are inconsistent with, the positive provisions of the Act ..., or*
>
> *(ii) go beyond the field of operations marked out by the Act, in particular, beyond the exercise of federal jurisdiction by courts doing so in respect of matters arising under the Act. [footnotes omitted]*

It follows, that it would not be a valid exercise of the rulemaking power for r 11.04(1) to vary, depart from or operate in a manner inconsistent with s 118.

The interplay between s 118 and r 11.04(1) was considered in DJC and SJS and Child Representative [2005] FamCA 1006; (2006) 34 Fam LR 329 and JB and BW [2006] FamCA 639. We observe that whether or not r 11.04(1) was a valid exercise of the rule making power is not discussed and thus these decisions proceed on the basis that it was.

In DJC and SJS the Full Court said at [53]:

> *It can be seen that as a necessary condition precedent to making any order under s 118 or Rule 11.04 restraining a party from filing or continuing an application it is necessary for the Court first to determine that there are proceedings before it which are frivolous or vexatious and to dismiss those proceedings before then making the order restraining the commencement of further proceedings.*

And at [54] the Full Court further said that absent a finding that the current application was either vexatious or frivolous:

> *...[I]t would be inappropriate to make any order under s 118 or under Rule 11.04. It is clear the parliament has provided in s 118 a clear legislative framework of circumstances in which the Court may order a person shall not file further proceedings without the leave of the Court which were not satisfied in this instance (see Bennett v Bennett [2001] FamCA 462; (2001) FLC 93-088 at 88,593).*

However, in JB and BW, a differently constituted Full Court said at [70]:

> *There are significant differences in the circumstances in which the power is enlivened either under s 118 or under the Rules. The s 118 power is enlivened if there are proceedings before the Court that the Court is satisfied are frivolous and vexatious and those proceedings are dismissed. If an application is then made by a party to the proceedings, seeking an order restraining the other party from*

> *commencing any further proceedings without leave of the Court, the Court may make the order. The power under the Rules may be exercised by the Court on its own initiative or on an application of a party. The Court is required to be satisfied that an applicant has frequently started a case or appeal that is frivolous, vexatious or an abuse of process.*

As can be seen, the Full Court in JB and BW gave r 11.04 a wider reach than that given in DJC and SJS. Although we cannot be certain, it would appear that the narrower view expressed in DJC and SJS reflects an interpretation designed to ensure that the rule did not exceed power. In circumstances where r 11.04 has been repealed; little argument was presented on the point and, as we will discuss, his Honour's interpretation of the word "vexatious" will not be upheld, we need not take this discussion any further.

A finding that proceedings are "vexatious" is thus a precondition to any order under s 118 and r 11.04. How then are proceedings to be characterised as "vexatious"?

In Batistatos the High Court considered what amounted to "abuse of process". The plurality (Gleeson CJ, Gummow, Hayne and Crennan JJ) quoted at [10] Lord Blackburn in Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210 (where he said at [220-221]:

> *[F]rom early times (I rather think, though I have not looked at it enough to say, from the earliest times) the Court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing — the Court had the right to protect itself against such an abuse; but that was not done upon demurrer, or upon the record, or upon the verdict of a jury or evidence taken in that way, but it was done by the Court informing its conscience upon affidavits, and by a summary order to stay the action which was brought under such circumstances as to be an abuse of the process of the Court; and in a proper case they did stay the action.*

The plurality continued:

> *[12] Several other points are to be made respecting that statement in Metropolitan Bank. The first is that Lord Blackburn treated vexatious process as synonymous with, or at least an instance of, abuse of process. Secondly, the issues to be considered go beyond a question as to whether the claim or defence in question is bad in law; the demurrer was developed to deal with that situation. Thirdly, and as later emphasised in this Court in authorities to which reference has already been made in these reasons, Lord Blackburn indicated that the power existed to enable the court to protect itself from abuse of its process thereby safeguarding the administration of justice. That purpose may transcend the interest of any particular party to the litigation.*

That the term "abuse of process" includes proceedings brought for an improper purpose or which are "frivolous, vexatious or oppressive" appears to be well settled. See Ridgeway v The Queen [1995] HCA 66; (1995) 184 CLR 19 where Gaudron J said at [74] to[75]:

> *The powers to prevent an abuse of process have traditionally been seen as including a power to stay proceedings instituted for an improper purpose, as well as proceedings that are "frivolous, vexatious or oppressive". This notwithstanding, there is no very precise notion of what is vexatious or oppressive or what otherwise constitutes an abuse of process. Indeed, the courts have resisted, and even warned*

> *against, laying down hard and fast definitions in that regard. That is necessarily so. Abuse of process cannot be restricted to "defined and closed categories" because notions of justice and injustice, as well as other considerations that bear on public confidence in the administration of justice, must reflect contemporary values and, as well, take account of the circumstances of the case. That is not to say that the concept of "abuse of process" is at large or, indeed, without meaning. As already indicated, it extends to proceedings that are instituted for an improper purpose and it is clear that it extends to proceedings that are "seriously and unfairly burdensome, prejudicial or damaging" or "productive of serious and unjustified trouble and harassment'."*

The plurality in Batistatos continued at page 267 at [15]:

> *...To that it should be added that the power to deal with procedural abuse extends to the exclusion of particular issues which are frivolous and vexatious...*

In Attorney-General v Wentworth Roden J said at [487]:

> *Meaning of "vexatious"*
>
> *This is obviously a critical term, and can hardly be regarded as mere surplusage. If, as I believe must be the case, "habitually and persistently and without any reasonable ground institutes vexatious legal proceedings", means something different from "habitually and persistently and without any reasonable ground institutes legal proceedings", then relevant vexation cannot be found simply in the habitual or persistent manner in which legal proceedings are instituted, in a lack of reasonable ground for their institution, or in a combination of those factors. Something more is required. Similarly, the use of the words "without any reasonable ground", implies that it would be possible to institute vexatious legal proceedings, and indeed to do so habitually and persistently, with reasonable ground.*

His Honour continued:

> *A subjective element, such as malice, lack of bona fides, or ulterior motive, seems to be both appropriate and necessary to give significance to the term "vexatious" within the context of s 84(1). It provides the required "something more" than is conveyed by the other words in the section, and it is consistent with legal proceedings instituted either with or without reasonable ground. If I were unaided by judicial authority, I would opt for such a construction here. I appreciate that, isolated from its context, the expression "vexatious legal proceedings" could mean "legal proceedings which vex", irrespective of the motives of the person instituting them. A construction requiring a purely objective test might also be applied to the word when used in the expression "vexatious litigant", which also appears in the section, although it would sit less happily there. The construction required for present purposes, however, is a construction within the context of the section as a whole; and for the reasons stated, I would, on first impression, opt for the inclusion of a subjective element.*

We observe that while Roden J was concerned with the meaning of these words within the context of a difference statute, that difference is not material to our consideration. We agree with his Honour's construction of the word "vexatious" and, in particular his rejection of the meaning being "legal proceedings which vex".

Roden J then concluded at [491] with the test which is set out at [81] of these reasons.

In Vlug & Poulos, the Full Court considered an appeal by a party against an order made pursuant to s 118.

In considering the scope of the power conferred by the section, the Court said at p 84,603:

> *There was, in our view, no power conferred by s 118 to impose either of the prohibitions contained in the order made by Moss J. This is because the power in s 118 to order that a person shall not, institute further proceedings without leave can only, in our view, be exercised where the court has already dismissed or is simultaneously dismissing proceedings which it was satisfied are frivolous or vexatious instituted by the person (against whom the order is to be made). Moss J in this case had dismissed the husband's applications filed on 9 July 1996 and 29 July 1996 (both of which, including the reasons for their dismissal, have been discussed above), but he had not done so on the basis that either application was frivolous or vexatious.*

The Court continued:

> *... the court must be satisfied before it exercises the power under s 118(1)(c) to prevent the institution of further proceedings, the proceedings which are then before it (or have just been dismissed by it) are frivolous or vexatious.*

Although the father has filed and prosecuted numerous applications in the court, not all of which have been successful, none has been dismissed as being either frivolous or vexatious. Similarly, the proceedings before the trial judge were unsuccessful but his Honour's reasons do not suggest that the proceedings were vexatious."

Despite the trauma caused to the mother by the application, it was not deemed vexatious. As a result, the father was successful on his appeal.

The obvious point is that in the absence of legislation to restrain a party, they can keep bringing a litany of applications that are traumatising to the other party.

The difficulty for the Full Court was that the father in that case had not repeatedly brought the same application. He had brought an appeal or two, but 20 separate applications. Each was entitled to be heard. None on their own fit the narrow description of vexatious- because they were not repetitive. Each one was different.

However, great psychological damage was done to the mother and the daughter, who, by the conclusion of the matter, was 14.

The Full Court remitted the matter to Watts J. A family report was obtained. The daughter, seemingly with great courage, in light of the obstinance and determination of her father, then said she wanted nothing to do with him, ever. The father then finally gave up, and orders were made for him not to have contact with the daughter.

Except of course, that was not the end. Those orders finished when she turned 18. Upon her doing so, the father was again in contact. The daughter then obtained an AVO to keep dad away.

LEGISLATIVE HISTORY OF S.102QAC

Section 102QAC was inserted into the Act by the *Family Law Amendment Act 2023* (Cth).

ALRC report

That *Amendment Act* in turn came about, in part, from the Australian Law Reform Commission report, *Family Law for the Future – an Inquiry into the Family Law System* (2019). Under the heading *Misuse of Processes and Systems* the Commission said:

> *"Stakeholders raised the issue of behaviour involving engagement, and non engagement, with various family law and other systems and processes to achieve ends other than those for which the processes are designed, in the context of family violence. Higher court use and higher rates of unsuccessful engagement with FDR are associated with patterns of violence marked as part of a pattern of coercive control.36 Research and analysis over a long period of time has highlighted a range of behaviours that can occur in this context, with submissions providing examples of:*
>
> - *manipulation in engagement with Family Relationship Centre services either prior to lodging a court application or when mandated by a court order;*
> - *refusing to attend meetings, rescheduling meetings, or refusing to sign documents;*
> - *seeking preliminary advice to create a conflict of interest and prevent the other party from obtaining legal advice, using litigation to waste the resources of the other party, and using the threat of indemnity costs to intimidate the other party;*
> - *repeated engagement with parenting orders programs over issues that have been dealt with by other services over a number of years;*
> - *instigating and re-instigating legal proceedings in multiple courts, including applications for final orders and for enforcement of parenting orders in the family courts;*
> - *repeated applications to the court in the same matter, including in relation to recovery orders;*
> - *prolonging court proceedings by requiring adjournments and challenging interim and procedural determinations, sometimes with the intent to and effect of exhausting legal funding (legal aid or private resources), also known as 'burning off';*
> - *making cross-applications in proceedings for personal protection orders;*
> - *using processes in one court to obtain an advantage in another, for example, using family court processes to gain evidence that is also relevant to a criminal matter;*
> - *self-representing in court to create opportunities to personally cross-examine victims about family violence, sexual abuse allegations, and other sensitive issues;*
> - *using evidence gathering processes, including subpoenas, to obtain access to sensitive personal material such as the victim's therapeutic counselling records or sexual assault service records;*

- *making multiple notifications to child protection agencies or making notifications to child protection agencies in relation to trivial matters;*
- *challenging and appealing child support determinations;*
- *deliberately not engaging or delaying engagement with FDR services to delay resolution or force the other party to self-represent in court; and*
- *non-disclosure of income and assets in property and financial matters.*

Misuse of processes and systems can impede post-separation re-establishment and recovery from the effects of family violence, as well as compromising parenting capacity and the emotional and other resources available to meet children's needs. It also has significant implications for the efficiency of the system and access to the system for other users with legitimate needs."

When I read through that list, it seemed a very familiar path by some litigious individuals. Acting on the other side can be exhausting.

The Commission stated, in responding to misuse of systems of processes:

"The family courts should be able to deal with the misuse of systems and processes of the family law system separately from the need to establish that such conduct may also amount to family violence.

Recommendation 30 proposes a stronger statutory foundation for the family courts' case management powers, including the introduction of an overarching purpose that encompasses resolution of disputes with the least acrimony and consideration of the best interests of the child in the conduct of proceedings. Among the justifications for this recommendation are concerns about misuse of systems and processes. The recommended measures will provide stronger support for addressing use of court processes for illegitimate purposes, including perpetuation of family violence.

The Family Law Act provisions on summary dismissal and vexatious proceedings provide the court with powers to address the misuse of court processes. The scope of these provisions is discussed below. However, the Family Court's submission to this Inquiry drew the ALRC's attention to a gap in the courts' powers to ensure court processes are used appropriately.

Additional power to scrutinise the institution of further proceedings

Recommendation 32 The Family Law Act 1975 (Cth) should be amended to provide the courts with a power to make an order requiring a litigant to seek leave of the court prior to making further applications and serving them on the other party where the court is satisfied that such an order is appropriate for the protection of the respondent and/or any children involved in the proceedings, having regard to the overarching purpose of family law practice and procedure.

The submission of the Family Court expressed concern that the vexatious proceedings and summary dismissal powers do not provide sufficient scope for the courts to make appropriate orders in cases where 'one party oppresses the other by repetitive filing of applications and the serving of those applications on the other party'. The Court noted that the respondent to the applications in these cases is often the primary caregiver of

children, and the 'misuse of process can have a deleterious effect on that person's mental status, and consequently their parenting capacity.

Under the current provisions, the power to prevent a party from instituting further proceedings is only exercisable where the court is satisfied that a person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals. The Family Court supported amendments that would ensure that a power to prevent a person from instituting proceedings without leave is exercisable by the courts in circumstances which do not fall within these parameters. In particular, the Family Court proposed that such a power should be exercisable where the court 'forms the view that the further institution of proceedings against that other person may have a detrimental effect on that person's wellbeing or detrimentally affect that person's parenting capacity.'

The Family Court highlighted the case of Marsden & Winch as an example of circumstances that are not adequately addressed by the current powers of the courts. The parties in Marsden & Winch had been engaged in 'protracted serial proceedings over many years' over time spent by the child with the father. The trial judge accepted that the mother, who was the primary caregiver of the child, had developed post traumatic stress disorder 'substantially as a result of the persistent litigation.' The trial judge noted the significant effect of the litigation on the psychological health of the mother and accepted that future litigation could affect her psychological health to such an extent that her parenting capacity 'might be seriously compromised.' On appeal the Full Court held that the trial judge did not have the power to make an order restraining the father from serving any application on the mother without leave of the court. The Full Court held that the relevant powers were not exercisable because the proceedings that were before the trial judge, and the preceding proceedings, were not 'vexatious' in the requisite sense.

Marsden & Winch was not decided on the basis of the family courts' current summary dismissal and vexatious proceedings powers. However, the Family Court noted that the lacuna in the courts' powers in relation to circumstances like those in Marsden & Winch would not be remedied by the amendments of the Family Law Amendment (Family Violence and Other Measures) Act 2018 (Cth), as the power to make an order restraining a person from instituting further proceedings remains limited to cases where the court is satisfied that a person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals.

Section 102Q(1) of the Family Law Act specifies that 'vexatious proceedings' include:

(a) proceedings that are an abuse of the process of a court or tribunal;

(b) proceedings instituted in a court or tribunal to harass or annoy, to cause delay or detriment, or for another wrongful purpose;

(c) proceedings instituted or pursued in a court or tribunal without reasonable ground; and

(d) proceedings conducted in a court or tribunal in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

The case law considering s 102Q(1) has referred with approval to the principles relating to vexatious litigants enunciated by Perram J in Official Trustee in Bankruptcy & Gargan (No 2) and adopted by Davies J in Attorney General (NSW) v Gargan.

The Family Court submitted that the concept of 'vexatious proceedings', as defined in s 102Q(1), is not sufficiently wide to cover the type of circumstance that arises in cases such as Marsden & Winch because:

- *They include a focus on the intention of the applicant and not just the effect on the respondent; and*

- *Although "detriment" might be wide enough to capture the effect on parenting capacity, that is not explicit and is made less so by the inclusion of the words "or ... another wrongful purpose".*

The ALRC recommends that the Family Law Act be amended to provide the family courts with a further power to make an order requiring a litigant to seek the leave of the court prior to making further applications and serving them on the other party, or to make any other order restraining the conduct of a litigant as the court sees fit. This power should be available where the court is satisfied that such an order is appropriate in the circumstances for the protection of the respondent and/or any children involved in the proceedings, having regard to the proposed overarching purpose of family law practice and procedure: to facilitate the just resolution of disputes according to law, as quickly, inexpensively, and efficiently as possible, and with the least acrimony so as to minimise harm to children and their families.

This new power would be available in circumstances that will not meet the specific parameters of 'vexatious proceedings. The ALRC does not recommend the expansion of the existing parameters of the vexatious proceedings powers. The new power should be contained in a separate provision from the vexatious proceedings and summary dismissal powers, to make clear that ***the exercise of this new power involves a qualitative assessment that differs from the existing powers. This new power is not concerned with unmeritorious applications per se, but rather is directed to the protection of the other party and any children of the parties.***

The recommended power would provide the family courts with an additional means of advancing the proposed overarching purpose, supplementing costs consequences for parties who fail to act in accordance with the overarching purpose, and the inclusion of failure to act in accordance with the overarching purpose as a ground for summary dismissal. The new power would assist the family courts to minimise harm to children and their caregivers by requiring a litigant whose conduct has been identified as problematic to seek the leave of the court before making further applications.

Case law confirms that powers to deprive people of access to courts are to be used sparingly. However, the effect of an order under the proposed powers would not be to deny a person access to the court to have legitimate claims heard. Rather, it would effectively introduce a court-supervised 'filter' on the applications made by that person; limiting the applications received by the respondent to those which the court is satisfied meet the threshold requirements for leave to serve.

Leave to serve an application should be granted where the court is satisfied that the application: is not 'hopeless'; has been brought for a proper purpose; and is consistent with the overarching purpose. It is important that applications for leave are made ex parte—without serving documents on the respondent. This is critical to the protective 'filtering' function of orders made pursuant to this power.

The power should be exercisable on the application of a party, or at the court's initiative, at any time while proceedings are on foot.

The power could also be exercised in conjunction with the summary dismissal powers under s 45A. This would occur where the court is satisfied that the proceeding on foot should be dismissed because it has no reasonable prospect of success or if it is satisfied that it is frivolous, vexatious, or an abuse of process; and further is satisfied that, having regard to the overarching purpose, the applicant should be restrained from making further applications without leave of the court." (emphasis added)

Joint Select Committee on Australia's Family Law System (2020)[2]

In its first interim report, the Andrews/Hanson committee stated[3]:

"Some submitters agreed arguing that the unnecessary prolonging of legal processes could constitute a form of family violence:

> *Vexatious misuse of legal process and courts systems by perpetrators constitutes family violence. By endlessly pursuing legal processes despite evidence or witness statements identifying them as perpetrators, those who use violence can continue to exercise behaviours of control and intimidation pressuring the targets of their violence to enter into court orders that do not address family violence or dragging them through legal procedures that unnecessarily increase costs and stress for the other party.*

AIFS put forward a similar view submitting that its findings suggested:

> *... the need for a more comprehensive analysis of systems abuse as a form of family violence and greater awareness of the possibility that services, systems and processes may be misused by perpetrators of family violence to perpetuate dynamics of abuse and control.*

Indeed, the Australian Women Against Violence Alliance (AWAVA) informed the committee that '[s]ystems abuse has been consistently identified throughout the Australian and international literature and evidence as being used in the family law proceedings', and provided the following examples:

- *2010 Australian Law Reform Commission report identified systems abuse as 'the vexatious use of cross applications for protection orders and giving false evidence';*
- *2014 [Women's Information and Referral Exchange Inc] research reports that examined experiences of 200 women found systemic continuation of financial abuse post separation through legal systems by their violent partners. This included financial costs of protracted legal costs, vexatious litigation, and partners hiding their assets to avoid paying child support;*
- *2017 [Australia's National Research Organisation for Women's Safety] research has found that systems abuse type behaviours of perpetrators included: exploiting the intersection between family law, child protection and criminal legal systems to*

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2 https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Family_Law_System/FamilyLaw/Interim_Report/section?id=committees%2freportjnt%2f024449%2f72726

3 At [4.89]-[4.91] and [4.94]

> *their advantage, raising counter-allegations and unjustifiable applications in family law or personal protection orders; manipulative engagement with family law services, noncompliance with court orders and exhausting women's legal and financial resources;*
>
> - *[Heather] Douglas in her study [into legal systems abuse and coercive control] reports that women's engagement with the legal systems is experienced as an extension of coercive control. This included frequent requests for adjournments, making counter allegations, calling irrelevant witnesses and initiating excessive litigation in the Family court.*
>
> *In its submission, Relationships Australia proposed reforming the Family Law Act 'to include misuse of courts and family dispute-related processes as a form of abuse in family law matters and to clarify court powers to impose consequences for misuse'. Relationships Australia reasoned that this proposal was necessary as:*
>
> > *Powers to identify and respond to abuse of systems and processes need to recognise the multiplicity of systems and processes that can be used, in concert or in succession, to perpetuate abuse, control, intimidation and coercion."*

The matter was not dealt with in the second interim report, third interim report or final report.

The committee made no recommendations about this issue.

Explanatory memorandum

S.102QAC was inserted, as I said by the *Family Law Amendment Act 2023* (Cth). I shall deal now with the explanatory memorandum to the bill. It is wise if you have a case, to be aware of the other memoranda, because the bill was amended in transition through Parliament.

As with some other controversial bill. there were a number of explanatory memoranda:

- explanatory memorandum
- addendum to explanatory memorandum
- replacement supplementary explanatory memorandum
- supplementary explanatory memorandum

The explanatory memorandum says:

> *"36. The Bill introduces 'harmful proceedings orders' to prevent vexatious litigants from filing and serving new applications without first obtaining leave from the court. The new orders will allow the court to prevent harm to the intended respondent, assisting to protect victim survivors of family violence from systems abuse. Recognising the agency of victim survivors, as part of the court's powers to make harmful proceedings orders, the courts will have the power to order whether or not the respondent (the person who a harmful proceedings order is intended to protect) should be notified of any further application for leave made by an applicant that has been dismissed. In making this decision, the court must have regard to the wishes of the respondent.*

52. New Division 1B introduces 'harmful proceedings orders'. This will provide the courts with a new power to restrain a person from filing any further family law applications and serving them on the respondent, without first obtaining leave of the court. The purpose of this measure is to protect the respondent and/or children who are the subject of proceedings from the harmful impact of frequent and unnecessary applications filed by an applicant. Once this order is in place, further applications will first be assessed by the court to ensure that they are not vexatious, frivolous or an abuse of proceedings and have reasonable prospects of success before they can be filed and served.

53. The power to make a harmful proceedings order will be exercisable by the court on its own initiative, or on application by a party to the proceedings, at any time while the proceedings are on foot. The court will need to be satisfied that there are reasonable grounds to believe that further proceedings will be harmful to the respondent. A non-exhaustive list of examples of 'harm' is provided to assist in determining what may be considered harmful (new section 102QAC).

54. The new orders constitute a limitation on the right to a fair hearing as they may limit an applicant's opportunity to present their case if they are subject to such an order. However, this limitation is reasonable and proportionate to the legitimate aim of preventing harm to the respondent through continuous litigation. To ensure procedural fairness to the applicant, the court must not make a harmful proceedings order without first hearing the person or giving them an opportunity of being heard on the merits of their application (new subsection 102QAC(5)). Additionally, once a harmful proceedings order is in place, a meritorious application made for a proper purpose would be allowed to proceed, regardless of the impact that it might have on the respondent (new subsection 102QAG(1)).

55. The Bill's limitations on the right to a fair hearing are therefore necessary, reasonable and proportionate to the legitimate aim of protecting vulnerable parties and sensitive information.

Item 4 - Subsection 102Q(1)

307. This item inserts a new definition of 'harmful proceedings order' into the list of definitions for Part XIB in section 102Q. The definition provides that a 'harmful proceedings order' means an order made under subsection 102QAC(1).

Item 5 - Section 102QA

308. This item repeals section 102QA and replaces it to make clear that Part XIB does not limit or otherwise affect the powers that a court has in other provisions in this Part or any other power that a Court has to deal with proceedings.

Item 6 - After section 102QA

Division 1A — Summary decrees

309. This item inserts new Division 1A - Summary decrees and new Division 1B - Harmful proceedings order into Part XIB of the Family Law Act alongside the court's existing power to make vexatious proceedings orders. The purpose of this measure is to collocate all the court's powers for dealing with applications or proceedings that are frivolous, vexatious, unmeritorious or an abuse of process to improve useability.

310. Division 1A contains new section 102QAB. This section substantially replicates previous section 45A, which is repealed by item 1. Section 102QAB brings the text in line with current drafting practice and clarifies the language to improve usability.

311. New subsection 102QAB(1) allows the court to make a summary decree in favour of one party, the 'first party', in relation to the whole or part of a proceeding, if the first party is prosecuting the proceedings or part of the proceedings, and the court is satisfied that the other party has no reasonable prospect of successfully defending the proceedings or part of the proceedings.

312. New subsection 102QAB(2) allows the court to make a summary decree in favour of one party, the 'first party', in relation to the whole or any part of a proceeding, if the first party is defending the proceedings or part of the proceedings, and the court is satisfied that the other party has no reasonable prospects of successfully prosecuting the proceedings or part of the proceedings.

313. New subsection 102QAB(3) provides that, for the purposes of this section, in determining whether a defence or proceeding has no reasonable prospect of success, proceedings need not be hopeless or bound to fail.

314. New subsection 102QAB(4) empowers the court to dismiss all or part of proceedings at any stage if it is frivolous, vexatious or an abuse of process.

315. New subsection 102QAB(5) provides that proceedings or a part of proceedings are not to be considered frivolous, vexatious or an abuse of process just because a related application is made and later withdrawn.

316. New subsection 102QAB(5) is intended to operate as a safeguard against the court misinterpreting the actions of victims of family violence who are litigants in person, who might make an application and then withdraw it for reasons other than the merits of their case, for example as a result of the power and control dynamics of family violence.

317. New subsection 102QAB(6) provides that the court may make costs orders as it sees fit.

318. New subsection 102QAB(7) provides that the court may take action under this section of its own volition, or on the application of a party to the proceedings.

Division 1B—Harmful proceedings orders

319. Item 6 also inserts a new Division 1B which contains provisions relating to the court's new power to make harmful proceedings orders. The purpose of this measure is to protect the respondent and/or children who are the subject of proceedings from the harmful impact of frequent and unnecessary applications filed by an applicant. This measure aims to limit systems abuse, which is a form of family violence that is prevalent in the family law system.

320. This measure addresses a gap in the court's powers to scrutinise the institution of further proceedings, cited in the case of Marsden & Winch (2013) 50 FamLR 409. The ALRC Report found that the court's existing vexatious proceedings and summary dismissal powers do not provide sufficient scope for courts to make

appropriate orders in cases where one party oppresses the other by repetitive filing of applications and the serving of those applications on the other party.

321. Harmful proceedings orders powers are different from the court's current vexatious proceedings orders powers (section 102QB). Harmful proceedings orders require the court to consider the impact that the repetitive and litigious nature of the applicant's filings would have on the respondent, whereas vexatious proceedings orders powers focus on the applicant's intent to institute or conduct proceedings in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose (see section 102Q). Harmful proceedings orders powers are not intended to limit the court's other powers, including those in relation to vexatious proceedings or summary dismissal under section 102QAB.

Subdivision A—Making harmful proceedings orders

322. Subdivision A contains new section 102QAC, which provides the court with power to make a ' harmful proceedings order '. A harmful proceedings order is defined in new subsection 102QAC(1) as an order restraining a party to the proceedings from making any further applications and serving them on the respondent to the proceedings, without first obtaining leave of the court under new section 102QAG. The person being restrained by the order is known as the 'first party'. The intention of this power is to allow the courts to proactively intervene, or intervene upon application by a party to the proceedings, before further applications are served on the other party, and therefore limit the detrimental effect, major mental distress or psychological harm that may result from further applications.

323. In considering whether to make a harmful proceedings order under new subsection 102QAC(1), the court should be satisfied there are reasonable grounds to believe that:

- *the other party would suffer harm of the kind outlined in new subsection 102QAC(2) if the first party instituted further proceedings against the other party, or*

- *in the case of child-related proceedings (within the meaning of Part VII), the child who is the subject of the proceedings would suffer harm if the first party instituted further proceedings against the other party.*

324. New subsection 102QAC(2) provides examples of what may constitute 'harm'. Harm may include psychological harm or oppression, major mental distress or a detrimental effect on the other party's capacity to care for a child. This list is intended to provide examples of when repetitive and litigious filing by an applicant has or may result in a significant negative impact on the respondent's wellbeing to the point where the making of a harmful proceedings order is appropriate for the protection of the respondent and/or any children involved in the proceedings.

325. The list of examples under subsection 102QAC(2) is non-exhaustive. A non-exhaustive list has been adopted as there are various types of harm that a respondent and/or their children who are the subject of proceedings may experience as a result of a litigant utilising the family court system as a mechanism to instigate further family violence. For this reason, a prescriptive definition of harm has not been included to avoid the risk of narrowing the scope of what constitutes harm.

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).

327. Subsection 102QAC(3) provides that in determining whether to make a harmful proceedings order, the court may also have regard to:

- *the history of the proceedings under the Family Law Act between the two parties*
- *whether the first party has frequently instituted or conducted proceedings against the other party in any Australian court or tribunal (including proceedings instituted (or attempted to be instituted) or conducted, and orders made, before the section would have commenced), and*
- *the cumulative effect, or any potential cumulative effect, of any harm resulting from the proceedings referred to in the two paragraphs above.*

328. Subsection 102QAC(3) is not intended to be an exhaustive list of the matters the court may consider in determining whether to make a harmful proceedings order. The 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.

329. New subsection 102QAC(4) provides that the power is exercisable by the court on its own initiative or on application by a party to proceedings.

330. Similar to existing subsection 102QB(4) of the Family Law Act (which relates to vexatious proceedings orders), new subsection 102QAC(5) provides that the court must not make a harmful proceedings order in relation to a person without hearing the person, or giving the person an opportunity to be heard on the merits of their application. This ensures procedural fairness to the applicant and balances access to justice considerations. This also ensures any restriction on a party's capacity to institute proceedings is not unfair or disproportionate, while balancing the need to protect the respondent from harm.

331. New subsection 102QAC(6) provides that a harmful proceedings order made under subsection 102QAC(1) is final (as opposed to an interlocutory or interim order).

332. New subsection 102QAC(7) provides that, when a court is making a harmful proceedings order under subsection 102QAC(1), the court must make a determination on whether the other party should be notified of any applications under section 102QAE for leave to institute proceedings against the other party. This notification includes, either or both, that the application was made, and if applicable, that the application has been dismissed.

333. New subsection 102QAC(8) provides that the court must have regard to the wishes of the other party when determining whether the respondent should be notified of any applications for leave made by an applicant, who is subject to a harmful proceedings order, under subsection 102QAC(7).

334. Whilst the objective of harmful proceedings orders is to minimise the exposure to harm of a respondent or child subject to proceedings, a victim-survivor of family violence who is a respondent may wish to be made aware of applications for leave to file further proceedings, including dismissed applications, to enable them to make arrangements for their safety and the safety of their children. If a respondent wishes to not be notified, the court will not be required to make arrangements to notify the respondent of any future applications made by an applicant that were dismissed, therefore minimising their exposure to further harm.

Subdivision B—Consequences of harmful proceedings orders

335. New Subdivision B contains provisions relating to the consequences of harmful proceedings orders.

336. New subsection 102QAD(1) provides that a person subject to a harmful proceedings order must not institute proceedings, or act in concert with another person to institute proceedings, without leave of the court under section 102QAG.

337. New subsection 102QAD(2) provides that if proceedings are instituted by a person who is the subject of a harmful proceedings order and leave has not been granted, the proceedings are automatically stayed.

338. New subsection 102QAD(3) provides that if proceedings are stayed, the court may make any orders relating to the proceedings, including a costs order.

339. New subsection 102QAD(4) provides that the court may make an order under subsection 102QAD(3) of its own volition, or on the application of a party to the proceedings.

340. New section 102QAE provides the requirements for the party who is subject to a harmful proceedings order to make an application for leave to institute proceedings. To do so, the applicant must file an affidavit with the application which lists all occasions on which the applicant has applied for leave as well as disclosing all relevant facts about the application known to the applicant (including both supporting and adverse).

341. Applications for leave made under section 102QAE would be made ex parte - without serving documents on the respondent - unless an order is made under section 102QAG granting an application for leave.

342. A note is provided at subsection 102QAE(2) that the court may be required to give notice to the respondent that an application has been made, with reference to subsection 102QAC(7). This is intended to account for circumstances where a respondent expressed a wish under subsection 102QAC(8) to be notified of applications for leave under section 102QAE, including dismissed applications.

343. Unless the respondent expressed a wish to be notified under subsection 102QAC(8), and the court has made an order to notify the respondent in accordance with the respondent's wishes under subsection 102QAC(7), the court will consider the application filed by the applicant without the respondent being made aware of the application or requiring the respondent to appear. Subsection 102QAE(4) provides that the applicant must not serve a copy of their application or affidavit on the respondent until an order is made granting leave to institute further proceedings. The rationale for this provision is to minimise further harm to

the respondent resulting from repeated exposure to unnecessary and unmeritorious applications.

344. New section 102QAF provides that the court may dismiss an application for leave under section 102QAE if the court considers that the affidavit does not substantially comply with subsection 102QAE(3) or if it considers the proceedings to be vexatious proceedings. If an application for leave is dismissed, due to the application being heard on an ex parte basis, the applicant is not able to serve the application on the respondent and the respondent will not be made aware of the unsuccessful application. This ensures that the section is consistent with the intention of Division 1B of this Part.

345. Notes at subsections 102QAF(1) and 102QAF(2) provide that the court may be required to give notice that the application has been dismissed, with reference to subsection 102QAC(7).

346. New subsection 102QAF(3) provides that the court may dismiss an application without an oral hearing (either with or without the consent of the applicant). This will assist with the case management of matters while still preserving the court's discretion to conduct an oral hearing if it chooses to do so.

347. New subsection 102QAF(4) provides that the court may make an order under this section in Chambers. This section does not prohibit the court from conducting an oral hearing if it chooses to do so, but is intended to ensure that matters proceed efficiently and without undue delay.

348. Subsections 102QAF(3) and 102QAF(4) are intended to provide the court with an efficient way of dealing with harmful or unmeritorious litigation sought to be brought by persons already subject to harmful proceedings orders. The court can still afford procedural fairness to such persons by providing them with the opportunity to make written submissions. These provisions will give the court the flexibility to determine applications by a person subject to a harmful proceedings order on the papers alone in Chambers, while preserving the court's ability to conduct oral hearings.

349. New section 102QAG provides that a court may only grant an application for leave to institute proceedings if it is satisfied that the proceedings are not frivolous, vexatious or an abuse of process, and have reasonable prospects of success. The respondent will only be made aware of the application filed by the applicant at the time of the application being served on them. This ensures that the respondent is only exposed to applications which the court has first filtered and assessed."

Second reading speech

The Attorney-General Mark Dreyfus KC in his second reading speech of 29 March 2023 said as to harmful proceedings orders:

"Harmful proceedings orders

Many victims-survivors of family violence, and their children, suffer the effects of continued abuse from their perpetrators through misuse of legal processes.

To address a gap in the current law, the bill introduces the capacity for the court to restrain a party from repeated litigation by making a harmful proceedings order. The

focus of this measure is on the protection of the other party and any children from harm, including the detrimental harm on the other party's capacity care for a child.

Once this order is in place, any further proceedings would first be assessed by the court to ensure that matters that are vexatious, frivolous or unlikely to be successful are not being heard. There will be no erosion of the principles of procedural fairness – applicants will have the opportunity to make the case for the particular matter they wish to bring before the court."

I have read many of the second reading speeches of Senators and MP's but did not see any reference to harmful proceedings orders.

Scrutiny Report – Parliamentary Joint Committee

The bill was the subject of a scrutiny report[4]. The scrutiny committee says[5]:

"Part 1 of Schedule 5 would re-draft existing procedures related to the court's power to issue summary decrees where an application is found to be vexatious. It would also introduce new 'harmful proceedings orders', which courts could make to protect a respondent and/or children. A harmful proceedings order would restrain a party to the proceedings from making any further applications and serving them on the respondent without first obtaining leave of the court under proposed section 102QAG."

In dealing with the right to equality and non-discrimination, the committee states[6]:

"The statement of compatibility recognises that this right is promoted. It states that the proposed 'harmful proceedings orders' to prevent vexatious litigants from filing and serving new applications without first obtaining leave from the court will allow the court to prevent harm to the intended respondent, and thereby would help to protect victim survivors of family violence from systems abuse. It also notes that these powers will preserve the agency of victim survivors as the court must have regard to their wishes.

The proposed new 'harmful proceedings orders' in Schedule 5, which would prevent certain persons from instituting further family law applications and serving them on the respondent without first obtaining the leave of the court, engages and limits the right to a fair hearing.

The right to a fair hearing applies to both criminal and civil proceedings, and to cases before both courts and tribunals. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings (including both parties having a procedurally equal position to make their case), the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body. In order to constitute a fair hearing, the hearing must be conducted by an independent and impartial court or tribunal, before which all parties are equal, and have a reasonable opportunity to present their case. Ordinarily, the hearing must be public, but in certain circumstances, a fair hearing may be conducted in private. In general, the right to a fair hearing may be subject to permissible limitations where the limitation pursues a

[4] https://www.aph.gov.au//media/Committees/Senate/committee/humanrights_ctte/reports/2023/Report_5/PJCHR_REPORT_5_OF_2023.pdf?la=en&hash=75589420E22B1EA73B062722552FDF7FEB9B6A70 .
[5] At [1.48].
[6] At [1.68]-[1.71].

legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

The statement of compatibility notes that this right is limited by the proposed harmful proceedings orders, which would impose an additional procedural hurdle for certain persons to institute further family law proceedings. It states that this limitation is reasonable and proportionate to the legitimate aim of preventing harm to the respondent through continuous litigation, and notes that to ensure procedural fairness to the applicant, the court must not make a harmful proceedings order without first hearing the person or giving them an opportunity of being heard on the merits of their application. It further notes that once a harmful proceedings order is in place, a meritorious application made for a proper purpose would be allowed to proceed, regardless of the impact that it might have on the respondent. As this would provide the court with the discretion to consider making a harmful proceedings order in relation to individual applicants, and noting that meritorious applications could nevertheless proceed, this would appear to constitute a permissible limitation on the right to a fair trial."

The committee supported the bill in promoting human rights but note that the statement of compatibility did not recognise the engagement of the right to protection of the family and suggested that it do so.

Senate Scrutiny Committee

There was nothing of substance relating to this aspect in that report.

Senate Legal & Constitutional Affairs Legislation Committee

The bill then was then referred to this committee. The committee said[7]:

"The [Explanatory Memorandum] advises that proposed Division 1B of Part XIB of the Family Law Act is being introduced to address a known problem in family law proceedings:

> *The purpose of this measure is to protect the respondent and/or children who are the subject of proceedings from the harmful impact of frequent and unnecessary applications filed by an applicant. This measure aims to limit systems abuse, which is a form of family violence that is prevalent in the family law system. This measure addresses a gap in the court's powers to scrutinise the institution of further proceedings.*

Many submitters supported the introduction of 'harmful proceedings orders'. The Family Law Council argued that focusing on the impact on a respondent would enable the court to better protect children and victim-survivor adults:

> *...the Council considers that strengthening Court powers to respond to the misuse of litigation is essential to protect parents and children from harm and ensure that publicly funded resources are not co-opted into campaigns of abuse.*

Similarly, the Law Council submitted that proposed subsection 102QAC(1) could be extended to address process abuse as a form of family violence:

[7] At [3.46]-[3.53].

> *The Law Council…suggests extending the power to make harmful proceedings orders to particular types of proceedings, or applications within proceedings. This would enable the court to prevent process abuse perpetrated within the currency of a set of proceedings and would also better reflect Recommendation 32 of the ALRC Report—with which the former Government agreed in principle.*

Some submitters referred specifically to proposed subsection 102QAC(3), which would provide a list of matters that the court may consider in determining whether to make a 'harmful proceedings order':

(a) the history of the proceedings under this Act between the first party and the other party; and

(b) whether the first party has frequently instituted or conducted proceedings against the other party in any Australian court or tribunal (including proceedings instituted (or attempted to be instituted) or conducted, and orders made, before the commencement of this section); and

(c) the cumulative effect, or any potential cumulative effect, of any harm resulting from the proceedings referred to in paragraphs (a) and (b).

The EM explains that the proposed list is not intended to be exhaustive:

> *The 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.*

However, Victoria Legal Aid queried whether the proposed subsection would 'prevent a party from oppressing another through repetitive requests for family dispute resolution'. Relationships Australia added:

> *Determined perpetrators of systems abuse are likely to try to 'game the system' by confecting 'new disputes' in relation to which they will seek to invite a respondent to engage in FDR, with the goal of harassing the victim survivor... The subsection should at least allow the Court to have regard to a party's history of use of FDR.*

In supporting a broadening of the proposed provisions, Relationships Australia noted that there are other forms of systems abuse that are not captured by proposed section 102QAC(3):

> *Other means of perpetrating systems abuse, which could be reflected in the Act, include unmeritorious and harassing reports to child protection authorities, to regulators (including professional disciplinary bodies), licensing authorities, and complaints handling agencies (eg. Ombudsman offices).*

An AGD representative indicated that proposed section 102QAC is intended to broadly capture systems abuse, such as in the child support system:

> *My understanding of the drafting is that that would be able to be considered. It doesn't just have to be where proceedings have been instituted within the court that it would be relevant. It could be instituting proceedings through a range of avenues where it is systems abuse. That could be relevant to a harmful proceedings order."*

The committee noted that overwhelmingly stakeholders supported the objects of the bill and:

> *"personal testimony shared with the committee illustrated the ways in which the family law system has failed, and continues to fail, separating families and serve to remind all policy-makers of the compelling reasons for reform in this area."*

Section 102QAC and related provisions

Section 102QAC provides:

> *"Making harmful proceedings orders*
>
> *(1) A court exercising jurisdiction in proceedings under this Act may make an order (a **harmful proceedings order**) prohibiting a party (the **first party**) to the proceedings from instituting proceedings under this Act against another party to the proceedings without the leave of the court under section 102QAG, if the court is satisfied that there are reasonable grounds to believe that:*
>
> *(a) the other party would suffer harm if the first party instituted further proceedings against the other party; or*
>
> *(b) in the case of child - related proceedings (within the meaning of Part VII)--the child who is the subject of the proceedings would suffer harm if the first party instituted further proceedings against the other party.*
>
> *Note: **Proceedings** includes cross - proceedings and incidental proceedings (see subsection 4(1)).*
>
> *(2) For the purposes of subsection (1), harm may include, but is not limited to, the following:*
>
> *(a) psychological harm or oppression;*
>
> *(b) major mental distress;*
>
> *(c) a detrimental effect on the other party's capacity to care for a child;*
>
> *(d) financial harm.*
>
> *(3) In determining whether to make an order under subsection (1), the court may have regard to:*
>
> *(a) the history of the proceedings under this Act between the first party and the other party; and*
>
> *(b) whether the first party has frequently instituted or conducted proceedings against the other party in any Australian court or tribunal (including proceedings instituted (or attempted to be instituted) or conducted, and orders made, before the commencement of this section); and*
>
> *(c) the cumulative effect, or any potential cumulative effect, of any harm resulting from the proceedings referred to in paragraphs (a) and (b).*
>
> *(4) The court may make a harmful proceedings order on its own initiative or on application by a party to the proceedings.*

(5) The court must not make a harmful proceedings order in relation to a person without hearing the person or giving the person an opportunity of being heard.

(6) An order made under subsection (1) is a final order.

Order about notifying other party in relation to application for leave etc.

(7) If the court makes an order under subsection (1), the court must also make an order as to whether the court is to notify the other party, in the event that the first party makes an application under section 102QAE for leave to institute proceedings against the other party, of either or both of the following:

(a) that the application has been made;

(b) if the application is dismissed--that the application has been dismissed.

(8) The court must have regard to the wishes of the other party in making an order under subsection (7)."

It may sound obvious, but it would be helpful in an application under s.102QAC to set out in the affidavit as thoroughly as possible the matters contained in (2) and (3).

S.102QAD makes plain that once the order has been made, leave is required before applying again:

"(1) If a person is subject to a harmful proceedings order prohibiting the person from instituting proceedings under this Act in a court having jurisdiction under this Act:

(a) the person must not institute proceedings in the court without the leave of the court under section 102QAG; and

(b) another person must not, acting in concert with the person, institute proceedings in the court without the leave of the court under section 102QAG.

(2) If proceedings are instituted in contravention of subsection (1), the proceedings are stayed.

(3) Without limiting subsection (2), the court may make:

(a) an order declaring proceedings are proceedings to which subsection (2) applies; and

(b) any other order in relation to the stayed proceedings it considers appropriate, including an order for costs.

(4) The court may make an order under subsection (3) on its own initiative or on the application of a person a party to the proceedings."

Section 102QAE provides that leave is required to institute further proceedings, when a harmful proceedings order has been made. The Court has made plain that this includes any appeal from a harmful proceedings order. Failure to substantially comply with the affidavit requirements may also doom that application: s.102QAF(1). S.102QAE provides:

*"(1) This section applies to a person (the **applicant**) who is:*

(a) subject to a harmful proceedings order prohibiting the person from instituting further proceedings under this Act in a court having jurisdiction under this Act; or

(b) acting in concert with another person who is subject to an order mentioned in paragraph (a).

(2) The applicant may apply to the court for leave to institute proceedings that are subject to the order.

Note: The court may be required to give notice that the application has been made (see subsection 102QAC(7)).

(3) The applicant must file an affidavit with the application that:

(a) lists all the occasions on which the applicant has applied for leave under this section; and

(b) discloses all relevant facts about the application, whether supporting or adverse to the application, that are known to the applicant.

(4) The applicant must not serve a copy of the application or affidavit on a person unless an order is made under section 102QAG. If the order is made, the applicant must serve the copy in accordance with the order."

As seen in the cases, the application is heard ex parte and is dealt with on the papers. Any applicant for leave would be wise to have clear written submissions, in anticipation of that process.

S.102QAF provides:

"(1) The court may make an order dismissing an application under section 102QAE for leave to institute proceedings if it considers the affidavit does not substantially comply with subsection 102QAE(3).

Note: The court may be required to give notice that the application has been dismissed (see subsection 102QAC(7)).

(2) The court must make an order dismissing an application under section 102QAE for leave to institute proceedings if it considers the proceedings are vexatious proceedings.

Note: The court may be required to give notice that the application has been dismissed (see subsection 102QAC(7)).

(3) The court may dismiss the application without an oral hearing (either with or without the consent of the applicant).

(4) The court may make an order under this section in Chambers."

CASES

There have been a series of cases decided under section 102QAC since its commencement. It is clear that harmful proceedings orders are being made in the manner that the ALRC had sought, outside the narrow scope of vexatious proceedings orders seen in *Marsden & Winch*.

It seems that there have been a significant number of cases decided since the commencement of the provisions in mid last year. Judges are not afraid to make these orders. The frequency of these orders being made speaks to the relatively small number of highly litigious matters, that seemingly never end. Until now. The nightmare cases that seem to take over our lives, and more importantly that of our clients and their children.

In most of the cases, there has been a clear basis for making the order. Nevertheless, orders have been refused. If seeking an order, make sure you have evidence carefully laid out.

Brasch J held that if the Court makes the order, then its role is that of gatekeeper. Several cases have noted that the Court can make the order on its own initiative.

Her Honour also said that a s.102QAC is not a Part VII order, in which a child's best interests are paramount- but the focus on harm focuses squarely on harm to the child from further proceedings. By contrast, Behrens J stated:

> *"In child-related proceedings such as these, that discretion must be guided by the child's best interests in the interests of justice more broadly."*

The focus of the application is not on the motivations of the litigant who commences further litigation. Rather, the focus is on the impact of potential further proceedings on the respondent and any child.

The court does not have to wait to the end of the proceedings, but can make the order earlier, as Judge Brown held in *Lamport & Garside*.

As two cases make plain, where there may be the basis of obtaining an order under either s.102QAB (summary dismissal or vexatious litigant order) *or* s.102QAC, consideration *might* be given to seek each in the alternative- depending on the case, of course.

Occasionally, mutual orders are made. One mother applied for a harmful proceedings orders to be made against the father- and found she was caught, too.

When formulating the draft order:

1. Consider an order that also provides for someone *in concert with the party* to be caught by the order. Often those determined to litigate until the ends of the earth have friends or family helping them. The language is taken from ss.102QAD and 102QAE.

2. Consider an order for your client not to be notified of the application for leave, and not to be notified of dismissal.

3. Consider a separate injunction against the other party for notifying your client of the application for leave or dismissal- as occurred in *Warshawsky & Leverent*.

Summary of decisions: first instance

I have highlighted in red those cases where an application to appeal was sought. I have highlighted in green in the order made column where in concert orders have been made. *Warshawsky & Leverent* is the only case where a separate injunction was made to restrain a party telling the other one about the application for leave.

Case	Order made?	Initiative of court or party?	What harm was considered?	No notice order made?	Was s.65DAAA (Rice & Asplund) considered?
***Babic & Taccini* [2024] FCWA 203**	Yes	Father	Psychological harm or oppression or major mental distress of the children	Yes	Yes
***Kori & Georgene (No. 3)* [2024] FedCFamC1F 381**	Yes	Father	Unclear	No	No
***Carey & Prescott (No 2)* [2024] FedCFamC1F 512**	Yes	G/parents	Psychological harm to child	If leave is dismissed, g/parents to be notified	No
***Purnell & Keene* [2024] FedCFamC1F 571**	No	Mother	Insufficient evidence	N/A	N/A
Morse & Duarte (No 8) [2024] FedCFamC1F 639	No, because s.102QB order made	Father	Financial harm, even after a large costs order	N/A	N/A
***Sheffield & Almond* [2024] FedCFamC1F 785**	Yes	ICL, adopted by Father	Psychological harm for 11 y.o. girl who had been at the centre of litigation since she was 3; financial harm to Father	If leave is dismissed, father to be notified	No
Naisby & Baisby (No 3) [2024] FedCFamC1F 787	Yes	By consent	Unclear	No: Mother to be told of application and if dismissed	Yes
***Warshawsky & Lewerentz* [2024] FedCFamC1F 909**	Yes	ICL	Psychological harm, major mental distress, capacity to care for child- to the mother	Yes- and an injunction against father notifying mother	No

Case	Order made?	Initiative of court or party?	What harm was considered?	No notice order made?	Was s.65DAAA (Rice & Asplund) considered?
Bruin & Bruin (No 4) **[2024] FedCFamC2F 870**	Yes	Father	Psychological/emotional harm to children, financial harm to father	Yes	Yes
Lamport & Garside **[2024] FedCFamC2F 1007**	Yes	Mother	Psychological distress to child and mother	Yes	No
Ridge & Hurley **[2024] FedCFamC2F 1174**	Yes	Mother	Capacity to parent	No	No
Powell & Powell **[2024] FedCFamC2F 1650**	Yes	Mother	Psychological harm to child, psychological, financial harm to mother	No: Mother to be told of application and if dismissed	Yes
Fukuzawa & Akhmetov **[2024] FedCFamC2F 1709**	Yes	Mother	Psychological harm to children – one had engaged in self-harm, the other had threatened to do so	Mother to be told by email of application and dismissal	No
Sastri & Kurta **[2024] FedCFamC2F 1742**	No	Mother	Insufficient evidence of psychological harm to the child or of financial harm to the mother	N/A	No
Cheadle & Pointer **[2025] FedCFamC1F 27**	Yes	Father	Psychological harm, major mental distress to father and child	Yes	Yes
Caceres & Barrett (No. 2) **[2025] FedCFamC2F 130**	Yes	Father	Psychological harm, oppression, financial harm – to the mother	No	Yes
Beckford & Beckford (No. 2) **[2025] FedCFamC2F 455**	Yes- against both parents	Mother	Psychological harm and major mental distress to children; financial harm to both parents	No	Yes

Case	**Order made?**	**Initiative of court or party?**	**What harm was considered?**	**No notice order made?**	**Was s.65DAAA (Rice & Asplund) considered?**
***Dalton & Nikolaou* [2025] FedCFamC1F 151**	No- only because mother had not been given procedural fairness	ICL	N/A- although mother engaged in systems abuse	N/A	N/A
***Vanetti & Harrison* [2025] FedCFamC1F 162**	Yes. Court declined s.102QAB order	Father	Psychological harm or oppression, major mental distress, detrimental effect on capacity to care for the child, financial harm – of the father	Yes	Yes
***Vaughan & Vaughan (No. 3)* FedCFamC1F 455**	Yes	The court, supported by ICL and mother	Mother's costs, father's failure to comply with orders	Yes	N/A
***Vaughan (No. 4)* [2025] FedCFamC1F 480**			Application by father for leave 8 days after the previous order made. Leave refused		
***Vaughan & Vaughan (No. 7)* [2025] FedCFamC1F 578**			Oral application for a stay – refused as no basis to make such an application		
***Shelbourne & Shelbourne* [2025] FedCFamC1F 587**	No	ICL supported by mother	No factors warrant an order being made. No harassment or systems abuse nor proceedings a form of control or harassment	No	No
***F & F (No. 8)* [2025] FedCFamC1F 472**	Yes	Court	Psychological harm to wife and costs	Yes	N/A
***McGee & Slattery* [2025] FedCFamC2F 313**	Yes	Mother	Harm considered family violence systems abuse, mother's mental and physical health	Yes	N/A

***Babic & Taccini* [2024] FCWA 203**

At trial in December 2023, the husband was awarded sole parental responsibility with the children to live with him and spend limited supervised time with the wife. The wife

commenced fresh proceedings in June 2024 seeking to reverse those arrangements, such that she would have sole parental responsibility, and the children would live with her and spend alternate weekends with the husband. There was no relevant change in the circumstances. The husband sought a harmful proceedings order under section 102QAC. The husband was successful. The wife did not attend the hearing.

O'Brien J stated[8]:

> *"Notably, where a harmful proceedings order is sought,* ***the Court is required to consider the impact of potential further proceedings on the respondent to them, and on any child the subject of those proceedings. That is distinguished from the traditional concept of vexatious proceedings orders, now reflected in s 102QB, where the focus of consideration is on the actions and motivation of the litigant who commences the further proceedings.***
>
> *The making of a harmful proceedings order does not shut the door of the Court; the person the subject of such an order may still seek to commence further proceedings but will require leave to do so. The protection afforded by a harmful proceedings order is extended in those circumstances, as an applicant for leave must not serve that application unless and until leave is granted. On applying for leave, the applicant bears the onus to satisfy the Court that the proposed proceedings are not frivolous, vexatious or an abuse of process, and that they have reasonable prospects of success."* (emphasis added)

The first question that his Honour identified was:

> *Are there reasonable grounds to believe that the husband or the children would suffer harm if the wife institutes further proceedings?*

He said[9]:

> *"First, proof that the husband or children would suffer harm if further proceedings were instituted is not required. What is required is the establishment of reasonable grounds to believe that they would suffer harm - the distinction is important. There must be facts sufficient to induce that belief in the mind of a reasonable person. "The objective circumstances necessary to found reasonable grounds to believe must point sufficiently to the subject matter of that belief, [but] they need not be established on the balance of probabilities."*
>
> *Second, the provisions of s102QAC(2) as to the nature of harm bear careful attention. By definition, harm may include psychological harm or oppression, major mental distress, a detrimental effect on the husband's capacity to care for the children, or financial harm. Those types of harm are listed in the legislation as examples only - the list is inclusive, not exclusive. Other types of harm may clearly be considered.*
>
> *In determining whether to make a harmful proceedings order, the Court may have regard to the matters set out in s 102QAC(3)."*

Proceedings were commenced by the husband's application in mid-2015. There was to be a five day trial in early 2017 with multiple interim and interlocutory applications and hearings along the way. The parties reached agreement on the first day of trial. Orders were by consent.

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[8] At [49]-[50].
[9] At [52]-[54].

The parties did not agree about financial matters and the trial continued in relation to them. Judgment was delivered in early September 2017.

In early 2018 the wife filed an application with leave to appeal out of time against the financial orders. Leave was granted, but the wife did not comply with the relevant orders and the appeal was deemed abandoned.

In 2018, an order was made for costs in favour of the husband in relation to the financial proceedings. The wife did not comply with the order resulting in the husband filing an enforcement warrant for seizure and sale of property.

In June 2018 in circumstances where consent orders had been made permitting the husband to travel with the children, it was necessary for him to bring a further application to facilitate that and the issue of passports.

In September 2018 the husband then filed a contravention application against the wife in relation to parenting matters and an application in a case. There were at least a further eight court events, including steps to progress the matter towards trial. A further application was filed by the husband in 2019.

By 2020, the husband applied for and obtained an urgent recovery order. Shortly thereafter, the wife admitted multiple contraventions and was ordered to enter into a bond. A few months later, in 2020, the husband filed a further contravention application. The wife was found by 2023 to have contravened and was required to enter a further bond and pay costs. In the meantime, the husband commenced proceedings about the children.

O'Brien J stated[10]:

> *"Some proceedings in this Court proceed smoothly and efficiently, with minimal acrimony, and in circumstances where the parties comply not only with substantive orders, but also with interlocutory and procedural orders designed to assist in a prompt resolution of their disputes. Other proceedings do not.*
>
> *Many litigants in this Court approach parenting proceedings in a manner consistent with the principles set out in the legislation. Many also accept determinations made by the Court, even where they opposed them, and move on with their lives. Others do not.*
>
> *In this case, the wife's conduct has led to the outcomes of contravention proceedings already described, enforcement proceedings in the financial case, substantial costs orders, and further proceedings required to enforce those costs orders. It may fairly be anticipated that any further litigation driven by the wife would be conducted in a similar vein. The documents filed in support of her present application make that clear. They also confirm that she maintains the beliefs expressed at the last trial and summarised in the words of Tyson J quoted earlier in these reasons. If anything, escalation of those beliefs and conduct is more likely than not. There is no identifiable prospect of the wife accepting determinations of the Court with which she does not agree, nor is there any identifiable prospect of her conducting any further proceedings in a manner different from what has gone before."*

[10] [68]-[70].

Further[11]:

> *"There is a logical and factual overlap between this consideration in the context of the application for a harmful proceedings order, and the consideration required in relation to the dismissal grounded in s 65DAAA of the wife's application. The latter seeks, among other considerations, to protect the children from the potential harm of ongoing exposure to litigation. The former focuses singularly on protection from such harm, whether that be to the respondent or to the children, or both.*
>
> *There can be no doubt that Lucy and Ellen have already suffered psychological harm and major mental distress as a result of the proceedings previously before the Court."*

Then[12]:

> *"Clearly, as found at trial, the children have already suffered psychological and emotional harm as a result of the actions of the wife. While there is a proper distinction to be drawn between harm caused by those actions, and the present required consideration of risk of harm arising from proceedings, there is an obvious factual overlap.*
>
> *The wife's behaviours towards the children which have caused them harm in the past were often directly related to the conduct of the litigation then on foot. There are clearly reasonable grounds to believe that such a pattern would resume in any future litigation, and thus that the children would suffer harm as a result."*

His Honour said[13]:

> *"I readily conclude that there are reasonable grounds to believe that both children would suffer harm in the form of psychological harm or oppression, and major mental distress, if the wife institutes further proceedings against the husband. I accordingly propose to make a harmful proceedings order.*
>
> *The husband did not adduce current evidence directed to the question of whether he would suffer psychological harm or oppression, major mental distress, or a detrimental effect on his capacity to care for the children if further proceedings are instituted. While the findings at trial, and for that matter in earlier proceedings, support a conclusion that the stress associated with those earlier proceedings impacted the husband, no prospective finding as to the possible effect on him of further proceedings being commenced is required, given the conclusion already reached.*
>
> *Similarly, while there are reasonable grounds to believe that the husband would incur legal costs in opposing any further proceedings instituted, it is unnecessary to consider whether that would amount to "financial harm".*"

It is no surprise that a costs order was also made against the wife, as she was wholly unsuccessful, costs being fixed at $10,000.

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[11] [71]-[72].
[12] At [78]-[79].
[13] At [83]-[85].

***Kori & Georgene (No. 3)* [2024] FedCFamC1F 381**

Baumann J ordered that a harmful proceeding order be made against the mother *"or any person acting in concert with the mother"* and that the father is to be notified (by email) if an application has been made and/or the outcome of the application. These orders were made by default. The mother was incarcerated. She failed to engage properly with the court, file material as directed and/or appear as ordered (and leaving aside on one occasion where she failed to appear) which was after she was charged by police with abduction of a child and was held in custody.

The mother did appear in court on one occasion by telephone but had sent emails to the court in which she set out as a sovereign citizen, she made claims that the court had no jurisdiction and most recently sought orders for the return of *"her property"*, being her daughter.

In his Honour's words, *"strangely, she sought to rely upon Australian Capital Territory statute to assert she has been asked to pay monies (I assume a standard administrative request once the matter was listed for a final undefended hearing), which she opposed."*

The matter was heard in Brisbane. The mother was arrested by Queensland Police. There had been a previous decision by his Honour in *Kori & Georgine* [2023] FedCFamC1F 989. His Honour rejected the mother's assertion that the father had sexually abused the child and was an unacceptable risk of harm to the child by way of sexual abuse. The court found that the father was not an unacceptable risk of harm. The court found that the mother was unable and unwilling to facilitate the child's relationship with the father and that child live with her and that the mother posed a risk of emotional and psychological harm to the child.

Final orders were made for a change of residence to the father's care. Interim orders were made for a moratorium of time with the mother for one month and thereafter supervised.

The first set of court proceedings were the first orders concerning the child made 11 months after the parties separated, when the child was 2½. Time ceased in June 2019. In November 2020 the father filed a contravention application which was finally discontinued. The mother commenced proceedings in 2021.

The court in November 2023 ordered the mother to bring the child to court in December. She failed to do so. A recovery order was then made, executed by police. Interim orders that permitted the child to spend supervised time with the mother was then suspended in January 2024. The matter was listed for an undefended hearing in May 2024. The mother removed the child from school, contrary to specific court orders and injunctions in mid-2024 resulting in recovery order being obtained and executed by police. The mother failed, despite further orders to attend court, except for that one phone attendance, to attend.

His Honour had very brief reasons, in light of the history of the matter about section 102QAC:

> *"The father seeks to invoke section 102QAC of the Act prohibiting the mother from instituting proceedings without leave of the court. The independent children's lawyers supports the making of the said order. I am prepared to make the harmful proceedings order, as it is important that the mother carefully consider any future applications to spend time with X and supports that application with appropriate evidence – including evidence explaining her conduct and failure to comply with court orders since 11 December 2023."*

***Carey & Prescott (No. 2)* [2024] FedCFamC1F 512**

The matter was in the critical incident list before Brasch J. The father died unexpectedly. The paternal grandparents applied for orders in that list to make major long-term decisions for the child. The mother had not seen the child for several years. The parties had been in litigation from when the child was a few months old to when the child was almost 12. The rounds of litigation were largely a consequence of the mother's antisocial and criminal behaviour towards the paternal family, her psychiatric admissions and her incarcerations for offences directed to the paternal family.

Her Honour made a harmful proceedings order. The court concluded that the mother was an unacceptable risk to the child, including the mother having *"an obsessional quality"* to her letters. The mother *"still struggles from time to time with depression, difficulty with stress management and 'persistent negative thought patterns related to a past trauma and current legal battles'"*.

The mother had *"high vulnerability to further deterioration of mental state"*.

Her Honour had no confidence that the mother was able to link her actions with the consequences of no time but blames the paternal family for a lack of relationship with the child.

The child, very safe with his grandparents, said *"I don't want to ever see her again"*. He described the mother holding him by the head and banging his head into a wall if he did something naughty, and at times the mother locking herself in her bedroom when he would hear her crying.

Brasch J said[14]:

> *"The mother has form for stalking and has been convicted of numerous counts of using a carriage service to menace, harass or cause offence. She has spent time in jail for offences directed at the paternal family. Her letters meant for B show a fixation with being together with him, just as she was fixated on being with the father to be with B. I will make the photo order proposed by the paternal grandparents so she can see the development of B over the years but temper any risks of that provoking or causing stalking, inappropriate carriageway usage or fixated behaviour on the part of the mother by also making the s 68B personal protection injunctions sought by the paternal grandparents. The risk of the mother acting on any obsession or fixation with B can be ameliorated by the s 68B injunctions."*

Brasch J said[15]:

> *"A s.102QAC Order is not a Part VII parenting order to which a child's best interests are paramount. That said, the concept of harm to a child in s 102QAC(1)(b) focuses squarely on limiting damage to the child if further proceedings ensued where that may cause the child, say, psychological harm (s 102QAC(2)(a)). The examples of harm in s 102QAC(2) are not exhaustive. Put differently, it is open to the court to find other factors will cause the child to suffer harm if further proceedings are instituted."*

[14] At [149].
[15] At [155].

Further[16]:

> *"Harmful proceedings orders do not shut a party out of the court. Rather, if such an order is made, the relevant party (here the mother) cannot bring further proceedings without the leave of the court under s 102QAG. The sections seek to balance a party's right to institute proceedings on one hand, against such proceedings causing harm to the other party and/or the child on the other. If a harmful proceedings order is made, then a subsequent court is in essence the gatekeeper in balancing the former and the latter.*
>
> *I have previously set out the parties' numerous engagements with court systems. With respect to this court, it is clear from the material that even though the paternal grandparents were not parties to earlier proceedings, they were still integrally involved in them. As for the many domestic violence and other court events and convictions, the father and his parents were involved as potential witnesses in the raft of proceedings arising from the mother's anti-social and criminal conduct and/or potential and actual beneficiaries of protection orders.*
>
> *It is correct that the mother has not been an instigator of proceedings brought in this court, but the proceedings largely arose out of anti-social things the mother had done. Protective measures were taken in seeking court orders to protect B; the father or paternal family cannot be criticised for those child focused, protective approaches.*
>
> *In terms of harm to the paternal grandparents (s 102QAC(1)(a)), the paternal grandmother deposed:*
>
> > *Litigation in relation to [B] has been ongoing since 2013. As [B] enters his teenage years, the costs of maintaining him will increase. We are most concerned that if [Ms Prescott] does not obtain the outcome that she desires at the trial of this matter on 17 July 2024, this may not be the end of Court proceedings if [Ms Prescott] is in a position to take matters further within the court system. We also live in fear of physical violence at the hands of [Ms Prescott] if she does not obtain the outcome she desires.*
> >
> > *(Affidavit of Ms L Carey filed 26 June 2024, paragraph 68).*
>
> *In terms of harm to B, (s 102QAC(1)(b)), the Family Report Writer at paragraph 89 of the Family Report said:*
>
> > *[B's] family have been in conflict about his parenting arrangements since his birth, and his participation in this family report is the third such intervention he has participated in.* ***[B] is unlikely to have experienced a time of calm and stability in his care arrangements****. Whilst his time with his mother ceased in 2019,* ***his caregiving adults have remained in conflict (either via parenting or criminal proceedings) and this is likely to have had a negative impact on the parenting he received, with the strain and stress evident to [B]***.(emphasis added)
>
> *I accept 11 years of litigation in various courts must be taxing and costly for all adults and must have detracted from the paternal grandparents ability to be always present for B. However, I am less troubled by harm to the paternal grandparents of further proceedings per se, than harm to B who is but a child and has no control over the litigation choices of the adults around him.*

[16] At [158]-[170].

Focusing on B, it has long been accepted that on-going litigation about a child is likely to inflict "enormous psychological harm ... upon each other [the adults] but especially upon the child" (McEnerney & McEnerney [1980] FamCA 43; (1980) FLC 90-866 per Nygh J at 75,499 ("McEnerney") (emphasis added).

The Family Report Writer was asked about further proceedings. On one hand she was asked for her opinion if B remained of the steadfast view he did not want to see the mother but she started future proceedings. The Family Report Writer responded:

> *...I think it would have a very destabilising impact on [B] and would result in him feeling some emotional distress, perhaps preoccupation with the litigation. It might further cement his negative expressed feelings about Mum and perhaps harden his position towards his mother, if litigation were to continue along the same track in the future.*

On the other hand, the Family Report Writer was asked about future proceedings if B was curious about his mother, wanted to spend time her and proceedings were brought to deal with that. The Family Report Writer agreed it would likely be less harmful.

Therefore, in the former example, leave may not be granted so as to protect B from harm, however in the latter, leave would likely be granted.

I am well satisfied that B needs freedom from being the object and subject of further litigation without the court's leave. B knows no other life than the adults about him being in litigation. To that end I accept the well-reasoned opinion of the Family Report Writer that litigation conducted over B's entire life means he is "unlikely to have experienced a time of calm and stability in his care arrangements" and "this is likely to have had a negative impact on the parenting he received, with the strain and stress evident to [B]". I also adopt what Nygh J said in McEnerney extracted just above about on-going litigation causing "enormous psychological harm" on children, and in this case, B. I am also satisfied more litigation, without leave, will see him suffer the further harms of the adults around him not being available to him, as they otherwise might, and a childhood and teen years knowing nothing but litigation, or put differently, an absence of freedom from court.

Cumulatively, these factors just mentioned give me reasonable grounds to believe that further proceedings would cause psychological harm to B, if the mother instituted proceedings against the paternal grandparents without the oversight (that is, leave) of the court. I will make the order sought by the paternal grandparents.

With respect to the notice requirement in s 102QAC(7), I will make an order the paternal grandparents be notified if an application for leave is dismissed (s 102(7)(b)). Obviously, if leave is granted they will be served. However, giving them notice that an application for leave has been made and yet to be determined (s 102QAC(7)(a)) seems to miss the point, respectfully, of quarantining B (derivatively by the paternal grandparents) from the prospect of further litigation pending the outcome of the leave application."

As her Honour said, the concept of harm to a child in section 102QAC(1)(b) focuses squarely on limiting damage to the child if further proceedings ensured where that may cause the child save psychological harm (section 102QAC(2)(a)).

Further, the harmful proceedings order does not shut a party out of court, but instead, a subsequent court order is in essence the gatekeeper in balancing the parties' right to institute proceedings against those proceedings causing harm to the other party and/or the child.

The mother thought it a good idea for the harmful proceedings order to be made against her, but her Honour considered that as she was self-represented, would not make the order by consent, but consider on first principles.

***Purnell & Keene* [2024] FedCFamC1F 571**

Berman J declined to make a harmful proceeding order on the application of the mother. His Honour said:

> *"Evidence was not presented in support of the order that would satisfy me that further proceedings would result in inevitable harm or aggression.*
>
> *As presented by the ICL, there is a possible pathway for the father that might result in the mother regaining some confidence that the father has gained insight into his threatening behaviour and complete rejection of the notion that he is not bound by court orders.*
>
> *The mother seeks the protection of wide-ranging injunctions in circumstances where the father presents no evidence disputing the threatening behaviour as alleged by the mother. In addition, there is no confidence of the father or respect either to the mother's clear intention that she is fearful of the father and does not wish to engage with him or his preparedness to comply with court orders. The father's presentation is unequivocal. He does not accept that he is bound by the determination of the court or orders made.*
>
> *The basis of the injunction sought is for the personal protection of the mother and the children."*

His Honour made orders under either section 114 or section 68B of wide-ranging injunctions but did not make a harmful proceedings order.

***Morse & Duarte (No 8)* [2024] FedCFamC1F 639**

The husband sought and obtained a costs order against the wife of $435,732.34, to be paid from monies held in trust, and sought either a vexatious proceedings order under section 102QB or a harmful proceedings order under section 102QAC.

A helpful Federal Court judgment set out the principles related to vexatious proceedings order: *Official Trustee in Bankruptcy v Garjan (No. 2)* [2009] FCA 398 per Perram J which were adopted by Harper J[17]:

> *"The power to prohibit or restrict vexatious proceedings is well known across many jurisdictions. In Official Trustee in Bankruptcy v Gargan (No 2) [2009] FCA 398, Perram J, in a passage followed many times (see for example Pencious & Searle [2017] FamCAFC 210; (2017) FLC 93-805 ("Pencious") at [75]), set out the following principles to determine when proceedings are vexatious, which I respectfully adopt:*
>
> *2. A comprehensive explanation of what makes a proceeding vexatious is difficult to proffer for the boundary between the persistent and over-zealous on the one hand,*

[17] At [63].

and the vexatious on the other, may at times be indistinct. However, the following principles are, at least, well-established. First, the making of such an order is an extreme remedy depriving its object of recourse to the enforcement of the law which is every citizen's ordinary right. It is, therefore, not lightly to be made.

3. *Secondly, the purpose of the order is not to impose condign punishment for past litigious misdeeds; it serves instead to shield both the public, whose individual members might be molested by vexatious proceedings, and the court itself, whose limited resources needs must be carefully managed and protected from the expense, burden and inconvenience of baseless and repetitious suits.*

4. *Thirdly, as might naturally be expected, such a severe power is not enlivened by the mere single occurrence of a vexatious claim. To err is human and transient lapses of judgment, even serious ones, may be found in the most reasonable of places. Instead, the power to make the order is conditional upon the litigant having commenced not only a single vexatious proceeding but also upon having commenced similar such proceedings in this court or in other Australian courts.*

5. *Fourthly, the qualities of vexation ... are to be found, ... , in the commencement by the litigant of proceedings which lack reasonable grounds and where the litigant's institution of such proceedings may fairly be said to be both habitual and persistent.*

6. *Fifthly, whether a proceeding is instituted without reasonable grounds is a different question to, although not wholly disconnected from, the inquiry into a proceeding's legal merits. The wheat, no doubt, must be separated from the chaff but in this area the question is whether what is before the court contains any wheat at all. Although, often enough, no great guidance is obtained by exchanging one formula of words with another, it will be usually of some assistance, limited perhaps, to ask whether the issues brought to the court for determination are manifestly hopeless or devoid of merit. It is, in that context, important to distinguish the difficult from the ridiculous and the unlikely from the hopeless.*

7. *Sixthly, although the ways in which unreasonable grounds may manifest themselves are myriad, one form often to be found in the baggage of the vexatious is a failure, often a refusal, to understand the principles of finality of litigation which rescue court and litigant alike from a Samsara of past forensic encounters.*

8. *Seventhly, it is the related quality of repetition which underpins, in part, a need for the institution of the proceedings to deserve the appellations habitual and persistent. The litigant's conduct will be habitual where the commencement of proceedings occurs as a matter of course when appropriate conditions for their commencement are present as was explained by Roden J in Attorney-General v Wentworth [1988] NSWCA 8; (1988) 14 NSWLR 481 at 492. That formulation may not wholly explain the litigant who commences proceedings on any occasion and without the presence of any conditions, whether appropriate or otherwise. In such cases, the idea of constant repetition driven by habit and symptomatic of an inability not to engage in the behaviour may be more useful. Persistence, on the other hand, generally suggests stubborn determination but, in the context of the vexatious, carries with it the capacity to endure failure beyond the point at which a rational person would abandon the field.*

> 9. *Eighthly, each of these notions — the want of reasonable grounds, habitual institution and persistent institution — are to be gauged objectively. But this does not mean that a litigant's own protestation as to his or her own mental state is irrelevant; frequently enough, the vexatious are betrayed out of their own mouths. Rather, the need for objective determination protects courts from the vexatious litigant who is genuinely, but misguidedly, persuaded as to the correctness of his or her own conduct.*
>
> 10. *Ninthly, the power to make the order arises when proceedings commenced in the way described are found to exist. But the notion of a proceeding is a broad one including a substantive proceeding directed at the attainment of final relief and collateral applications within such a proceeding; further, it extends outside the proceeding itself and embraces appeals therefrom and applications which, whilst not made in the proceeding, are properly to be seen as collateral thereto — so much flows from the definition of proceeding in s 4 of the Federal Court of Australia Act 1976 (Cth).*
>
> 11. *Tenthly, other proceedings commenced before bodies which are not courts, such as the Administrative Appeals Tribunal, are not directly pertinent to the existence of the power but may nevertheless throw light on the vexatious nature of proceedings before the court; so too, the existence of a body of such administrative litigation may have relevance to the question of whether the court's power to make the order, once enlivened, should be exercised.*
>
> 12. *Finally, once it is concluded that the court's power to prevent a litigant from commencing or pursuing proceedings has been enlivened, the considerations germane to the exercise of that power are unconfined. However, the factors which will be relevant are informed by the protective purpose which the order serves. Where a litigant displays insight into their previous litigious history this will, no doubt, be relevant for it will suggest — although not determine — a diminution in the risk posed to the public. On the other hand, the manner in which a litigant conducts herself in her affairs generally is also capable of throwing light on whether the commencement of further vexatious proceedings is likely. Those general affairs include the litigant's defence to the proceedings by which the order restraining him is sought. Because of the protective nature of the jurisdiction it is also relevant to know the extent of the damage and inconvenience the litigant's forays into the courts have caused, pecuniary or otherwise."*

The wife considered her many applications to all be defensive in nature, though she admitted some were misconceived and should be discounted.

His Honour said[18]:

> *"His Honour: [Ms Duarte], the harmful proceedings provisions direct me to take account of the history of the proceedings, whether you've taken proceedings frequently, and also the cumulative effect, or potential cumulative effect, of any harm resulting from the proceedings. One thing that the husband points to is the number of applications you've brought yourself in the last 10 years in these proceedings.*
>
> *[The Wife]: Well, I acknowledge that there has been a high number, but when we actually look at – okay. There was a few that were just, frankly, off the planet, I think. There was*

[18] At [95].

one – they mentioned one in one of the affidavits or one of the submissions where there was a couple of things that were just well and truly misconceived, but they were, like, in 2015; okay? But, you know, other than those couple of obviously misconceived applications – right? Which I think, in all intents and purposes, in 2024, we can discount those couple of obviously misconceived applications; right? But the bulk of these applications that I'm bringing – as I said, they're all defensive applications; right?"

His Honour said[19]:

"It is not necessary to determine whether every proceeding instituted or conducted by the wife is vexatious, rather the central question is whether the wife has frequently instituted vexatious proceedings in Australian courts. In light of the previous detailed discussion, I am satisfied that she has.

It is plain in my view that the wife has shown a proclivity to institute applications which has been habitual and persistent, demonstrating a limited insight into her conduct, a stubborn determination to continue with hopeless applications when beyond the point at which a rational person would have abandoned the field, and an inability to accept the principle of finality. Very few of her applications were instituted on reasonable grounds and her past conduct raises a real risk that she may continue to make specious applications in the future, despite her submission apparently conceding that any further applications would be pointless. The need to protect the public interest by confining the capacity of the wife to institute proceedings is almost self-evident.

I am further satisfied, for the same reasons, that the wife should be restrained as a vexatious litigant, as the husband proposes."

Although the husband pressed the section 102QAC application as an alternative against the possibility that Harper J was wrong in his conclusions concerning section 102QB, it was appropriate that he express his conclusion concerning section 102QAC.

His Honour was also satisfied if necessary to have made an order under section 102QAC[20]:

"I have found above that the history of proceedings between the parties shows such proceedings have been frequently and habitually instituted by the wife.

In addition to the matters already considered above, the husband submitted that were the wife to institute further proceedings against him he would suffer financial harm and stress that impacts upon his quality of life. He claimed to have incurred legal fees in the sum of $685,962.71 for the period November 2013 to date as a result of the many "unjustified, repeated and unmeritorious" applications instituted by the wife over some 10 years of litigation. The husband adverted to the legal costs being disproportionate to the complexity of issues in dispute and to the size of the parties' net property pool being some $2.1 million. The husband contends the incurred legal fees amounts to harm as he has limited capacity to work and has had to go into debt and obtain a loan from his mother which has impacted upon his capacity to financially provide as sole carer of the parties' children. It was further submitted the financial harm the husband would suffer could not be properly addressed through a costs order given the wife's persistent non-compliance with prior costs orders (see above).

[19] At [96]-[98].
[20] At [103]-[106].

I have had regard to the cumulative effect, or potential cumulative effect, of any harm to the husband resulting from further proceedings instituted by the wife. Such effect seems to me to be significant.

I find that there are reasonable grounds to believe that the husband would suffer harm if the wife instituted further proceedings against him, within s 102QAC."

***Sheffield & Almond* [2024] FedCFamC1F 785**

This was also a case of a mother acting badly. The proceedings concerned a child aged 11. Final orders were made in 2020 which provided for the child to live with the father and spend time with the mother. The mother's time was suspended in circumstances where she removed the child from the care of the father twice. The mother was charged and imprisoned. The mother has spent limited time with the child since 2020.

The issue in dispute was what time, if any, the child should spend with the mother. The parties had been involved in litigation since 2016. Both the father and the ICL sought a harmful proceedings order against the mother. The proceedings had been commenced in 2022 after the mother had been released on parole in late 2021.

Boyle J said[21]:

"X has been in an ongoing therapeutic relationship with a psychologist, Mr MM, since May 2023. X on the evidence has significant anxiety. Her anxiety and stress increase when thinking about her mother. X has participated in family report interviews for the current proceedings, and in interviews for reports prepared by Ms E dated 1 December 2019, 10 October 2018 and 9 June 2017 referred to in the judgment of Justice Henderson. She has engaged with an Independent Children's Lawyer. X's views in any future litigation would be highly relevant. This would likely involve her again speaking with an Independent Children's Lawyer, and participating in some form of report. I accept there are reasonable grounds to accept that this would cause her psychological harm by increasing her stress and anxiety. X has been at the centre of litigation since she was three years old.

The report writer has raised concerns with respect to the impact on X of anxiety, and the deleterious effect that has on her. The report writer was clear in her evidence that further proceedings would not be in X's interests. I accept that X would likely suffer psychological harm if proceedings are brought by the mother in the future.

The mother has initiated proceedings once, being these proceedings. She was a respondent in previous proceedings. Her conduct in breach of orders has required the father to make an application for a for recovery order. Interim hearings were conducted in previous proceedings when the mother took X to live in Town B, and did not comply with an order to return to the Sydney metropolitan area for a year.

The father alone provides X with financial support. I accept that litigation has occurred over eight years. The father has been assisted under the s 102NA scheme in this most recent round of litigation. He has had to take time off work unpaid to participate in the hearing, which incurs a financial burden on him. I accept the mother instituting further proceedings without leave of the court would cause him financial harm.

[21] At [106]-[111].

The specific order sought by the father and Independent Children's Lawyer would require the mother to seek leave to bring further proceedings, and that the father would be advised if the application is dismissed. The order does not preclude the mother from making an application. The court would fulfill the role of 'gatekeeper' to future applications, as referred to by Justice Brasch in Carey & Prescott (No 2) [2024] FedCFamC1F 512. The father would not be required to do anything unless the mother were successful in obtaining leave. Future applications would be left for the court to weigh without his input. No orders would be made for an Independent Children's Lawyer, for example, unless leave was granted.

It is appropriate for these reasons to make the orders sought pursuant to s 102QAC."

***Naisby & Naisby (No 3)* [2024] FedCFamC1F 787**

An order under section 102QAC was made by consent of the parents and ICL that the applicant father be prohibited from instituting further proceedings against the respondent mother without leave of the court and under section 102QAC(7) the respondent mother is to be notified by the court of an application having been made and an application being dismissed.

Jarrett J considered an application by the father under section 65DAAA and dismissed it because the father had not made it a change of circumstances based on the wishes of the children. The children were content with the current arrangements more or less and there is no reasoning in his Honour's reasons as to why the section 102QAC order was made.

***Warshawsky & Lewerentz* [2024] FedCFamC1F 909**

Smith J made these orders as to section 102QAC[22]:

"Excluding any Appeal from these Orders, pursuant to s 102QAC of the Family Law Act 1975 (Cth) Mr Lewerentz, or any person acting in concert with Mr Lewerentz, is prohibited from instituting proceedings under the Family Law Act 1975 (Cth) in a court having jurisdiction under the Act, against or in relation to Ms Warshawsky, or X or Y, without prior leave of a court having jurisdiction under the Act.

Should Mr Lewerentz seek leave to institute proceedings pursuant to s 102QAE of the Family Law Act 1975 (Cth), Ms Warshawsky is not to be notified by the court, that:

(a) An application has been made; and/or

(b) The outcome of the application, unless the outcome is the granting of leave to commence proceedings.

Should Mr Lewerentz seek leave to institute proceedings pursuant to s 102QAE of the Family Law Act 1975 (Cth), Mr Lewerentz or any person acting in concert with Mr Lewerentz, is prohibited from serving, notifying or bringing to the attention of Ms Warshawsky, directly or indirectly, that:

(a) An application has been made; and/or

(b) The outcome of the application, unless the outcome is the granting of leave to commence proceedings."

[22] At [12]-[14].

The form of orders is interesting about the in concert provision, the no notice provision, and unique about how an appeal might be dealt with. The proceedings had commenced in 2023 when the mother filed an initiating application. The matter was allocated to the Evatt list. An ICL was appointed.

There was extensive family violence by the father. The father misunderstood what involved family violence. He repeatedly made statements that he believed that he was entitled to threaten people, including the mother and to make threats which would reasonably be considered threats up to threats of murder as long as he did not act on the threats. He admitted that he made these threats for the purpose of intimidating people. He believed that since he had not acted on the threats, there was no problem with the behaviour.

The court found that the father held the persistent belief that he is entitled to make threats at will for the purpose of intimidating, harassing and threatening people and coercing and controlling them into doing what he wants. His occasional acknowledgement that this was unacceptable was no more than for him to write letters saying, *"BS like I'm remorseful"*. The court did not accept that the father had any remorse whatsoever for any of the threats that he had made to the mother.

The effect of his threats, including that of murder, were that he will never see or speak with or communicate in any way with the children again and he will be subject to injunctions that mean he will be arrested if he breaches those orders and he will not be allowed to come back to the court without leave of the court, the court being satisfied as to the Briginshaw standard.

Smith J said that, *"the father is a persistent family violence offender who believes he is entitled to use, and will continue to use, family violence by reason of threats, stalking and intimidation, and will possibly escalate to physical violence, and that this means he presents a clear and unacceptable risk of both psychological harm to the children, and to the mother."* The only result is a no contact order and there was no other way in which the children and the mother could ever be safe.

The ICL sought a harmful proceedings order on the basis of the father's threatening and harassing conduct throughout the course of the proceedings and his repeatedly stated intention that, if he did not succeed, he intended to use litigation process as a means of mechanism of harassment and intimidation to get his way until the children reach adulthood, including that would *"keep … [the mother] in court for 15 years to get my kids 50/50"* and that unless and until he gets his way, he would make the mother's life hell for the next 25 years and that he will *"ensure that [she] has the same ability to build a happy family life with their kids that I currently do"* and would dedicate his life to ensuring his children are back in his care. The father made it clear that no matter what the outcome of the proceedings, he would continue litigating.

Smith J found that the father[23] *"intends to continue litigation as a form of an acceptable, in his view, "tactic", to punish the mother and to intimidate her unless and until he gets his way.*

In effect the father's stated intention is to engage in ongoing litigation abuse."

His Honour was comfortably satisfied that the criterion section 102QAC were met[24]:

> *"I am satisfied that the mother would and will suffer psychological harm, noting her psychological history and the impact of these proceedings on her, and major mental*

[23] At [358]-[359].
[24] At [361]-[366].

distress, and a detrimental effect on her capacity for care for the children if subjected to ongoing litigation by the father after these proceedings are finally concluded.

I am satisfied that, as a consequence, the children would and will suffer significant harm by reason of the likely negative impact on the mother's parenting capacity of allowing litigation abuse to occur, through the father being able to continually start proceedings after these proceedings. This assumes at the moment that this judgment will stand and will not be overturned on appeal.

I make that finding that a harmful proceeding order should be made cognisant of the extremely high standard that is, and indeed should be, required to be met to satisfy a court that it is appropriate to remove from the citizen the right to come before the court and to commence proceedings without leave, given that this is a very significant restriction on a fundamental and fundamentally important legal right of a citizen in this country.

It is not an order to be made lightly and I have not made it lightly.

I have given significant consideration to whether the order should not be made, and to whether perhaps the mother should wait to see whether the father does, in fact, carry out the threat to continue litigation regardless of the outcome.

However, given the history, given what I consider to be the likelihood that it will occur and the very potentially serious psychological consequences for the mother, if, having concluded this proceeding and any appeals from it, she is then faced with another round of litigation, and given that the finding is not based on inferences but on the father's repeatedly stated and maintained intention, I have come to the view that this is one of those rare and unfortunate cases where such an order is required."

The case is also one in which there was a referral of the father, being that people who are associated with state police forces sometimes have a problem using their resources to stalk and harass and if the father is using the resources of a Government contractor, working for the intelligence or security community, the Government would want to know so they could stop it. A referral must be made. Accordingly, whilst acknowledging it, it is unlikely to be true. Smith J considered that he had an obligation to refer a copy of the judgment to the office of the Inspector General of Intelligence and Security to determine whether the father is by himself or with the assistance of anyone else, abusing his access to the resources of the security community to stalk, harass and intimidate the mother and her household and so to take any action they deem appropriate if such abuse is taking place.

***Bruin & Bruin (No 4)* [2024] FedCFamC2F 870**

Within three weeks of final orders being made as to parenting, the mother brought an application to reopen. Her application was met in turn with a response seeking a harmful proceedings order against her under section 102QAC, which was successful with an order that the father not be notified by the court that the application has been made and/or if such application has been dismissed. Judge Mansini considered the various secondary material[25]:

"There being no prior judicial consideration of the provision or its meaning known to the parties, submissions were made about the Explanatory Memorandum, Family Law Amendment Bill 2023 (Cth), the Supplementary Explanatory Memorandum, Family Law Amendment Bill 2023 (Cth) and the Addendum to the Explanatory Memorandum, Family

[25] At [15]-[18].

Law Amendment Bill 2023 (Cth) (together, the Explanatory Memoranda), as an aide to the proper construction and application of the provision. By those extrinsic materials, the legislature explained the intention that the new limitation available under s.102QAC:

> *..is reasonable and proportionate to the legitimate aim of preventing harm to the respondent through continuous litigation.*

The types of harm a court may have regard to pursuant to s.102QAC(2) are non-exhaustive. According to the Explanatory Memoranda, it is intended that the Court assess and determine what constitutes harm depending on the individual circumstances of each case including any non-specified type of harm.

Importantly, the Explanatory Memoranda clarifies that there need not be a finding of actual harm suffered in order to make a harmful proceedings order. It being the protective intent that those who may suffer from harm upon the institution of future proceedings are not required to have first experienced harm in order for a harmful proceedings order to be made.

Although a harmful proceedings order made under s.102QAC order is strictly final, a person subject of such order may still apply for leave of the Court to institute future proceedings under the Act that would otherwise be prohibited by the harmful proceedings order: s.102QAE. Such leave may be granted provided that the Court is satisfied that the proceedings are not frivolous, vexatious or an abuse of process and have reasonable prospects of success: s.102QAG(1)."

The parties separated prior to June 2016. On that date, final parenting orders were made by the court by consent of the parties. In mid-2019, upon intervention of child safety officers, children were removed from the mother's care for their first time. They were subsequently returned to her but again in 2021 removed by the Department. Since then, they have lived with the father and had supervised time with the mother. In 2021, the Childrens Court made orders following the intervention of the Department on the basis that the children live with the father and had professionally supervised time with the mother. Shortly prior to the discharge of the Childrens Court orders, the father commenced proceedings under the *Family Law Act*. That application was heard in November and December 2023 with judgment reserved. Judgment was scheduled to be delivered on 1 February 2024. On 31 January 2024 the mother applied to reopen. That application was dismissed. On 14 February 2024, final judgment was delivered. The mother was unsuccessful. It was noted there were certain issues about lack of stability with the mother parenting capacity as well as drug use, as well as the mother's lack of insight.

A cost judgment was delivered on 26 March 2024. On 4 March 2024 the mother's further application commenced which she then sought to discontinue by June. In the meantime, the father pressed his 102QAC order and costs.

The father's argument about harm included financial harm on himself and the children. His evidence was that he had spent almost $125,000 in legal fees since 2024 and there was an estimate of a further $88,000 in costs should the second parenting order application be reopened. He was not in receipt of Legal Aid. The amount he had spent on an indemnity basis was equivalent to 97 weeks of child support paid by the mother. He had to redraw on his mortgage to fund his legal expenses in 2022 and 2023. He no longer had a redraw facility available. He did not have financial capacity continuing incurring costs to respond to any of the current or further applications by the mother and would prefer to apply his income towards the children's schooling, textbooks, medical expenses, excursions and extracurricular activities.

The mother's evidence was the father seemed to own two properties and owned 15 motor vehicles. The father's case was that he owned one of the properties but the other belonged to his father, with the same name.

The father also asserted that the children had been subjected to ongoing litigation or therapy due to the trauma they have experienced for being in their mother's care and navigating through the court processes and he wanted them to thrive and enjoy their childhood without the shadow of litigation.

The father's application under section 102QAC was confined to the institution by the mother of parenting proceedings. There was no evidence related to property or other proceedings that might be brought.

Judge Mansini stated[26]:

> *"It is not necessary to demonstrate past harm. It is sufficient that the Court be satisfied of reasonable grounds to believe the father would suffer harm if the mother were to institute further proceedings against the father or the children would suffer harm if their mother instituted further proceedings against their father. This necessarily involves somewhat of a predictive assessment. The statute expressly provides that the Court may be assisted in weighing up whether to make a harmful proceedings order by having regard to: the history of proceedings as between the parents under the Act, by definition at s.4(1) including any incidental proceedings; whether there is a frequency of institution or conduct of proceedings by the mother against the father in any Australian court or tribunal, including attempted institution of proceedings and orders made before commencement of the provision; and the cumulative or potential cumulative effect of any resultant harm."*

The court accepted that there would be financial harm to the father and psychological and emotional harm to the children if there were further proceedings instituted by the mother against the father[27]:

> *"The father and the children have been involved in Court proceedings directed at protecting the children from risks of being in their mother's care for at least 5 years. During the course of their lives to date, the children have twice experienced intervention of the Department to protect their welfare when in their mother's care and, since then, been subject of orders made by independent judges of the Children's Court and this Court who respectively considered it necessary to protect their welfare by providing supervised time only with their mother. When parenting proceedings were otherwise closed and concluded, the mother has twice sought to reopen them. In doing so, she has unilaterally prolonged the participation of the father and her children. In turn, she has prolonged a resolution for this family. The father has given evidence of his despair about the impact on the children's development and in particular that they have the opportunity to thrive as children free from the burdens and stresses of ongoing family court litigation. Very recently, just 4 months ago, with the benefit of substantial evidence on the matter, another Judge of this Court made findings about the trauma the past proceedings have occasioned on the children which may properly be and are adopted here."*

[26] At [58].
[27] At [61].

Further[28]:

> *"Appropriate regard has also been had to the potential cumulative effect of the resultant harm ."*

And while it was unnecessary to establish that harm had occurred in the past, *"the mother's conduct in twice agitating to reopen proceedings and in her late withdrawal of one such attempt serves to demonstrate the harm that such litigation can occasion on the respondent father and the children"*.

Based on the discretion as to whether to make an order under section 102QAC, the court was satisfied that there were reasonable grounds to do so and the criteria would order accordingly.

***Lamport & Garside* [2024] FedCFamC2F 1007**

There were two children aged 7 and 4 who were living with their mother. A section 102QAC order was made against the father and that the mother is not to be notified that an application has been made and/or dismissed by the court.

The father had been physically separated from both children since mid-2020 due to his incarceration, firstly as a consequence of being charged and then more recently, been convicted of a serious crime of violence against the elder child.

The father said that it could not be in the interests of either child that the court should dismiss the application with at least some form of investigation involving expert evidence in respect to the future liability of his relationship with the children given the primacy that the Act provides for the relationship between a parent and child. The mother sought summary dismissal of the father's application having regard to it being unmeritorious harmful and vexatious.

Judge Brown said that if the mother's application is satisfied, it is difficult to see that such an outcome could have any consequence other than the severance of the relationship between the children and their father for the very least, the majority of the remainder of their infancy.

The father said that his overall culpability (and he's not due for release until 2029) is mitigated by a degree of mental illness from which he was suffering in the months leading up to the commission of the events which resulted in his incarceration.

There had been no contact between the children and the father since 2020. His Honour considered section 69ZN[29]:

> *"Pursuant to section 69ZN of the Act, the court is directed to give effect to a number of delineated principles in respect of how proceedings relating to children are to be conducted. The effect of these principles is to ensure that the court's focus always remains on the best interests of the children concerned rather than on the perceived rights of their parents or others.*
>
> *In general terms, these principles, of which there are five in number, can be summarised as follows:*

[28] At [64].
[29] At [37]-[39].

- *The court is to consider the needs of the child concerned and the impact the conduct of proceedings may have on that child;*

- *The court is to actively direct, control and manage proceedings involving children;*

- *The court is to conduct proceedings to ensure a child, or children and parties are safeguarded from exposure to family violence;*

- *Proceedings are to be conducted in a manner that will promote cooperation and child-focus between the parties concerned; and*

- *Proceedings are to be conducted without undue delay, formality and legal technicality.*

In this context, pursuant to the provisions of section 69ZQ(1)(a) the court has authority to decide which issues raised by the parties require its full investigation and hearing and which may be disposed of summarily.

While Mr Garside was entitled to his views[30]:

"It is axiomatic that the children are currently not spending any time with him as a consequence of his actions, which have led to his incarceration. In addition, in my view, the degree to which the court should investigate his opinion that Ms Lamport is a person of some emotional robustness must depend on the overall circumstances which give rise to these proceedings.

Necessarily, any court proceedings have the potential to be emotionally traumatic for the individuals concerned in them. In exercising its discretion, arising under any of the various provisions of Part XIB of the Act, the court must weigh up and balance many competing factors.

Although the court must be mindful of Mr Garside's entitlement to have a procedurally fair hearing, this does not mean he has an untrammelled entitlement to examine any issue which is of interest to him. In this context, the court must also bear in mind the child-related nature of these proceedings and the fact that this case is fundamentally an inquiry into what is the best outcome for the children concerned."

Further[31]:

"In my view, the actions of Mr Garside, as described by the sentencing judge, can only be described as constituting an extreme example of violence, which inevitably must have caused Ms Lamport to have been fearful. In the sentence, the judge said as follows:

> *The body-worn footage from the police officers who were the first responders sets out very clearly the terror and fear that your partner had and the concerns of those first responders in dealing with your daughter.*

In my view, it is hard to conceive of a set of circumstances, which could have been conceivably more terrifying for the parent of an infant of X's age."

[30] At [41]-[43].
[31] At [63]-[64].

His Honour said as to part XIB[32]:

> *"The provisions of Part XIB are ancillary to these powers and provide two major means of sparing children and their relevant carers from such unnecessary litigation, which can be characterised under one of three categories, which can be summarised as follows:*
>
> - *Unmeritorious proceedings on account of an absence of reasonable prospects of success;*
> - *Proceedings which are harmful to a party or a child concerned in them;*
> - *Vexatious proceedings."*

His Honour considered as to the summary dismissal, as well as section 102QAC. As to 102QAC, he said[33]:

> *"It is clear that the power to make a harmful proceedings order is a discretionary one and is potentially prospective in nature – able to made by the court to prevent further proceedings after an earlier proceeding or proceedings have presumably been determined by the court and from its analysis of those proceedings the court is able to conclude that further proceedings would be harmful to either a party or a child concerned in them.*
>
> *In this context, I concede that there have been no such previous proceedings, regarding the parties or children in this case. In these circumstances, it may be open to Mr Garside to argue that the provision can have no application to him given the absence of any previous proceedings between him and Ms Lamport, other than the property proceedings, which were expeditiously resolved without the need for any type of extended hearing. For the reasons which follow, I am not persuaded that this is necessarily the case."*

Further[34]:

> *"In my view, it is significant that the power is characterised as being able to be utilised to allow the court's intervention to be made proactively to limit distress. On the evidence available to me I accept unequivocally that the continuation of the proceedings will occasion severe psychological distress to both Ms Lamport and X. It is also significant, in my view, that such intervention, pursuant to the provisions of section 102QAC(4), can be made by the court on its own initiative.*
>
> *...*
>
> *In this context, it is Ms Lamport's case, supported by the evidence of her treating psychiatrist Dr J, that the proceedings have already caused her emotional anguish and will continue to do so if they proceed further. In this sense, although the current proceedings are obviously at a nascent stage, her application to have them dismissed does have a prospective quality, nonetheless."*

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[32] At [96].
[33] At [126]-[127].
[34] At [130]-[131].

Further[35]:

> *"For the reasons provided above, it seems to me to be the case that the continuation of these proceedings, including the engagement of the interventions proposed by Mr Garside, has the potential to cause harm to both Ms Lamport and X in the sense envisaged in the subsection and as a result to be harmful to them."*

Further[36]:

> *"In general terms, it seems to me to be unarguable that to utilise ordinary parlance, given the highly unusual circumstances in which these proceedings arise, that Mr Garside's application must be regarded as psychologically corrosive and so harmful to Ms Lamport and as a consequence of that it should be curtailed in the exercise of either of the court's discretions arising under either section 102QAB or section 102QAC.*
>
> *The relevant structure of Part XIB envisages any person who is subject to either a potential harmful proceedings order or an application seeking summary dismissal should be given an opportunity to be heard by the court. Clearly, although due to his incarceration Mr Garside faces some difficulties in this regard, he has been given an opportunity to be heard.*
>
> *Necessarily such procedure envisages the court balancing the need to ensure a proper degree of procedural fairness for any given applicant with the need to protect both parties and children from exposure to unnecessary and harmful proceedings, particularly those involving family violence and those which are unmeritorious. In the current matter, in my view, there is a factual overlap in the application of the two distinct provisions to this case.*
>
> *Firstly, given the overall structure of Part VII of the Act, it seems to me that Mr Garside has no realistic or reasonable prospects of advancing his case in respect of the two children concerned given his current circumstances and what gave rise to them.*
>
> *Secondly, given those circumstances, it is, in my view, axiomatic that the continuation of the proceedings must be regarded as being liable to bring harm to both X and her mother of the most severe kind."*

***Ridge & Hurley* [2024] FedCFamC2F 1174**

Judge Brown made a section 102QAC order against the father, but no reference to section 102QAE about whether or not the mother be notified.

The mother's case was that there had been significant coercive and controlling behaviour from the father which in part was manifested by him bringing continual legal proceedings against her and members of her family and against third parties who had any engagement with the parties. The father characterised himself as a loving parent.

The first proceedings were commenced in 2016 and concluded in 2020. The second proceedings were commenced in 2023. In 2023 the father filed a contravention application against the mother with 68 counts. The application was dismissed with costs. Judge Betts characterised the application as a *waste of time* noting that the father had been absent from the child's life for two years due to his incarceration. The father was subject to a permanent

[35] At [134].
[36] At [138]-[142].

stalking order. The mother gave evidence that she was diagnosed with PTSD and that this ameliorated when the father was incarcerated but reestablished itself with his release and what she would characterise as his attempts to reassert himself as an active in her life, but not only recommencing proceedings, but by contacting the child through unwanted lunch orders at school and through contact with her sports club. She said that that was tantamount to stalking of her and the child and thus constitutes family violence.

Mr Ridge was a *"serial and serious"* litigator. The documents he was capable of producing were not capable of cursory dismissal by the courts in which he has filed them. He was clearly an intelligent person who was capable of searching out possible courses of action, under all manner of categories, against any individuals whom he perceives have wronged him.

The judge said[37]:

> *"Whether Mr Ridge derives gratification from his litigation and the attention which it brings him is not capable of my elucidation. On any view, the amount of litigation which he has personally brought, against all manner of individuals in all manner of jurisdictions, must be regarded as extraordinary. The record also indicates that he has been singularly unsuccessful.*
>
> *Although it is not possible for me to definitively determine what is Mr Ridge's personal motivation for being such a determined litigator, given this lack of success, it seems more likely than not that his motivation is not simply access to justice but is more malign in its nature. This is particularly so in respect of his actions against member of Ms Hurley's family, against whom he clearly bears a significant level of grudge."*

Further[38]:

> *"the only conclusion which is open to me on the evidence before me is that Mr Ridge has frequently instituted litigation against any individual whom he perceives is aligned with Ms Hurley, such as members of her family, in other Australian courts. Mr Ridge may perceive that he is the person who has been wronged but no such finding has been made.*
>
> *Given Ms Hurley's previous diagnosis of PTSD, I accept that the further exposure of her to litigation emanating from Mr Ridge is likely to cause her major mental distress, as it has done in the past. It is also likely to impact on her capacity to care for X to the best of her ability because of the stress it will occasion her. If she continues to be legally represented, it will also cause her financial harm.*
>
> *More significantly, I am concerned that the protracted and unremitting nature of Mr Ridge's recourse to litigation, from which Mr Ridge is not likely to be easily deterred not withstanding his level of success or otherwise, his litigation is oppressive in nature and is analogous to coercive and controlling behaviour.*
>
> *In short, as Ms Hurley puts it, Mr Ridge is intent by his recourse to such apparently minor things as sending a parcel of clothes or filling out a lunch order, to demonstrate to her that he is out there, watching her. In my view, this is, in itself, a form of psychological harm and oppression. In his judgment Judge Heffernan characterised it as a form of passive aggression. Certainly, I do not characterise it as child focussed or insightful."*

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[37] At [145]-[146].
[38] At [149]-[152].

Further[39]:

> *"Oppress is an ordinary English word, which means to keep in a state of subservience or oppression. Given the single-minded and implacable nature which Mr Ridge has demonstrated in all the litigation which he has undertaken, even with the dismissal of the current application, Ms Hurley can only conceive that it will be followed by another and another application. This is oppressive and is likely to precipitate in her an adverse and harmful psychological reaction.*
>
> *In addition, the evidence also indicates that X herself is a vulnerable child. She has been distressed by being the subject of the father's unsolicited lunch orders. Ms Hurley reported to Ms B that X was expressing anxiety since her father had been released from prison and the lunch orders had started.*
>
> *I also consider that the possibility of continual and almost certainly unending litigation from Mr Ridge will undermine Ms Hurley's capacity to care for X. It will also expose Ms Hurley to financial harm, if she is compelled to oppose Mr Ridge's application through the engagement of legal representation. Given his impecunious status and his preference for self-representation, cost implications Mr Ridge faces no disincentives in regards to commencing legal proceedings against Ms Hurley.*
>
> *In these circumstances, it is my view, that the court, in the exercise of the various discretions conferred on it, both under Part XIB to control unmeritorious and harmful proceedings and pursuant to Division 12A of Part VII to conduct child related proceedings, the court should dismiss the current application and make a harmful proceedings order under section 102QAC(1) restraining the father from continuing with his current application or instituting further proceedings."*

***Powell & Powell* [2024] FedCFamC2F 1650**

The matter was before Judge Bertone who made a section 102QAC order. Between 2018 and 2021, the parties had litigated about parenting and property, finally consenting to property orders. In 2023, the father sought to discharge the final property orders. The father ultimately withdrew his application after he was cross-examined at length.

Her Honour summarised the mother's evidence that she[40]:

> *"(a) Feels scarred emotionally by the litigation;*
>
> *(b) Felt relieved when the litigation (being the first tranche of proceedings) had come to an end;*
>
> *(c) Feels distressed and harassed by the Father's repeated requests for additional time;*
>
> *(d) Feels she has to make excuses to X for time she spends in the Court proceedings by saying that she has "meetings";*
>
> *(e) Is exhausted by the Father's conduct, in particular he is relentless in his demands, his emails, his jibs;*

[39] At [182]-[185].
[40] At [155].

(f) Says the litigation is like a monster that constantly steals her time and sucks the life out of her;

(g) Is mentally exhausted;

(h) Works full-time and is X's primary carer; and

(i) Wants peace and to not have to do this [Court] again."

Her Honour also noted that the mother had significant legal fees in both tranches of the proceedings which had *"no doubt caused her hardship and thus financial harm"*.

Her Honour accepted the mother's evidence and found that she was worn out and cannot emotionally or financially face another round of litigation.

The court accepted the observation of the report writer that the long-term effect of the father's behaviour and his relentless pressure to have the mother relinquish the boundaries made by the court would be to exact a toll on the mother and may indirectly inflict a cost on a future parenting of the child. In both instances, when there were proceedings before the court, they were commenced by the father. It was only the father who was cross-examined in each of the first and second tranche of the proceedings.

The court accepted the mother's submissions that the father's conduct at the second proceedings demonstrated a self-focus and a determination to ignore the impact of the litigation upon the mother and child from an emotional, psychological and financial position.

The court found that the mother has been distressed, worn down and exhausted by the father's constant attacks and ongoing litigation and that there were reasonable grounds to conclude that the mother would suffer harm if the father were able to institute further proceedings.

Her Honour followed *Carey & Prescott (No. 2)*. Judge Bertone considered that the child may suffer emotional harm by being negatively impacted by her mother's upset and distress if further court proceedings were again commenced by the father and considered that it is appropriate to shield the child as much as possible from future litigation between her parents. Her Honour made the order.

***Fukuzawa & Akhmetov* [2024] FedCFamC2F 1709**

Judge Beckhouse made a section 102QAC order. The form of order is wider than others:

"1. Pursuant to s 102QAC(1) of the Family Law Act 1975 (Cth), the Father ***or any person acting in concert with the Father****, is prohibited without leave from the Court, from instituting proceedings under the Family Law Act 1975 (Cth) in a court having jurisdiction under the Family Law Act 1975 (Cth), against or in relation to the Father.*

2. Should the Father seek leave to institute proceedings pursuant to s 102QAE of the Family Law Act 1975 (Cth), the Mother is to be notified by the Court (by email):

(a) that an application has been made; and/or

(b) the outcome of the application.

(Emphasis added)

The parties had been in protracted legal proceedings since 2008:

> *"This matter has been marked by excessive, prolonged, and intractable parental conflict that the children are caught in the middle of. At least two of the children now experience considerable mental health difficulties."*

Judge Beckhouse said[41]:

> *"The final orders that I have made in relation to the ongoing parenting arrangements for the children is based on the history of proceedings between these parties under the Act. In doing so I have observed that:*
>
> *(a) The children have suffered psychological harm as a result of these proceedings and the parental conflict more generally.*
>
> *(b) The children have been overtly involved in the parental conflict, including through the regular involvement of other agencies in the lives of the children.*
>
> *The attempts at self-harm by X and more recent threats by Z, point towards major mental distress.*
>
> *Dr C noted that "this matter is one of prolonged significant conflict, even taking into account nearly 30 years working in this jurisdiction". The children have been stuck between two warring parents for six years. The intent of these orders is to end the children's exposure to that warfare for the rest of their childhood. They will maintain a relationship with their father under restricted circumstances. When they reach adulthood, they can decide for themselves how they manage that relationship.*
>
> *For these reasons and in the particular circumstances of this case, I am satisfied that there are reasonable grounds to believe that the criteria at s 102QAC(1)(a) and (b) of the Act are met.*
>
> *There is ample evidence before the Court for me to be satisfied that any further proceedings brought by the father will result in the children suffering further harm."*

***Sastri & Kurta* [2024] FedCFamC2F 1742**

Judge Glass dealt with an application under section 102QAC, where the father withdrew his parenting application after the mother obtained an anti-suit injunction in country B.

Mr Sastri did not object, through counsel, to a section 102QAC order being made, but the court did not take that to amount to him consenting to the order.

His Honour said[42]:

> *"Ms Kurta's counsel made the following submissions:*
>
> > *I had considered the breadth and depth of the evidence before the court, in a more broad sense, was sufficient to indicate that after litigation of this length and of this tenor – that harm was made out, broadly. I am not in a position to particularise it further in the sense of taking your Honour, point by point, to the many allegations*

[41] At [288(a)-(b)], [289]-[292].
[42] At [69]-[78].

> *made by the parties in this matter as to, among other things, family violence and the uncertainties caused to their lives by the litigation.*

The "breadth and depth of the evidence" before me does not satisfy me "in a more broad sense" that harm would be caused to Ms Kurta by the institution of further proceedings to warrant Mr Sastri being deprived of access to the Courts.

It is certainly regrettable that Mr Sastri, at various points in this litigation, indicated an intention not to pursue it, including cancelling appointments with Ms E and Consultant Ms F. However, much of that was done because of Ms Kurta's pursuit in a foreign Court of relief to restrain Mr Sastri from pursuing his application in this Court, whilst at the same time seeking her own relief from this Court. When she ultimately succeeded in obtaining that injunctive relief, Mr Sastri withdrew his application.

Mr Sastri has not previously instituted proceedings in this or any other Australian court or tribunal. It could certainly not be said he has frequently done so.

There is some evidence before the Court that X experienced distress as a result of her exposure to aspects of the current litigation. Ms Kurta gives unchallenged evidence, which I accept, that:

> *[X] has experienced some distress, restlessness, and broken sleep, particularly before and after her meetings with the Child Impact Report writer, family therapists [Ms E] and [Ms G], and the family report writer. [X]'s school provided two reports in 2022 describing incidents at school when [X] was emotional with friends and distracted in class and expressing concern and distress about meeting [Mr Sastri].[29]*

Nevertheless, the evidence does not satisfy me there are reasonable grounds to believe the institution of further proceedings would cause X harm. She need not be appraised of the proceedings unless and until such time as she is required to participate in a process ordered as part of them. On the evidence before me, it would be her exposure to those processes that may cause her harm, not the institution of the proceedings.

Ms Kurta's counsel asserts that "I anticipate that it is likely that the mental distress that it would cause to my client would trickle through to the child, and there would be an impact on her, even if my client was, as she has been, careful to, as much as possible, shield [X] from this conflict and the awareness of it." With respect, counsel's anticipation of what is "likely" is not a matter to which I can afford any weight. No evidentiary foundation for the submission was advanced. I reject it.

As to the harm that might be caused to Ms Kurta, her counsel submits that she has been put to "extensive cost, she has been put to uncertainty in her life". Whilst Ms Kurta has incurred significant expenditure, counsel advised that a costs application will be made. I am also bereft of evidence in relation to Ms Kurta's financial circumstances. In those circumstances, I am unable to conclude that further proceedings would cause her financial harm.

Ms Kurta deposes that "[t]he emotional and financial stress of these proceedings and the proceedings in [Country B] have taken a toll on [Mr D] and me, and our marriage",[30] and that "[t]he financial stress of these proceedings and the proceedings in [Country B] led to disagreements between [Mr D] and me."[31] It is notable that the proceedings in Country B are those prosecuted by Ms Kurta, despite her own invocation

> *of this Court's jurisdiction. I am not satisfied that the stress to which she refers establishes a basis to deprive Mr Sastri of access to the courts.*
>
> *I decline to make the harmful proceedings order proposed by Ms Kurta."*

***Cheadle & Pointer* [2025] FedCFamC1F 27**

The mother sought discharge of the final parenting orders, with the result that section 65DAAA was engaged. The father sought a harmful proceedings order. Behrens J said that the proceedings were the fourth set of parenting proceedings in respect to the child, the first having been commenced by the father in 2013 when the child was 1. The 2023 orders were the most recent final parenting orders, having been made by Harper J after a six day final hearing during which both parties were legally represented, including by counsel and there was an independent children's lawyer with counsel. There had been a previous final hearing in 2019 over eight days before McLelland DCJ during which his Honour found that there continued to be *"an unacceptable emotional risk to [the child] if the mother does not take steps to address her extreme level of anxiety, pattern of dysregulated behaviour and instances of unacceptable interaction with [the child]."* By 2020, Harper J found that the mother had *"continued to expose the child to emotionally dysregulated behaviour since the 2020 orders"* and that *"the likelihood of a significant change in the mother's emotionally damaging behaviour, given what has transpired since the 2020 orders, seems improbable"*. Her Honour was not satisfied that there was any change of circumstance that justified reopening under section 65AAA.

Each of the parties were self-represented. Her Honour said as to section 102QAC(1):

> *"In child-related proceedings such as these, that discretion must be guided by the child's best interests in the interests of justice more broadly."*

There is no requirement that such orders can only be made at a final hearing. Her Honour agreed with Judge Brown in *Lamport & Garside* [2024] FedCFamC2F 1007 at [132] that:

> *"It would make a nonsense of the provision, if the court, having formed a view that relevant proceedings are likely to cause harm to a party or child, could only intervene under the section, after the conclusion of such harmful proceedings, and only in respect of prospective proceedings."*

Her Honour said[43]:

> *"For me to have power to make a harmful proceedings order, I am not required to be satisfied on the balance of probabilities that harm will occur if further proceedings are instituted, but rather to be satisfied that there are reasonable grounds to believe there will be such harm. Harm is defined non-exhaustively in s 102QAC(2). Much litigation will cause mental distress. That something more is required is indicated by the fact that s 102QAC(2) refers to "major mental distress" as one kind of harm."*

The mother was aware that there was an application for harmful proceedings order on foot. She confirmed at the commencement of the hearing that she understood it would be dealt with should her application be allowed to go forward and the question of whether such an order be made. She opposed the making of the harmful proceedings order and made submissions. The requirements of section 102QAC(5) were therefore met.

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[43] At [84].

There was no medical evidence as to the question of harm. It was not possible to assess whether there were reasonable grounds to believe further proceedings would cause harm without examining the history of proceedings.

The case had a history extending back 12 years to 2013 with the first set of proceedings which resulted in the orders being made by McLelland DCJ. The first set of proceedings were ultimately discontinued in 2016. The second set of proceedings were commenced by the father in late 2017 ultimately determined by McLelland DCJ in 2019. The third set of proceedings were determined by Harper J in 2023. Following the making of those orders, the mother unsuccessfully appealed them, including by seeking special leave to the High Court. She then commenced the current proceedings. In the meantime, during the course of the second proceedings, she had filed multiple applications. Her Honour said:

> *"This history is almost sufficient in itself to provide a reasonable basis to believe that further proceedings will cause harm to Mr Pointer and to [the child]."*

Both the father and the child were receiving help from Mental Health professionals. It appeared likely that the mother would continue to attempt to litigate. Following an email she wrote in 2023, an apparent breach of the 2023 orders:

> *"We do not give up. When you 12-13 the court must listen to you. I'll go to seek the international children's right organization to help, if the high court not order you to come back. i will never give up."*

The mother said that the child having been protected from knowing about the litigation and that will continue with the result that the child will not be harmed by further litigation but protected by it – a proposition firmly rejected by the court.

Her Honour said[44]:

> *"There is a reasonable basis to believe that both Mr Pointer and X will suffer psychological harm and/or major mental distress if litigation continues. Responding to litigation is also hugely time consuming, and expensive if lawyers are engaged. X has had some significant difficulties, and parenting her likely requires more time and energy than the average 12-year old. Time and energy spent responding to litigation is time and energy which Mr Pointer does not then have for parenting. There is a reasonable basis to believe that further proceedings would have a detrimental effect of Mr Pointer's capacity to care for X.*
>
> *Mr Pointer has at times been self-represented, including at the 2019 final hearing. He was represented, including by counsel, in the 2023 proceedings. It is likely he would at least have to obtain and pay for legal advice if there were further proceedings. His evidence is that "I am self-presenting [sic] in these proceedings because I do not have the financial means to retain a lawyer, and I was recently informed by Legal Aide [sic] that I am ineligible for a grant" (father's affidavit, paragraph 3). There is a reasonable basis to believe that, in addition to other forms of harm, further proceedings would cause financial harm to Mr Pointer (and, in turn, to have implications for his ability to meet X's needs)."*

[44] At [110]-[111].

The father sought that he not be informed if an application is made for leave or is dismissed as such information would likely interrupt his and the child's life in a harmful way. Her Honour was satisfied that that was appropriate to make such an order.

***Caceres & Barrett (No. 2)* [2025] FedCFamC2F 130**

The father brought an application under section 65DAAA to reopen. The issue related to his cannabis use. His application was dismissed by Judge Cope. The mother sought a harmful proceedings order against the father.

Her Honour said:

> *"What was formerly known as the vexatious litigant order is now called a harmful proceedings order and is codified at section 102QAC of the legislation."*

That comment is clearly incorrect in that there is still the ability to make a vexatious proceedings order under section 102QB.

The court was satisfied *"that the father is determined to continue in endless litigation"*.

Further[45]:

> *"The mother gives evidence of the harm caused to her in terms of financial expense, time spent drafting material and attending court, and the toll on her health in the form of stress and mental distress.*
>
> *There is no medical evidence of the psychological impact on the mother. I accept however that any litigation is stressful and that repeated and ongoing litigation in multiple jurisdictions could be overwhelming. I have also considered that in addition to the actual litigation there are the letters written by the father to the mother's employer and others to the media, the government and to third persons.*
>
> *While harm is defined non-exhaustively in s 102QAC(2) I am satisfied that something more than the usual stress and distress associated with litigation is required, as s 102QAC(2) refers to "major mental distress" as one kind of harm. I am of the view that the impact psychologically on the mother has not been established to a threshold that I can consider in this application without independent evidence of that.*
>
> *I am however satisfied that the volume and nature of the proceedings together with the threat of future proceedings constitutes oppression. To oppress someone includes to treat them cruelly or to weigh them down. The mother's affidavit evidence as to the impact on her and her time with the child fulfills that definition – in particular the hours spent drafting response material and attending court events rather than spending time with the child and her other family members and the impact of the father's communications with her employer.*
>
> *Turning then to the financial harm alleged, in the last 12 months alone the father has filed the Initiating Application to re-open the proceedings and the Contravention Application in this court, he filed a Family Violence Protection Order application in the state court and he tells the court that a complaint has been made, or at least prepared, to the Human Rights Commission. Each of those proceedings require the mother to engage and either pay legal fees or herself take the time to prepare the necessary*

[45] At [106]-[112].

material – which still involves filing fees. The father has been unsuccessful in his application to re-open proceedings for a second time, he was unsuccessful in the family violence proceedings and he was unsuccessful in the Contravention Application.

The mother was fortunate that her solicitor at the hearing of this matter was government funded, but that will not always necessarily be available to her, noting that funding for the scheme is not guaranteed.

Having considered those matters I am satisfied that the mother would suffer harm, including oppression and financial harm, if the father were allowed to continue to file proceedings in this jurisdiction. A view of the cumulative nature of the unremitting litigation in this court together with his conduct in other jurisdictions is sufficient to raise a real red flag."

The harmful proceedings order was made against the father.

***Beckford & Beckford (No. 2)* [2025] FedCFamC2F 455**

There were three children and eight years of family law proceedings. There had been previously seven reported cases, including *Beckford v the Federal Circuit & Family Court of Australia and the Judges and Justices thereof* [2024] HCA SJ 33. A harmful proceedings order was made against both parents by Judge Mansini.

The father's application for further final parenting orders was met with an application by the mother for a harmful proceedings order. At hearing, the court asked why such an order if it were made would not apply mutually. The mother's primary contention was that the father habitually abused court processes by filing numerous frivolous fictitious and unmeritorious applications in Divisions 1 and 2 in the Magistrates Court and the High Court. She asked the court to find that the father's continual initiation of unnecessary proceedings causes significant distress for her and jeopardises the wellbeing of the children requiring them to relive prior traumas. As the mother had been funded by Victoria Legal Aid as she could not afford her own representation and is required to respond to each application brought, the father is creating an unjust burden on public resources.

The ICL supported this position and added that the father had expended significant amounts of money on litigation rather than the needs of the family.

The mother and the ICL opposed a harmful proceedings order against the mother on the basis that the evidence did not support a finding that the mother had been an initiator of applications, contravention applications and appeals. Further, given the father's past withholding and removal of the children from Victoria, the mother anticipates the need to come back to court for an urgent recovery order or urgent variation or harmful proceeding order may be an impediment to her doing so.

The ICL suggested the court could and ought make a harmful proceedings order of the father and his agents be prevented from instituting proceedings under the Act and acknowledgment that it was the paternal uncle who had instituted these proceedings on behalf of the father.

The father did not oppose the order provided that it was mutual and would operate as a measure to protect the children from further litigation. The father's counsel submitted the question of leave under section 102QAE and the ex parte application could be decided at one hearing and there would be no prejudice.

There was a long history involving a litany of litigation and protective interventions in relation to the family. The parents were diametrically opposed on many issues but agreed that their children had suffered significant trauma, emotional and psychological impacts on account of the ongoing court proceedings and legal processes. Absent any prohibition of the kind contemplated by the provision, any future parenting application made by either parent or their agent would directly involve the children through participation in child impact reports and indirectly through the involvement of their parents and other family members. Whilst it is unnecessary to demonstrate that harm has been occasioned in the past, the evidence established that for both children much of their lives to date have been characterised by the litigation of this kind and required their participation resulting in them having been forced to relive their trauma and remain at the centre of their parents' dispute. The elder child's observations were of being overwhelmed and disheartened by court processes and that the re-telling of their narrative has affected their emotional and educational development. Beyond that, there was no current probative medical evidence of the psychological impact on the mother of the ongoing proceedings or the likely impact of future proceedings as may have assisted the court to make such a finding. Neither parent has the financial means to sustain the cost of further litigation and in this way the other would be inflicted with financial harm. There are reasonable grounds to believe that the children would suffer psychological harm and/or major distress if either parent instituted child-related proceedings against the other. The mother would also suffer financial harm if the father or his agents would institute future proceedings against her and the father would suffer financial harm if the mother or agents would institute proceedings against him.

Most of the proceedings were initiated by the father or his paternal uncle or by the mother in response to the father's withholding and relocation of the children.

Both parents have sought to reagitate in other jurisdictions historical allegations at times approximate to court events or hearings in a manner that has unnecessarily prolonged the involvement of authorities.

The mother has not presented as the most frequent initiator and at times has done so in order to recover the children and mostly has been required to respond to the many and various applications and interventions are matters to be taken into account yet not determinative.

Appropriate regard has been had to the potential cumulative effect of the resultant harm.

The interests of the administration of justice with the ongoing burden of Legal Aid system associated injustice favour the making of harmful proceedings orders.

The father's frank evidence about his past difficulties with complying with court orders are likely to be occasioned on his children and this would continue is a relevant matter to be taken into account.

The mother's fear of future non-compliance with court orders is found in a past experience of the father having secretively removed the children from Victoria and refused to return them. Her fear is justified in light of the father's past non-compliance and frank admissions. A harmful proceedings order against the mother would not impede her ability to obtain recovery orders in the event it is necessary to do so because the father has contravened the court's orders.

The court adopts the procedure whereby recovery proceedings are heard urgently by a judge who had be in a position to grant leave and proceed to make recovery orders in an appropriate case.

In that event, it would be necessary for the other parent in each case to receive notification of future proceedings subject of an application for leave pursuant to section 102QAG. There is insufficient evidence to support a finding of the mother that would suffer emotional or psychological harm were she to receive such notification in the future and the father did not oppose being so notified.

The power is discretionary. There are reasonable grounds that the criteria section 102QAC(1)(a) and (b) are met and will make harmful proceedings orders against each party respectively. They are made in the knowledge of the parties will be able to pursue meritorious applications in the future with leave of the court as afforded by a section 102QAE subject to the requirements of the grant of leave under section 102QAG.

***Dalton & Nikolaou* [2025] FedCFamC1F 151**

As Bennett J had done in *Vanetti & Harrison (No 3)* [2023] FedCFamC1F 698, McLelland DCJ put the mother on notice about the possibility of a harmful proceeding order being made in future. The ICL had sought one against the mother, but his Honour declined to do so because she had not been given adequate opportunity to respond to such an application.

His Honour said that such an order would be appropriate insofar as it will minimise the prospect of any further litigation which would not be in the child's interest. Further[46]:

> *"Returning to the final issue, while I do not make a harmful proceeding order under s 102QAC of the Act, I specifically do not rule on the merit of such an order being made. I have refrained from considering that application purely and solely as a result of my concern that the mother has not had an adequate opportunity to respond to such an application.*
>
> *It would of course be inappropriate for me to attempt to bind or even attempt to guide any judicial officer in the event that there are further proceedings involving parenting arrangements for the child. I do note, however, that the child has had a disrupted life as a result of the circumstances she has confronted when living with the mother; and she has had a reprieve from that disrupted life during the two year period that she has lived with the paternal aunt. However, even during that two year period, she has experienced disruption as a result of a number of welfare checks that the mother had requested in respect to the child in the care of the paternal aunt, which in my view, have been unmeritorious and have themselves amounted to systems abuse.*
>
> *Any future application by the mother and/or the father to commence proceedings and to address the well-known threshold requirements of s 65DAAA of the Act, would be considered in the context of all circumstances that would be before the judicial officer at the time. I have outlined the circumstances that I have found to exist as at the date of this judgment: that the mother has engaged in conduct which in itself has amounted to systems abuse and has been disruptive of the harmonious household of the paternal aunt and her ability to properly care for the child and to provide for her physical, emotional, intellectual and educational needs."*

***Vanetti & Harrison* [2025] FedCFamC1F 162**

The mother sought to reopen under section 65DAAA. The court found, in March 2025, where final orders had been made in July 2023, that there had not been a significant change of circumstances. The court made an order against the mother under section 102QAC(1) and,

[46] At [58]-[60].

under section 102QAC(7) ordered that the father not be notified that an application had been made under section 102QAE and/or if the application was dismissed, that the application had been dismissed.

McNab J found that there had not been a significant change of circumstances such as to warrant a reconsideration of the final orders.

The father sought that the mother be declared a vexatious litigant but that was dismissed on the basis that it had no reasonable prospects of success, but the court was prepared to make the section 102QAC order. The comment it made about the vexatious proceeding was[47]:

> *"The mother's basis for this assertion is that the Family Report writer lacked the specialised skill to assess the parties and provide recommendations for a "neurodiverse family like ours." She says that the Family Report writer does not possess qualifications in neurophysiological diversity, medicine, chronic disease, health prevention or nutrition, nor did she consult practitioners with such expertise."*

The mother had previously been put on notice by the court that she may face an application that she be declared a vexatious litigant, but[48]:

> *"During the course of the hearing in this application, the mother made it clear that she would not stop initiating proceedings until she was successful in overturning the orders. The mother's continued litigation is likely to cause the father harm in respect of each of the listed heads of harm under s 102QAC(2) of the Act if he is required to respond to repeated applications – whether they are to reopen proceedings or in regards to enforcement. The mother has stated in written and oral submissions that she will continue to make applications until she obtains the orders that she seeks. For these reasons, I will make orders pursuant to s 102QAC of the Act prohibiting the mother from making further applications without leave of the Court. The possibility of such an order being made was raised with the mother and she was adamant in her response to the Court that she would continue to litigate until she was successful."*

In the previous decision in *Vanetti & Harrison (No 3)* [2023] FedCFamC1F 698, Bennett J raised with the parties as to the potential for a vexatious proceedings order to be made against the mother. She said[49]:

> *"The father did not make an application that the mother's enforcement application be declared a vexatious proceeding. Indeed Mr Rubino stated that he was instructed not to make the application in this instance but that his client would consider doing so if he is again faced with a similarly misconceived application.*
>
> *The court can make a vexatious proceedings order on its own initiative. I am not satisfied that the mother's enforcement application is vexatious in this instance but the mother should not feel encouraged to make more applications like the enforcement application I have just dismissed. It is sufficient to put the mother on notice that she should familiarise herself with the Part XIB – Division 2 – Vexatious Proceedings Orders under the Act in case she faces an application in that regard at some future time."*

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[47] At [41].
[48] At [83].
[49] At [29]-[30].

Vaughan & Vaughan (No. 3) **FedCFamC1F 129**

Kari J made an order against the husband, who was a prolific filer. There were 225 filed documents:

> *"This is an extraordinary volume of documents generally, but specifically in circumstances where the proceedings have not progressed out of interlocutory warfare towards the final hearing. I observe that 40 additional documents have been filed in the proceedings and ten sets of orders have been published since the reasons delivered 28 February 2025. I lamented in those earlier reasons … that the proceedings were likely to be having a deleterious impact on the parties, their finances and their co-parenting relationship … it is now my apprehension that the conduct of the litigation since that time, particularly by the father is very likely to have been entirely ruinous upon any prospect of a functional co-parenting relationship."*[50]

The wife's costs were about $279,000 which had increased about $60,000 since a hearing a few months before.

Her Honour had no difficulty making the section 102QAC order.

Not to be discouraged, eight days later, the father filed again in *Vaughan (No. 4)* [2025] FedCFamC1F 480. It is no surprise that leave was refused. He continued not to comply with orders, resulting in the wife returning to court. The last reported hearing was *Vaughan & Vaughan (No. 7)* [2025] FedCFamC1F 578. In that case, the husband sought leave to bring an oral application for a stay. During the course of the hearing, the husband was called on to make submissions:

> *"In addition, he made an oral application for a stay of [the order] in the same terms as that pursued by Ms Kostic … , variously submitting to the Court that 'I'm allowed to co-opt another party's orders if I wish.'*
>
> *During the course of the husband's submissions, the court indicated to him that he would need leave to make his application for a stay, given the harmful proceedings order in force.*
>
> *The court thereafter invited the husband to make submissions on the question of leave. To the extent that the husband made submissions in support of leaving being given, such submissions were heard."*[51]

Ms Kostic was an associate of the husband who registered a caveat of a property within a day of the orders being made for the sale of that property.

Her Honour said:[52]

> *"The Court has some apprehension that there is a level of collusion between the husband and Ms Kostic with the ultimate aim of circumventing the effect of the harmful proceedings order directed to the husband. Whilst it is not possible or necessary for the court to form any concluded view in this regard at this stage, if however the court was to form this concluded view, the husband and Ms Kostic ought be aware that significant consequences may follow for each of them, including but not limited to orders for costs*

[50] At [7].
[51] At [14]-[16].
[52] At [21].

> *and/or any other sanction the Court might be invited to impose by way of contempt pursuant to Part XIIIB of the Act and/or pursuant to Part XIIIA of the Act for failure to comply with orders of the Court."*

Her Honour then noted section 102QAD and in particular, that once the order is made *"another person must not, acting in concert with the person, institute proceedings in the court without the leave of the court under section 102QAG: section 102QAD(1)(b)."*

Her Honour dismissed the husband's oral application for leave where:

> *"(a) Section 102QAE does not contemplate an oral application for leave being made, and*
>
> *(b) The husband has not complied with section 102QAE(3) by filing an affidavit in support of his application for leave, which is a mandatory requirement for any application for leave pursuant to section 102QAE."*[53]

In any case, *"there is no basis whatsoever to entertain, let alone exercise, discretion to grant a stay of any of those orders."*[54]

***Shelbourne & Shelbourne* (No. 2) [2025] FedCFamC1F 587**

Curran J declined to make a harmful proceedings order despite each of the parties being locked into litigation against the other:[55]

> *"There is no evidence of either party frequently instituting or conducting proceedings against the other party and in considering the history of the proceedings there are no factors that in my view warrant such an order being made. There was no evidence and no submission that any conduct in the proceedings could amount to a form of harassment or systems abuse, nor that the proceedings were a form of control or harassment. The submission made was that the cumulative effect of the proceedings on the children was in essence the basis for the making of the order…"*

Curran J was not satisfied on the evidence, after having considered the relevant factors that an order was warranted or appropriate in the circumstances of the case.

***Fowles & Fowles (No. 8)* [2025] FedCFamC1F 472**

Hartnett J made a harmful proceedings order. The husband filed a barrage of material, most of it aimed at the wife's solicitors and counsel. Reading the history of his filings is exhausting.

After a considerable history of litigation as to property matters, the husband then became even more active. On one day in 2025, he filed three applications in a proceeding and nine affidavits. He sought similar orders in the applications in proceeding filed at 8.09 a.m. and 12.13 p.m., including that counsel for the wife be disqualified, that any orders influenced by that counsel's involvement be reconsidered by the court, that the solicitors for the wife be disqualified from *"acting on [sic] cahoots with"* the counsel, and an order for indemnity costs against the wife's solicitors and that both solicitors and counsel be referred for professional misconduct.

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[53] At [24].
[54] At [25].
[55] At [139].

These applications were struck out by Judicial Registrar but a third application filed at 8.10 a.m. included that the court declare that the conduct of the solicitors and counsel regarding the third party debt notice application constituted abuse of the court's process, indemnity costs order be made against the solicitors in respect of the enforcement hearing and all costs of the current application arising from procedural misconduct and improper use of the court's process by them, that solicitor and counsel be referred for investigation into professional misconduct and that the husband be granted leave to cross-examine the wife's counsel. The husband sought that the application be heard by Justice Harnett.

Three days later the husband filed another affidavit and two days after that, he filed yet another application in a proceeding and an affidavit seeking that the solicitors be restrained from continuing to act and any counsel briefed by them be restrained from being able to act.

Twelve days later he filed yet another affidavit and the following day filed yet another application in a proceeding and affidavit, seeking that the solicitors be found in contempt of court, that they pay $50,000 to the wife, that they pay the wife's costs on an indemnity basis, that a particular solicitor be incarcerated for one year, that they be restrained for continuing to act and that the court make a finding that the husband was not seeking to personally benefit from his application in his proceedings.

One week later the husband sought to file a similar type application.

Eight days after that he filed yet another application. That application in a proceeding was later dismissed.

In the meantime, the husband filed a notice of appeal seeking to appeal one of the interlocutory applications, but he withdrew that appeal the following day.

The husband then sought the issue of a series of subpoenas, which were not accepted for filing.

In the meantime, the husband had complained to authorities about professional misconduct concerning the wife's solicitors and counsel. He then filed two notices to admit and on the one day, two further affidavits.

Five days later, he filed yet another application in a proceeding plus affidavit in support, a further affidavit the following day and another affidavit the day after that.

Five days after that, he filed three applications in a proceeding and four affidavits.

It then took just over a fortnight for the husband to file yet another application in a proceeding and affidavit, but only a day for him to do so again and another day to do so again.

He then left it four days to file an affidavit and application for review and two days after that, an application for a stay.

One week later, the husband filed yet another application in a proceeding and two affidavits, three days after a further affidavit.

Hartnett J noted that the parties had been in litigation for 10 years. The central point remained, which was that the husband was required to comply with final property orders from 2023 undisturbed by his various appeals.

Hartnett J was satisfied that there were reasonable grounds to believe the wife would suffer harm upon the institution of any further proceedings by the husband and the cumulative effect

of subsections 102QAC(3) (a) and (b) amount to *reasonable circumstances of themselves*. The wife had suffered significant psychological harm and mental distress by the husband's conduct where the wife was already in a very vulnerable position, both mentally and financially due to the husband's conduct and financial oppression of her during the proceedings spanning over 10 years. The legal costs wasted by the wife in having to respond to the husband's constant barrage of applications, subpoenas and notices to admit were in circumstances where her financial situation was dire and the husband remained in breach of his obligations pursuant to the final orders as to property settlement. The husband's applications included orders related to the wife's solicitors and counsel, including for one of the wife's solicitors to be imprisoned for 12 months and to effectively relitigate matters which had already been heard determined. This had a detrimental impact on the wife's health.

***Fowles & Fowles (No. 13)* [2025] FedCFamC1F 835**

The husband was granted by Hartnett J a stay for an appeal where the husband had been sentenced to 60 days imprisonment. Accordingly, he was granted leave (given the s.102QAC order) to make the application.

***McGee & Slattery* [2025] FedCFamC2F 313**

Liveris J made the section 102QAC order but noted that reliance could have been had against the mother, although reliance could have been had on section 64B(2)(g).

Section 64B(2)(g) provides:

> *"A parenting order may deal with one or more of the following:*
>
> *(g) the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of:*
>
> *(i) a child to whom the order relates; or*
>
> *(ii) the parties to the proceedings in which the order was made."*

Liveris J found that the basis of making the order was because of family violence, systems abuse and the impact on the wife's mental and physical health. A no notice order was made.

APPEALS

All reported cases show the appeal or leave to proceed has been unsuccessful. In the appeals of *Ridge*, *Garside* and *Beckford*, the first instance decisions where in each a harmful proceedings order was made, are referred to above.

A number of cases have highlighted that once a harmful proceedings order has been made, there is no right of appeal. Instead, an ex parte application, with the right information in the affidavit under s.102QAE, must be made. Only then, with permission to proceed, can an appeal be brought.

All of the appeals have been heard in chambers. As Austin J has stated, while the Court *may* allow substantial compliance as to the form of the affidavit, if the Court determines that the application is vexatious- within the statutory definition, the application *must* be dismissed.

Summary of applications for leave/appeals

Case	Justice/s	S.102QAE compliant?	Dealt with in chambers?	Vexatious: s102Q? If so, must be dismissed: s.102QF(2)	Outcome
Ridge [2024] FedCFamC1A 181	Austin J	Seemingly	Yes	Yes	Dismissed
Garside [2024] FedCFamC1A 250	Austin J	Yes	Yes	Yes	Dismissed
Nootkamp & Brulja (No 2) [2025] FedCFamC1A 78	Christie, Schonell and Berry JJ	N/A	No	N/A	Dismissal of appeal against refusal to make s.102QAC order
Beckford [2025] FedCFamC1A 84	Austin J	No	Yes	Yes	Dismissed
Uttar [2025] FedCFamC1A 121	Schonell J	No	Yes	Yes	Dismissed
Padgett [2025] FedCFamC1A 140	Austin J	No	Yes	Yes	Dismissed
Fernan [2025] FedCFamC1A 220	Aldridge, Carew and Behrens JJ	No	Yes, after the husband did not rejoin the hearing for oral submissions	N/A	Dismissed
Fernan v Mina [2025] HCASJ 50	Jagot J	N/A	No	N/A	Dismissed
Meidner [2025] FedCFamC1A 224	Campton J	Yes, as to 102QAE(3)(a), but not as to 102QAE(3)(b)	Yes	Yes	Dismissed

***Ridge* [2024] FedCFamC1A 181**

This is a decision by Austin J sitting as the Full Court. His Honour dismissed the application in an appeal. The father sought to file a notice of appeal from those orders but it was rejected because the injunction made against him pursuant to section 102QAC(1) prevented him from instituting any fresh proceedings without the interior grant of leave to do so.

The applicant sought the necessary leave to file and prosecute his intended appeal and expressly requested his application not be determined on the papers in chambers. His Honour said, however, that the Act enables the application to be determined in that way despite the father's contrary preference: section 102QAF(3) and 102QAF(4).

The only child of the parties was born in 2015. The parties separated in November 2015. The father commenced proceedings in January 2016. Those proceedings were concluded following a lengthy trial in May 2020. The orders were for the child to live with the mother and for her to have sole parental responsibility for the child and for the child to spend time with the father for six hours on alternate Sundays. The orders were premised upon findings that the father had perpetrated family violence upon the respondent and there was still high conflict between the parties.

The father appealed, but the appeal was abandoned. He attempted to reinstate it in 2023, but that was dismissed.

The child last saw the father in July 2020.

Shortly after that, the father was convicted of offences and sentenced to imprisonment for about two years. Following his release, he filed an application initiating fresh proceedings seeking to revise the 2020 orders, including to share parental responsibility and for the daughter to live on an equal time basis.

In December 2023, the primary judge suspended the orders made in 2020 requiring the child to spend time with the applicant, given that she had not done so in three years.

In 2024, following the commencement of the provisions of the Act, the mother brought an application seeking three things:

1. Summary dismissal of the father's application under Part VII.

2. A harmful proceedings order.

3. The variation of the 2020 orders.

That application was heard in June 2024. The primary judge summarily dismissed the father's parenting application under section 102QAB, restrained the father from bringing further proceedings under section 102QAC, discharged the former orders made in May 2020 and made fresh parenting orders so that the mother had sole parental responsibility, the child live with her, the child not spend any time with the father before she turned 14, after which she can decide herself and the regulation of the parties' conduct.

All other applications were dismissed.

His Honour stated:

> *"The harmful proceedings order made here pursuant to section 102QAC(1) of the Act … does not carve out any exception for appeals and so the injunction restraining further proceedings catches both original and appellate proceedings (Pencious & Searle [2017] FamCAFC 210; (2017) FLC 93-805 at [77]-[88]). The applicant therefore needs leave under part XIB of the Act to bring an appeal from <u>any</u> of the orders made by the primary judge."*

His Honour stated[56]:

> *"For clarity then, the task at hand is quite different from the tasks undertaken by the primary judge. When making Order 1, the primary judge had to be satisfied the applicant had no reasonable prospect of prosecuting his parenting application (s 102QAB(2)). When making Order 2, his Honour had to be satisfied there were reasonable grounds to believe the respondent, the child, or both of them would likely suffer harm if the applicant brings fresh proceedings in the future (s 102QAC). In making Orders 3–11, his Honour had to be satisfied they were made in the child's best interests (s 60CA and s 65AA). However, it only now needs to be determined whether the applicant's intended appeal from those orders is "without reasonable ground". If so, leave to appeal must be refused."*

The decision by the primary judge seems to be a masterclass in hosing out an unmeritorious party[57]:

> *"The primary judge expressly referred to the obligation to decide which issues in the Pt VII dispute could be disposed of summarily (s 69ZQ(1)(a)), but his Honour was also importantly: obliged to deal with as many aspects of the parties' dispute as was possible on a single occasion (s 69ZQ(1)(g)), permitted to refuse a party's desire to adduce evidence "in relation to a particular matter" or of a "particular kind" (s 69ZX(2)(g) and s 69ZX(2)(h)), permitted to refuse a party's desire to cross-examine particular witnesses (s 69ZX(2)(i)), and entitled to limit the number of witnesses called to give evidence (s 69ZX(2)(j); s 192(2)(c) of the FCFCA Act).*
>
> *In the face of such express statutory power and the factual findings made by the primary judge adverse to the applicant's interests, it would be exceedingly difficult for him to maintain in any appeal that it was a material deprivation of procedural fairness for him to have been denied the chance to adduce more evidence and to cross-examine witnesses. That is particularly so if the parenting dispute was determined summarily.*
>
> *Once the Pt XIB orders were made against the applicant (which are not the subject of any claim of procedural unfairness), only the respondent's Pt VII application then remained pending. In contesting her Pt VII application to vary the May 2020 orders, the applicant could not cross-examine her because of the embargo imposed by s 102NA of the Act (at [68]). Given the child had neither seen nor spoken to the applicant for four years and the child told the court child expert she did not want to rekindle her relationship with him, it is highly doubtful his proposed cross-examination of the court child expert could have yielded any useful favourable concession or that he could have adduced any extra useful evidence to obstruct the primary judge's decision to accede to the respondent's parenting application."*

The primary judge said that the outcome of the pending application was inevitable and that there was a **new paradigm** which is that from July 2020 where the child neither spending any time nor communicating with the father, and although the court must be mindful of the father's entitlement to have a procedurally fair hearing, this does not mean he has an untrammeled entitlement to examine any issue which is of interest to him or commence and pursue any application which occurs to him. Austin J determined that the procedural fairness grounds

[56] At [24].
[57] At [35]-[37].

lacked reasonable prospects of success and were therefore vexatious within the meaning of section 102Q(1).

The trial judge determined to summarily dismiss the father's application and restraining from bringing further proceedings because:

1. The child was emotionally vulnerable and had not seen the father for four years.

2. The mother was diagnosed with a psychological disorder which was aggravated by having to deal with the father and the litigation he instigated thereby compromising her parenting capacity.

3. The father was a *"serial and serious litigator"* who had unsuccessfully mounted an *"extraordinary"* litigious campaign against all manner of individuals.

4. The father's motivation was probably malign, and

5. It was unlikely that the father's parenting proposal would find favour, and

6. Continuation of the litigation would likely be detrimental to the child's emotional stability.

As to evidence of the mother being harmed by the ongoing proceedings, she gave evidence that the symptoms of her diagnosed PTSD had moderated when she was relieved of interaction with the father but had returned since he instituted those proceedings, for which she received monthly treatment, although she did not adduce any current medical reports to verify her condition. The trial judge inferred, from the mother's evidence, that the continuation of the proceedings would likely cause her *"major mental stress"* and have a *"detrimental impact"* upon her capacity to care for the child. Those inferences were open, in the view of Austin J, on the available evidence without the need for corroborative expert opinion and evidence.

The father complained that the new parenting orders were not workable and that there had not been a finding as required by *Rice & Aspland* or section 65DAAA. However, that complaint was misconceived. Both parties applied for variation of the 2020 orders because the child had not seen or spoken to the father for four years and neither the mother nor the father wanted to revert to compliance with those orders. The mother wanted new orders to reflect the current reality. Because the father was released from prison, he wanted the child to resume spending time with him but he wanted it to occur even more liberally and frequently than the 2020 orders permitted and he wanted to regain parental responsibility. His application stood no reasonable chance of success whereas her application verged on being inevitable.

His Honour found that the grounds lacked reasonable prospects of success and were therefore vexatious within the meaning of section 102Q(1), resulting in the application being dismissed.

***Garside* [2024] FedCFamC1A 250**

This was a decision by Austin J sitting as the Full Court. A section 102QAC order had been made by a Division 2 judge in 2024. In 2020, the father had assaulted the elder child who was then not quite 4. His attempt was thwarted by the mother who luckily awoke in time to avert the tragedy. She urgently summoned police, who had to break down the door of the room in which the father had barricaded himself and the elder child. Fortunately, the child was revived by paramedics and she progressively recovered her physical health over ensuring months. However, she suffered from post-traumatic stress disorder diagnosed by the psychiatrist whom she has consulted regularly over the years since the incident. The mother has also been

diagnosed with post-traumatic stress disorder. The father was arrested by police and eventually pleaded guilty to a charge of a serious offence against the child and in 2022, was sentenced to imprisonment. He is eligible for conditional release in about mid-2029.

The father intended to commit suicide after assaulting the elder child. Police recovered suicide notes he wrote and left for the paternal grandfather, the younger child and the mother. The sentencing judge found the assault and intended suicide were premeditated, and the father's conduct was found to be motivated by vindictiveness towards the mother. The father had not seen nor spoken with either child since the events of that day.

The trial judge said[58]:

> *"In my view, it is significant that the power is characterised as being able to be utilised to allow the court's intervention to be made proactively to limit distress. On the evidence available to me I accept unequivocally that the continuation of the proceedings will occasion severe psychological distress to both [the mother] and [the elder child]. It is also significant, in my view, that such intervention, pursuant to the provisions of section 102QAC(4), can be made by the court on its own initiative.*
>
> *In this context, it is [the mother's] case, supported by the evidence of her treating psychiatrist [name], that the proceedings have already caused her emotional anguish and will continue to do so if they proceed further. In this sense, although the current proceedings are obviously at a nascent stage, her application to have them dismissed does have a prospective quality, nonetheless.*
>
> *In my view, it would make a nonsense of the provision, if the court, having formed a view that relevant proceedings are likely to cause harm to a party or child, could only intervene under the section, after the conclusion of such harmful proceedings, and only in respect of prospective proceedings....*
>
> *In general terms, it seems to me to be unarguable that to utilise ordinary parlance, given the highly unusual circumstances in which these proceedings arise, that [the applicant's] application must be regarded as psychologically corrosive and so harmful to [the mother] and as a consequence of that it should be curtailed in the exercise of either of the court's discretions arising under either section 102QAB or section 102QAC."*

Austin J noted that this section became operative on 6 May 2024 and[59]:

> *"When prosecuting an application under s 102QAE(2) of the Act for leave to institute further proceedings and override the operation of the harmful proceedings injunction, it is obligatory for the applicant to file a supporting affidavit containing certain evidence (s 102QAE(3)) and, absent substantial compliance with the requirements of s 102QAE(3) of the Act, the application may be dismissed (s 102QAF(1)). I proceed on the basis the applicant has complied.*
>
> *However, the application must be dismissed if the proposed further proceedings fall within the definition of "vexatious proceedings" (s 102QAF(2)) or if the applicant fails to satisfy the Court the further proceedings are not vexatious (s 102QAG(1)). The distinction between the counterparts of those two sub-sections (being s 102QF(2) and s*

[58] At [15].
[59] At [23]-[24].

102QG(4)) has been explained by the Full Court (Darley (No 4) [2023] FedCFamC1A 158 at [13]–[22]).”

His Honour found[60]:

“The applicant’s application for leave to appeal fails at the hurdle because the intended appeal is “without reasonable ground” and therefore “vexatious”. It must be dismissed.”

Accordingly, his Honour dismissed the application for leave out of time.

His Honour made this comment about the extraordinary detail that the father had gone to in four grounds of appeal. Austin J stated in a quote for the ages[61]:

“Without descending to the detail of the dense sub-grounds, their text is an indiscriminate blend of alleged procedural and substantive errors of law, fact and discretion. The complaints are ethereal, abstract and amorphous, defying any attempt to rationally isolate and specifically address them.”

***Nootkamp & Brulja (No 2)* [2025] FedCFamC1A 78**

This was a decision of the Full Court: Christie, Schonell & Berry JJ. The father, who was self-represented, was the applicant in the appeal and was unsuccessful. The court dismissed the appeal concerning a refusal by the trial judge to make a harmful proceedings order. Their Honours said[62]:

“A reading of the trial reasons as a whole reveals that the primary judge comprehensively addressed amongst other things:

(a) the terms of s 102QAC(1), (2) and (3) of the Act at [436];

(b) observed that the Court must assess the individual circumstances of the case to make an assessment as to whether or not there are reasonable grounds to believe the person protected by the order would be “harmed”, which is defined in a non-exhaustive manner at [437];

(c) the parties’ history, in this Court and in other jurisdictions, implies that the appellant’s application “arguably further highlights...earlier findings about his lack of insight” at [439];

(d) declined to make a harmful proceedings order against the respondent because such an application was wholly without merit, for three reasons (at [440]); and

(e) made findings about the respondent's application for and resolution of the various FVROs obtained against the appellant (at [440(a)]).”

Further, the circumstances surrounding the other litigation which the parties had been involved, in particular finding that it has been the appellant who has been the driver of the conflict underpinning those proceedings, was open and sound. Her Honour’s finding that the appellant has used litigation and threats of litigation to perpetrate family violence against the respondent was available and relevant. These findings directly engage consideration of section

[60] At [31].
[61] At [36].
[62] At [81].

102QAC(3) and was soundly relied upon by the primary judge in deciding to dismiss the application.

Further[63]:

> *"The Court's discretion was enlivened to make a harmful proceedings order if the Court was satisfied that there were reasonable grounds to believe that the other party would suffer harm if the first party instituted further proceedings against the other party, or in the case of child related proceedings (within the meaning of Part VII of the Act) the child who is the subject of the proceedings would suffer harm if the first party instituted further proceedings against the other party (ss 102QAC(1) and (2)).*
>
> *Those pre-conditions were addressed by the primary judge's findings in her comprehensive reasons for decision, which make clear that neither the appellant nor the children would suffer harm if the respondent instituted proceedings against the appellant.*
>
> *In any event, the primary judge clearly decided, for the reasons given, that in the Court's exercise of discretion there would be no reasonable basis for a harmful proceedings order to be made."*

***Beckford* [2025] FedCFamC1A 84**

This is a decision by Justice Austin, sitting as the Full Court. When making the harmful proceedings order the primary judge *"had to be satisfied there are reasonable grounds to believe the parties and/or the children would likely suffer harm if fresh proceedings were brought in the future: section 102QAC. However, it only now needs to be determined whether the applicants intended appeal from those orders is 'without reasonable ground'. If so, leave to appeal must be refused."*

His Honour concluded the grounds of appeal appeared bereft of merit. Lacking any *"reasonable ground"*, the appeal is vexatious and so the application for leave to bring it must be dismissed.

***Uttar* [2025] FedCFamC1A 121**

Schonell J sat as the Full Court. The mother appealed against a harmful proceedings order being made against her. The parties had been in litigation for 11 years, including the Family Court, FCFCOA Division 1 and the Supreme Court.

The mother sought leave to appeal the dismissal of the enforcement application, the costs order and the order made pursuant to section 102QAC(1).

His Honour noted that section 102QAE(2) enables a party who is subject to a harmful proceedings order to apply to the court for leave to institute proceedings. They are required pursuant to section 102QAE(3) to file an affidavit in support of the application for leave. The section directs the filing of an affidavit that:

(a) Lists all of the occasions in which the applicant has applied for leave under the section, and

[63] At [87]-[89].

(b) Discloses all relevant facts about the application, whether supporting or adverse to the application, that are known to the applicant.

The court retains a discretion under section 102QAF(1) to dismiss the application if it considers the affidavit does not substantially comply with section 102QAE(3).

The affidavit clearly did not comply with the requirements of the section. The affidavit said[64]:

> *"The applicant's affidavit in support of the application comprises five paragraphs. The affidavit is in the following terms:*
>
> *(1) I am the applicant.*
>
> *(2) I am applying for leave under section 102QAE of Family Law Act 1975 for first time.*
>
> *(3) Annexed and marked A is my proposed notice of appeal with copy of orders.*
>
> *(4) Annexed and marked B are my missing super fund bank statements that were inadvertently misplaced during affirmation.*
>
> *(5) I suffer substantial miscarriage of justice if I am not allowed to appeal the unjust orders and reasons for orders made by primary judge."*

As his Honour said it clearly is not disclosure, there was not compliance with section 102QAE(3)(b) as to all relevant facts about the application. Consequently, there was not substantial compliance and it was open to dismiss the application on that basis alone. His Honour said that section 102QAF(2) provides that the court must make an order dismissing an application under section 102QAE if it considers that proceedings are vexatious. Pursuant to section 102QAG the court may grant leave only if it is satisfied that the proceedings are not frivolous, vexatious or an abusive process and have reasonable prospects of success. The latter casts an onus upon the applicant in a failure to establish that onus means that leave will not be granted: *Darley (No. 4)* [2023] FedCFamC1A 158.

Vexatious proceedings are defined in section 102Q(1) of the Act to include[65]:

> *"(a) proceedings that are an abuse of the process of a court or tribunal; and*
>
> *(b) proceedings instituted in a court or tribunal to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and*
>
> *(c) proceedings instituted or pursued in a court or tribunal without reasonable ground; and*
>
> *(d) proceedings conducted in a court or tribunal in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.*

Further[66]:

> *"Proceedings will constitute an abuse of process if they can clearly be seen to be "foredoomed" to fail (Walton v Gardiner (1993) 177 CLR 378 at 393). A determination*

[64] At [14].
[65] At [17].
[66] At [18]-[20].

> *under either s 102QAF(2) or s 102QAG(1) invites consideration of the merits of the appeal as articulated through the grounds in the context of the primary judge's reasons (Ebner & Pappas [2014] FamCAFC 229; (2014) FLC 93-619).*
>
> *No part of the draft Notice of Appeal set out "a specific and concise statement of the points sought to be argued" (Nimesh Watapaldeniya v Transport Accident Commission [2022] VSCA 50 at [2]). It is not for this Court to identify error (Bahonko v Sterjov [2008] FCAFC 30; (2008) 166 FCR 415).*
>
> *The orders made by the primary judge involved the exercise of a wide discretion. To succeed in an appeal from a discretionary determination, the applicant must bring their appeal within the well-settled principles identified in House v The King (1936) 55 CLR 499 at 504–505 ("House v The King").*"

His Honour said:

> *"It is immediately apparent from the draft notice of appeal that does not establish House v The King error. Nor does the inclusion of the word 'unjust' give rise to appealable error in the terms of any category of House v The King, least of all the last, namely, that on the facts the determination was unreasonable or plainly unjust."*

His Honour said:

> *"The appeal is devoid of merit and has no reasonable prospects of success. The consequence is that it is vexatious within the terms of section 102Q(1) of the Act and the application must be dismissed."*

***Padgett* [2025] FedCFamC1A 140**

As he has done in other decisions, Austin J quickly disposed of the application.

***Fernan* [2025] FedCFamC1A 220**

This case was listed for oral submission. For some reason, the husband dropped out of the hearing and then did not reconnect. The court then dealt with the application on the papers.

This is a decision of Aldridge, Carew and Behrens JJ. There was no merit in the leave application and the application was dismissed. Not to be deterred, the husband then brought a constitutional writ of application to the High Court. Jagot J dismissed that in *Fernan v Mina* [2025] HCASJ 50 as an abuse of process.

***Meidner* [2025] FedCFamC1A 224**

Campton J dealt with the matter on the papers. The court found that all grounds, which were numerous, were bereft of merit. The husband failed to comply with section 102QAE(3)[67]:

> *"The father complied with section 102QAE(3)(a) of the Act by confirming he has not previously applied for leave to institute proceedings.*
>
> *The father failed to comply with the additional requirement prescribed by section 102QAE(3)(b) of the Act to disclose in his affidavit the full extent of relevant facts known to him adverse to the application. His evidence that "I have never initiated proceedings*

[67] [39]-[40].

> *against the mother" is misleading by omission. By way of his various responses in the two tranches of the Pt VII of the Act proceedings, he has applied for parenting orders. He has sought interlocutory orders made within those causes, including by way of responses to recovery orders by way of enforcement of final orders generated from his breaches of them. His complaints grounding IVOs sought either personally by him, or those that he facilitated or was instrumental in others seeking, were vexatious. Each of these matters constitute a "relevant fact" in the leave enquiry."*

Although that was sufficient to dismiss the appeal, Campton J concluded that the appeal would be dismissed because it lacked merit and that in fact all grounds were bereft of merit.

CONCLUSION

Provided that there is ample evidence to show that a harmful proceedings order ought to be made, the Court is clear that it will make that order, and that the chances of having it discharged in such a case are minimal. This is a new and powerful tool available to be sought by litigants who were not otherwise able to have a vexatious litigant order made.

When seeking an order, make sure that you do the groundwork and lay out the evidence. Give sufficient notice so that there is procedural fairness. If you can do so early in the proceedings, do so. Consider the drafting of such an order so that some of the bells and whistles are in place as needed with your client's case.

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