MONASH UNIVERSITY

ACCESS TO JUSTICE: HOW MUCH IS TOO MUCH?

THE LEGAL AND MEDICAL ISSUES ARISING FROM VEXATIOUS OR QUERULOUS PEOPLE

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SELF REPRESENTED AND VEXATIOUS LITIGANTS IN THE FAMILY COURT OF AUSTRALIA

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Introduction

Kirby J of the High Court of Australia said in *Re Attorney-General; Ex parte Skyring*:

> *…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. It is a rare thing to declare a person a vexatious litigant.*[1]

Although it may be rare for litigants in the High Court to be restrained from issuing proceedings without leave, the same cannot be said of the Family Court of Australia. The Court is only 30 years old, yet as of 1 May 2006 there were 195 litigants who had been restrained from issuing proceedings on the basis that they are vexatious. In some instances, multiple orders had been made against the same person with respect to different proceedings. How can this apparent disparity be explained?

There is very limited research available on the number and effect of vexatious litigants in family law litigation. However, as vexatious litigants are a sub-set of the larger group of self-represented litigants, assistance in understanding vexatious litigants can be gained from considering research into self-represented litigants in the Family Court of Australia.

[1] (1996) 135 ALR 29 at 31-2.

It is beyond doubt that the numbers of self-represented litigants in the Family Court has markedly increased in the last ten years. Cuts to the legal aid budget for family law, the cost of legal services, the introduction of simplified procedures to reduce complexity and cost, changes to the substantive law in the area of children's cases, the rise of the father's rights movement and the perception that family law is not 'real' law such that the services of a lawyer are not required have all been identified as factors contributing to this increase.[2] These factors could also assist in explaining why the Family Court has significantly higher numbers of vexatious litigants than many other jurisdictions.

The nature of family law itself, which is a discretionary and flexible jurisdiction that operates in a highly emotional environment, may also contribute to the comparatively high number of self-represented and vexatious litigants in the Family Court of Australia. As the Australian Law Reform Commission (ALRC) has observed, the resolution and adjudication of family law disputes is complicated by social, economic and legislative challenges, which affect the issues that arise in family disputes and people's expectations of family relationships.[3] The ALRC noted that family law is profoundly affected by non-legal factors in ways quite distinct to other jurisdictions, including the presence of immature or short-lived relationships, a lack of trust, family violence, allegations of child abuse, controlling behaviour by one of the parties and 'parental alienation'. The lack of finality in family law, due to the need to focus on children's future needs and interests, is also a point of difference.

This paper commences with a short discussion of the distinction between self-represented litigants generally and vexatious litigants. It then briefly discusses the powers available to the Court to restrain a litigant from commencing or continuing proceedings without leave before going on to consider available research which discusses the number and impact of self-represented and (where available) vexatious litigants in the Family Court of Australia. The paper then considers four case studies involving querulous litigants and complainants before discussing specific responses the Court has developed to the

[2] Rosemary Hunter, Ann Genovese, April Chrzanowski and Carolyn Morris, *The Changing Face of Litigation: unrepresented litigants in the Family Court of Australia*, Law and Justice Foundation of New South Wales, August 2002, pp. 2-5.

growing phenomenon of self represented and vexatious litigants. Finally, the paper considers activity that has been undertaken at a national level to develop a consistent legislative response to vexatious litigants through the development of a model bill.

Self represented litigants and vexatious litigants distinguished

Dewar, Smith and Banks, who undertook research into litigants in person in the Family Court of Australia in 2000, considered some conceptual and definitional issues surrounding self-represented litigants. Firstly, they emphasised that a self-represented litigant is a litigant without a lawyer. The significance of this statement lies in the fact that a person is pursuing court proceedings as a way of resolving their dispute, despite the fact that there are many other ways of resolving family disputes without resorting to litigation (for example, through the development of a parenting plan or by making consent orders). Dewar, Smith and Banks go on to state that a litigant in person is also someone who appears without legal representation. However, as the researchers point out, this does not necessarily mean that a litigant in person has not had legal assistance or advice in preparing their matter, nor that they will not have assistance in the Court itself. The researchers comment that it is possible that a litigant in person will have received assistance from a variety of sources, including community legal centres, legal aid authorities, duty lawyer schemes, support groups or from lawyers in private practice.[4] Such support does not however extend to formal representation in legal proceedings. The researchers also acknowledge that it is also possible that a party has been represented in some stage of the proceedings but not at others. They conclude that there is a "spectrum of possibilities, ranging from the well supported and well advised, through to those that have never consulted anyone."[5]

[3] Ibid p. 327.
[4] John Dewar, Barry W Smith and Cate Banks, *Litigants in Person in the Family Court of Australia*, A report to the Family Court of Australia, research report No. 20, Family Court of Australia, 2000.
[5] Ibid p. 5.

The Family Law Council's report to the Attorney-General on litigants in person in the Family Court of Australia sought to profile unrepresented litigants.[6] The Family Law Council distinguished between those who can afford legal representation but choose not to, and those that cannot afford representation and have no choice but to appear in person. The Family Law Council went on to identify two further sub-categories: unrepresented litigants in cases which merit litigation and may be successful, and those with unrealistic expectations about the merits of their case or who wish to pursue litigation for other purposes, such as harassment. The Family Law Council warned that those unrepresented litigants who are disgruntled with the system and who are using litigation in the Family Court as a form of 'therapy' will need to be identified early in the process in order to prevent them becoming vexatious litigants. The word 'vexatious', as Freckelton explains, has traditionally been applied to the client who makes "dubious but oft-repeated complaints or desires to institute litigation which in fact is groundless."[7]

Lester's discussion of querulous complainants is instructive in understanding how vexatious litigants differ from litigants in person. Lester's analysis distinguishes between a 'normal' complainant and a difficult or vexatious complainant. A 'normal' complainant believes they have experienced a loss and if the loss is assessed as being caused by an external agency they may feel aggrieved. They may seek redress, usually in the form of reparation or compensation.[8] By comparison, what Lester refers to as the 'difficult' complainant also believes he or she has suffered a loss but will generally attribute that loss to external causes and will become not only aggressive but also indignant. Lester cautions that this is a heterogeneous group: some are purely mendacious and avaricious; others have egocentric personalities and are incapable of viewing perspectives other than their own. Lester's description of a further sub-set, the 'morbid' or 'querulous' complainant, captures many salient features of vexatious litigants. Lester states:

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[6] Family Law Council, *Litigants in Person: a report to the Attorney-General prepared by the Family Law Council*, August 2000, pp. 27-31.
[7] Ian Freckelton, 'Querulous Paranoia and the Vexatious Complainant' (1988) 11 *Inter. J of Law and Psych.* 127.
[8] Dr Grant Lester, 'The Vexatious Litigant' (2005) 17(3) *Judicial Officers' Bulletin* 17.

> *In general, they have a belief of a loss sustained, are indignant and aggrieved and their language is the language of the victim, as if the loss were personalised and directed towards them in some way. They have over optimistic expectations for compensation, over-optimistic evaluation of the importance of the loss to themselves, and they are difficult to negotiate with and generally reject all but their own estimation of a just settlement. They are persistent, demanding, rude and frequently threatening (harm to self and others). There will be evidence of significant and increasing loss of life in life domains, driven by their own pursuit of claim. Over time, they begin to pursue claims against others involved in the management of claims, be it their own legal counsel, Judges and other officials. While claiming a wish for compensation initially, any such offers never satisfy and their claims show an increasing need for personal vindication and, at times, revenge rather than compensation or reparation.*[9]

Lester's concluding comments have particular relevance to family law. As Lester observes, "the key event is usually a genuine grievance and seems to echo previous losses. The key event is often of a type to threaten the (male) status symbols of prestige, position, power, property and rights."[10] Thus, it is conceivable that decisions of family courts made about children and/or matrimonial property may 'echo' losses surrounding the deterioration of a relationship and may act as a trigger for obsessive and irrational litigation.

The available literature on vexatious litigants, although limited, suggests that (unlike self-represented litigants generally) vexatious litigants suffer from a psychiatric disorder that causes or influences their persistent, habitual litigious conduct. Freckelton, for example, contends that the psychiatric condition responsible for vexatious complainants is 'querulent paranoia'. Freckelton describes the condition as one where:

> *[i]nstitutional barriers and technicalities that would normally be effective barriers become subsumed in the paranoid's mind into conspiracies, hatched to prevent the complainant from establishing his or her rights. Righting the imagined wrong becomes a cause, a moral crusade, into which all manner of people can be drawn if they are not watchful. Generally some kind of wrong has initially been perpetuated, whose redress*

[9] Ibid p. 18.
[10] Ibid.

> *becomes an obsession which evolves into a full-time occupation. They become driven, harried individuals who derive a specific and agonizing pleasure from their identification with a solitary cause.*[11]

Murdie, writing for the United Kingdom's *New Law Journal*, advances the position that the defining characteristics of a vexatious litigant – pursuing the same person repeatedly, largely through repetition of the same cause of action that has little or no basis in law, to a degree that is irrational and harassing – arguably mirrors one of the three categories of the condition known as de Clerambault syndrome.[12] Murdie claims that European psychiatry has, since at least 1869, recognised that the intense delusional desire to vindicate oneself against others through litigation is a form of mental disorder and would be so diagnosed. Suffers of this type of de Clerambault's syndrome can be distinguished from other forms of paranoia by the absence of hallucinations and the presence of a vehement and passionate attitude manifested in unsustainable claims being made against another person.[13] According to Murdie, vexatious litigants are in need of psychiatric treatment but English-speaking countries have been less willing than European countries to identify and treat vexatious litigants through the mental health system.

The Family Court of Australia's power to restrain vexatious litigants

The primary mechanism that enables litigants to be restrained from issuing proceedings (without at first obtaining leave) in the Family Court of Australia is section 118 of the *Family Law Act 1975*. Justice Watt of the Family Court prepared a comprehensive paper on the availability and use of section 118 and related sources of power to impose restraints on the institution and continuation of proceedings in the Family Court and the following discussion is largely gleaned from that paper.[14]

Section 118 of the *Family Law Act 1975* provides:

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[11] Ibid p. 129.
[12] Alan Murdie, 'Vexatious litigants and de Clerambault Syndrome' (2002) 152 NLJ 61.
[13] Ibid p. 62.
[14] See Justice Michael Watt, 'Vexatious Litigants: the availability and appropriate use of section 118 *Family Law Act 1975* and other (related) sources of power', 14 September 2004.

"(1) The Court may, at any stage of proceedings under this Act, if it is satisfied that the proceedings are frivolous or vexatious –

(a) dismiss the proceedings;

(b) make such orders as to costs as the court considers just; and

(c) if the court considers appropriate, on the application of a party to the proceedings – order that the person who instituted the proceedings shall not, without leave of a court having jurisdiction under this Act, institute proceedings under this Act or of the kind or kinds specified in that order

and an order made by a court under paragraph (c) has effect notwithstanding any other provision of this Act.

(2) A court may discharge or vary an order made by that court under paragraph (1)(c)."

Watt J makes some observations about section 118. Firstly, Watt J comments on the "quite startling" limitation imposed by section 118(1)(c) that an order restraining a person from initiating further proceedings without leave can only be made on application by a party to the proceedings. The Court does not have the power under section 118 to issue a retraining order of its own motion. Watt J also observes that sub-sections 118(1)(a) and (c) appear to envisage a link between the nature of the proceedings dismissed (for example, an application to vary a contact order in relation to an identified child) and the proceedings prohibited. Such an interpretation would reduce the concern associated generally with restraint of vexatious litigants that their right of access to the court at large can be severely curtailed.

The leading authority on vexatious litigants in the family jurisdiction is *Vlug v Poulos* (1997) FLC ¶92-778. In that case, the husband appealed against orders by Moss J

dismissing his two applications and an order that the husband be prohibited from commencing any action in the Court or from seeking a date for hearing of any application already filed by him without the leave of the Court. By way of background, the husband had filed two applications seeking orders with respect to the eldest child, dismissal of orders limiting the husband's involvement with the child's schooling and orders that the wife involve the husband in decision making in relation to the children. The wife then filed an application seeking orders that the husband be declared a vexatious litigant and that he be prevented from commencing any further proceedings. The husband also filed an application for residence of the children, which was effectively stayed by Moss J. Moss J declined to make the order sought by the wife – that the husband be declared vexatious – because of the state of the evidence but was satisfied that an order should be made to prevent the husband filing applications which caused the wife to have to come to court. The husband appealed against the trial Judge's orders restricting him from bringing or continuing any action in the Court (including appeals or other proceedings) without first obtaining leave, on the basis that the order was "plainly unjust."

The Full Court agreed. It found that the power in section 118 can only be exercised where the Court has dismissed or is dismissing proceedings on the basis that they are frivolous or vexatious, as this is a condition precedent to exercising power under section 118 to restrain a party from issuing proceedings. In this case, Moss J had dismissed the husband's applications but not on the grounds they were frivolous or vexatious. The Court also found that the power in section 118 is limited to the institution of proceedings and does not extend to staying proceedings already on foot. In obiter, the Full Court went on to state that the ambit of the order, if validly made, should have been confined to proceedings between the husband and wife (and not, for example, between the husband and another ex-partner).

The Court is also empowered under the *Family Law Rules 2004* to dismiss and restrain proceedings. Rule 11.04 states:

(1) If the court is satisfied that an applicant has frequently started a case or appeal that is frivolous, vexatious or an abuse of process, it may:

(a) dismiss the applicant's application; and

(b) order that the applicant may not, without the court's permission, file or continue an application.

(2) The court may make an order under subrule (1):

(a) on its own initiative; or

(b) on the application of:

(i) a party;

(ii) for the Family Court of Australia – a Registry Manager; or

(iii) for the Family Court of a State – the Executive Officer.

(3) the Court must not make an order under subrule (1) unless it has given the applicant a reasonable opportunity to be heard.

Watt J notes that the rule is wider in application than section 118 in a number of ways, including:

- 'abuse of process' has been added to 'frivolous and vexatious';
- the restraint may include a stay of pending proceedings;
- the court is able to restrain a party on its own motion;
- an order may be made in relation to any proceedings brought in the Court (rather than under the Family Law Act);[15]
- there is no requirement to specify the kind or kinds of proceedings that are restrained.[16]

[15] This has particular significant for applications brought under the *Child Support (Assessment) Act 1989* (Cth) in the Family Court of Australia.
[16] Ibid.

It should also be noted that application for dismissal and restraint of proceedings can be made under rule 11.04 by a person other than a party (a Registry Manager or Chief Executive Officer). This is another point of difference between Rule 11.04 and section 118 of the *Family Law Act 1975*.

Watt J observes that a Judge of a statutory court like the Family Court of Australia has inherent power to dismiss or stay proceedings before it on the basis that they are an abuse of the court's process and have no prospect of success, although these powers are effectively codified in the Rules.

Nature, extent and impact of self represented and vexatious litigants in the Family Court of Australia

In discussing the availability of research on self-represented and vexatious litigants generally, Thompson contends that little precise data exists charting the impact of self represented litigants in the civil jurisdiction and even less data has been collected about the small number of people who become vexatious. The available Australian research about self-represented litigants comes largely from the Family Court of Australia so, unlike other jurisdictions, the Family Court of Australia has a comparatively strong understanding of the number, characteristics and impact of self-represented litigants. As Thompson observes, "whilst it cannot by any means be said that all litigants in person are vexatious, practically all vexatious litigants are litigants in person. No consideration of one can be undertaken without an understanding of the other."[17] Thus, consideration of issues surrounding self-represented litigants can assist in understanding why certain litigants may abuse court processes to pursue their own ends.

Litigants in Person in the Family Court of Australia (2000)

Research was conducted into litigants in person in the Family Court of Australia during 1999 by Dewar, Smith and Banks. The project focused on duty list matters (those

[17] Claire Thompson, 'Vexatious Litigants: Old phenomenon, modern methodology' (2004) 14 JJA 64, 69.

matters of half a day or less duration) and directions hearings, rather than trials, in which one or both parties were unrepresented. It was undertaken in five different Family Court registries, namely Canberra, Brisbane, Melbourne, Parramatta and Dandenong. The researchers used a mix of qualitative and quantitative approaches, in particular questionnaires and semi-structured interviews with Judges, Judicial Registrars, Registrars and litigants in person. The project sought responses to six questions:

- why do litigants appear unrepresented in the Family Court?
- what are the demographic and other characteristics of litigants in person?
- what needs for assistance do litigants in person have and what sources of assistance do they use?
- what are the effects of a party being unrepresented?
- do cases involving litigants in person use more resources that matters in which both parties are unrepresented?
- how might the Court be able to assist litigants in person more effectively and how can the Court cope with the problems that litigants in person present?

For current purposes, the focus will be on the effects of a party being unrepresented and the resource impacts of unrepresented litigants. It is worth noting however that in responding to the first question, 'why do litigants appear unrepresented in the Family Court', Judges, Judicial registrars and registrars interviewed believed that a significant number of self-represented litigants were dysfunctional 'serial' litigants, many of whom may have been emotionally disturbed or mentally ill. They observed that some serial litigants appeared to be vexatious.

Judges, judicial registrars and registrars who were interviewed for the project reported that proceedings in which there was one or more unrepresented party often increased the time taken for a hearing, and that proceedings were characterised by more mentions and return dates, and administrative tasks, when compared to proceedings where both parties were represented. In terms of the personal effect upon them, many Judges, Judicial Registrars and registrars reported frustration, stress, annoyance and irritation, particularly where the litigant was unable to explain or adequately present his or her case.

Additionally, some indicated they faced a dilemma in hearing the matter in a way that accorded both parties procedural fairness.[18] 'Brainstorm groups' held with registry staff, members of the legal profession and members of Court Network (where available) in each of the five registries reported that the principal effect on the Judge or Registrar of a party being unrepresented was increased time spent on the case, both before and during the hearing. Other reported effects included more delays, more adjournments, more judicial work, cases not being heard, frustration, anger at staff and increased stress. In terms of the principle effect on the Court system, reports again emphasised increased time and therefore cost. It was said in some registries that matters take longer at all stages, including at the counter, and that filing a document takes three or four times as long as normal because a person has to explain all the forms and court procedures in great detail. Documents that were incorrectly filed, or that had missing information, or that were out of time had to be sent back, creating additional resource burdens.

Questionnaires completed by Judges, Judicial Registrars and registrars indicated that 63% thought that the unrepresented party was disadvantaged by the lack of legal representation. In only 31% of cases was it considered that the unrepresented party participated in the proceedings with competence. 77% of respondents considered that they or the Court would have been assisted if one or more of the parties had been represented.[19]

In summarising the research findings, the authors of the study concluded that matters involving litigants in person are frequently more consuming and wasteful of the time of judicial officers, registry staff and other parties and their representatives than where parties are represented. The authors suggest that matters involving litigants in person remain in the system for shorter periods of time but while they are in the system they are more time-intensive than in cases where both parties are represented.

Litigants in Person (2000)

[18] Dewar, Smith and Banks, op. cit, p. 37.

A report into litigants in person which was released by the Family Law Council in 2000 similarly found that unrepresented litigants can delay the trial process and impact on case management because of their ignorance of relevant court procedures and rules of evidence.[20] The Council found that, generally, judicial officers may spend extra time explaining procedures and rules of evidence to unrepresented litigants, although trials may be shorter due to unrepresented litigants asking only a few questions or making short submissions. Judges were considered by the Council to be facing a conflict between their need to ensure that all relevant evidence is before the Court and the duty to remain impartial and objective.[21] Most Judges were obliged to explain requirements to unrepresented litigants in detail, disseminate the arguments put forward by unrepresented litigants in order for cases to proceed and even reformulate orders as the evidence and arguments of an unrepresented litigant change. With respect to the impact on registry staff, the Family Law Council noted that although unrepresented litigants take up more registry staff time, this needs to be seen in the context of expectations that courts and tribunals provide assistance to members of the public and the amount of time legal representatives spend consulting with registry staff on behalf of clients.

The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia (2002)

The research undertaken by Hunter et. al. into unrepresented litigants in the Family Court of Australia is interesting because of the methodology used – both qualitative and quantitative analysis – and because of the in-depth consideration given to self represented litigants in the appeal process.[22] This is particularly apposite given the observable increase in the number of self-represented and 'querulous' litigants in the appellate division (Full Court) of the Family Court.

In their 2002 study, Hunter et. al devoted considerable attention to the phenomenon of unrepresented litigants in the appellate division of the Court. This attention was in part of

[19] Ibid p. 38.
[20] Family Law Council, op cit.
[21] Ibid p. 41.

product of concerns expressed by the previous Chief Justice about the impact of unrepresented appellants on the development of the jurisprudence of the Family Court. The researchers undertook a qualitative in-depth analysis of files for all appeals and applications for leave to appeal filed in the 1998-9 financial year in the Northern, Eastern and Southern appeal registries (with the exception of Newcastle and Canberra in the Eastern registry). There were 63 unrepresented litigants in the qualitative sample from a total of 337 litigants. The majority of these were fully unrepresented ie. that they had not been represented at any stage of the appeal process. The researchers identified three categories of litigants in person – 'vanquished litigants', 'serial appellants' and 'procedurally challenged litigants'. The second category has obvious relevance to this discussion of vexatious litigants.

The researchers described 'serial appellants' as those who bought multiple appeal applications before the Court. The report states"[t]hey created significant difficulties for the Court, as they had a tendency to appeal every decision (including interim orders and procedural directions), abused the assistance of Appeal Registrars, and often based their multiple grounds for appeal on a belief that their personal rights had been infringed."[23] Nineteen of the unrepresented litigants, or around 30%, fell into this category. When considering various categories of appeal, the researchers discussed appellants who issued appeals on procedural grounds. They found that appeals containing grounds involving a procedural error disproportionately involved unrepresented litigants; the majority of whom were 'serial appellants'. Speaking generally about procedural appeals by self represented litigants, the researchers said that the character of these grounds for appeal by unrepresented parties seemed to provide a picture of litigants who were unable to separate their emotions and personalised disputes from the general policy and machinery of the family court.[24]

The researchers also observed that many unrepresented litigants listed multiple grounds of appeal, an action that was attributed both to a misunderstanding of the nature of

[22] See discussion in Hunter et. al., *op cit*, p. 103 onwards.
[23] Ibid p. 95.
[24] Ibid p. 110.

appeals as de novo hearings and (arguably) and indication of the desire of many of them to use the appeal as an additional day in court. The discursive tendency of many litigants was attributed to the appellant's personal feelings of 'injustice' and a purposive desire to 'be heard'. Allied with this was the misunderstanding of the function of the Full Court and the belief that it provides a right to re-hearing. This was evident in 22 cases, where unrepresented litigants had based their grounds for appeal on a general lack of 'fairness' or 'justice'. This is described as consistent with the 'rights discourse'.

The researchers found that unrepresented litigants tended to construct their experience of a negative outcome at trial as a personal denial of amorphous 'rights'. As the researchers noted, the Court's role in children's cases is to make a decision in the best interests of the child. In the sample however, there was scant recognition of this principle in challenging contact or residence orders, with the primary source of motivation being centred around the unrepresented parent's 'right' to their child. The study also noted the tendency of unrepresented litigants to embody their dissatisfaction in the trial Judge. This included alleging the trial Judge was incompetent, alleging the trial Judge was in breach of his or her judicial office for commenting negatively on the credit of the appellant, alleging the trial Judge displayed personal prejudice and alleging the trial Judge denied the appellant his or her 'constitutional right' to a fair trial.

In discussing the role of appeal registrars and expectations placed upon them by unrepresented litigants, the researchers found that 'serial appellants', unsurprisingly, drew substantially upon the advice and direction of the Appeal Registrars. These appellants demonstrated a high level of expectation of the Appeals Registrar and demanded legal advice and constant and continuous personalised support and assistance. The researchers concluded that these serial appellants openly used their communications with Appeal Registrars as one of the ways in which they learned about the law. They concluded:

> *they emerge as a singularly bright and autodidactic individuals, using correspondence with Registrars (and often with the other party's legal representative) about rules, case law and procedure as tutorials. More often than not these parties would quote sections*

> *of the Act and sub-rules of the Family Law Rules that had been cited in correspondence from the Court, back to the Registrars, arguing in many instances that they had been subject to the denial of natural justice or procedural fairness in the administration of the appeals process.*[25]

In summary, the researchers found that serial appellants have created problems for the Court with lengthy, unfocussed and legally irrelevant grounds for appeal and outlines of argument, and have created considerable work for appeal registrars in responding to their requests and demands for assistance.[26]

Case studies

The following four case studies seek to demonstrate the effect that querulous litigants and complainants have on the administrative and judicial functioning of the Family Court of Australia. The litigants in each case are not necessarily subject to a restraint under section 118 of the *Family Law Act 1975* but are nevertheless exemplify the pathology and behaviours discussed by Lester, Freckelton and Hunter.

First instance – F v F[27]

This case involved an application by a self-represented litigant, who was a respondent to children's and property proceedings. Mr F had a history of non-compliance with procedural orders leading up to the trial. The trial was set down for hearing on 10 September, two days later than the date originally fixed to enable the respondent to travel interstate and attend his brother's wedding. On 9 September Mr F telephoned the registry manager and advised he could not attend the hearing the next day and required a video link. No indication was given by Mr F at the pre-trial conference that a video link would be required. In a subsequent fax, Mr F cited stress and his inability to purchase petrol to enable him to drive to Court as reasons for requiring the video link. He accused the

[25] Ibid p. 153.
[26] Ibid p. 187.
[27] [2005] FamCA 1362 (Unreported, Family Court of Australia, 17 August 2005).

registry manager of treating him rudely and of finding his predicament amusing. Mr F's application was listed for hearing on 10 September, where Mr F attended by telephone. The wife and the Child Representative opposed the father's application.

What followed was described by the trial judge as "a most harrowing experience". The trial Judge noted that Mr F had not in fact attended his brother's wedding and referred to an earlier affidavit in which Mr F had deposed to his attendance, at which stage the father repeated earlier accusations that the Judge was a "liar". The trial Judge noted that Mr F had not filed an application and affidavit in accordance with the Family Law Rules and the material he was relying on was "utterly devoid" of recognition of what should be placed before the Court when permission to attend via video link is being sought. While noting that Mr F was a litigant in person, the trial Judge said that case management considerations must come into play and that the father had a responsibility to comply with the rules of court in order to achieve their main objectives, including timely and expeditious disposal of cases. Mr F continued to regularly interject, variously referring to the Judge as an "idiot", a "wanker" and a "f-----g fool", and accusing him of manufacturing transcript. Mr F also made some highly offensive comments about the supposed relationship between the Child Representative and the trial Judge. When the Judge ordered that Mr F's application be dismissed, he responded by saying "I'm going to have fun nailing your arse to the frigging wall." Mr F proceeded to accuse the court of being weak, acting unconstitutionally, and suggesting that the Judge should be removed from office. In his ex tempore judgment, the trial Judge concluded by saying he would rather resign his commission than be exposed to such behaviour again and stated "I had 30 years at the bar, 15 years as senior counsel and never once in cases of the greatest of stress have I come across such rancorous vitriol delivered by a litigant to the court."[28]

[28] Ibid p. 16.

Appeal - W and M[29]

This was a matter in which I was a member of the Full Court bench. It neatly illustrates some of the findings made by Rosemary Hunter in her research, including the tendency of 'serial appellants' to appeal decisions as a matter of course, the largely unarticulated allegations of bias or unfairness against the trial Judge and the general lack of regard for the best interests of the child.

I, as Chief Justice, delivered the ex tempore judgment in this matter, with which my fellow Judges concurred. The case was unusual in the sense that interim orders were made by Justice Thackray concerning the father's contact with the parties' five year old child but these orders were not the subject of appeal. Instead, the father applied to Justice Holden for variation of the interim orders on the basis of a change in circumstances and issued a second application seeking discharge of the Child Representative and challenging the order that he submit to a psychiatric evaluation. Upon those applications being dismissed, the father then appealed to the Full Court. He was self-represented at all three hearings.

Thackray J was concerned to afford the father procedural fairness by permitting him to participate in proceedings involving his child, notwithstanding the father's failure to file documents required to support his application. The father was permitted to rely on previous affidavits and interim applications and to give oral evidence. On the second day of trial, the father declined to return to the witness box for cross examination and refused to take any further part in the proceedings. On the basis of the evidence before him, which was necessarily limited by the father's withdrawal, Thackray J found there were grounds for concern about certain of the father's behaviours and his emotional state. This conclusion was fortified by evidence from a child psychologist, who recommended that the father submit to a psychiatric evaluation as a matter of urgency.

[29] [2006] FamCA 502 (Unreported, Family Court of Australia, 27 March 2006).

Thackray J nevertheless formed the view that it was in the child's best interests to maintain a good relationship with his father and ordered that supervised contact take place "for the time being." Thackray J declined to make final orders for contact, instead making interim orders for supervised contact and ordering that the father undertake a psychiatric assessment, with the father having liberty to apply after six months for orders for unsupervised contact.

The applications to vary those orders, to discharge the Child Representative and for the Court to undertake a review of the order that he attend a psychiatric evaluation, were duly dismissed by Holden J and the father appealed. The grounds of appeal included:

- that the trial judge erred in the exercise of his discretion;
- that he took into account irrelevant evidence;
- that he failed to act on correct principles;
- that he failed to consider what was just and equitable with regard to the welfare of the child; and
- that he demonstrated judicial prejudice and bias against the father, his child and his family.

The father's written submissions, which bore little relation to the grounds of appeal, alleged there were personal injustices associated with the legal process that distressed and angered him and asserted that Thackray J (against whose orders he had not appealed) should have known that the mother's allegations against him were false.

In dismissing the appeal I had this to say:

> *The position is not as the father asserts, that the relationship between himself and his son has been severed. Thackray J made interim, not final, orders and was careful to do so in anticipation that there may be appropriately at some stage unsupervised contact. It is true that he imposed conditions for supervision and for the father to obtain a psychiatric assessment, and he did so on the basis of proper evidence. It is obvious, perhaps to everyone but the father, that the door is open to him, not closed. If he proceeds as*

suggested, accepts the finding that his son should see him, albeit on a supervised basis, and submits to the psychiatric assessment, it is available to him to re-apply for unsupervised contact. Holden J made the point that if he obtained the psychiatric report by the psychiatrist suggested by the child representative and was unhappy with it, he could seek another opinion.

The answer to the ongoing relationship with his son, in my view, lies in the father's hands and his alone. He may not like the orders made, but if he really believes the relationship between himself and his son is important, he surely ought to be pursuing it however unreasonable he believes the present constraints to be.

First Instance and Appeal – IM (ex parte)[30]

This matter involved an application by a parent, Mr M, for leave to issue contempt proceedings against a trial Judge. Leave was required because Mr M was subject to an order restraining him from issuing proceedings without leave of the Court pursuant to section 118.

Parenting orders had been made by the trial Judge on 24 January 2004 and a further order made that Mr M be restrained from issuing any further application in parenting proceedings involving his two children without the leave of the Court. Mr M filed an application to appeal out of time, a contravention application and three contempt applications in October 2004, all of which were dismissed. Mr M then filed an application on 25 January 2005 seeking leave to bring certain applications and requesting that the Attorney-General or the Direction of Prosecutions be requested to intervene in the case. That application came before the trial Judge and was reserved. On 24 May 2005 the father filed two applications asserting that the mother and her former solicitor had been in breach of orders of the court in December 2002 and during 2003. On 1 July 2005 the father filed a further application alleging that the mother was in contempt of court by reason of matters that she had deposed to in February 2003. That matter also came on before the trial Judge and the question of whether leave should be granted was reserved.

[30] IM (ex parte) [2006] FamCA 503 (Unreported, Family Court of Australia, 13 June 2006)

In August 2005, Mr M orally advised the trial Judge that he intended to file an application seeking leave to bring contempt charges against him (the trial Judge), at which stage the trial Judge adjourned all extant applications pending determination of the foreshadowed contempt application against him. The adjourned applications and the contempt application against the trial Judge came before me on 19 December 2005. Mr M represented himself.

At the time the matter came before me, there were three unissued contempt applications, two unissued contravention applications, an unsealed and unissued contempt application against the mother, the contempt applications reserved by the trial Judge and the contempt application against the trial Judge on the court file. In relation to the latter, Mr M asked the Court to find that there was "merit" in listing an application for contempt against a judicial officer and also sought parenting orders in substitution for those made by the trial Judge. Mr M further sought the intervention of the Attorney-General to address issues allegedly arising under section 72 of the Constitution and to consider whether to issue a Writ of Mandamus. The contempt application against the trial Judge was supported by an affidavit that alleged the trial Judge prevented a police officer from giving evidence that would have been favourable to the father in parenting proceedings, intimidated another witness (Mr M himself), tampered with the mother's evidence and that the trial Judge engaged in form of abuse by ordering Mr M to produce financial records.

During the hearing before me, I pointed out to Mr M that he appeared to face a significant obstacle in his application against the trial Judge arising from the doctrine of judicial immunity. Mr M contended that the trial Judge was acting with bias and malice and that the doctrine therefore did not apply. In my judgment I referred to a number of authorities which confirmed that the doctrine extends to both bone fide and mala fide acts and the policy underlying the application of judicial immunity. As Mr M was not contending that the trial Judge was acting other than judicially when the alleged contempts occurred, I was obliged to dismiss the application for leave on the basis that there was no reasonable prospect of the contempt application succeeding.

Mr M then appealed my decision to the Full Court of the Family Court. Mr M in essence sought that the Family Court 'deal' with the trial Judge for contempt of court. A number of orders were sought on appeal, including an order that the "Statute of Westminster Clause 2(2) gives the Criminal Code preference over the Immunity Law of Lord Edward Coke" and that "the Criminal Code creates the Law and demonstrates a Judicial Officer can be pursued for crimes committed at the Bench. Only when it is arguable that the conduct of a Judge could lead to claims pursuant to s22 of the Act and s72(ii) of the Constitution." Mr M also sought to adduce further evidence during the appeal.

Mr M raised thirty grounds in his Notice of Appeal and filed a summary of argument comprising eleven pages of submissions. In oral submissions, Mr M sought to rely upon the *Statute of Westminster Adoption Act 1942* (UK), the *Judiciary Act 1903* (Cth), the *Acts Interpretation Act 1901* (Cth) and the Constitution. The Full Court found that none of the statutes relied upon by Mr M advanced his appeal and determined that his submissions were without merit. The Full Court agreed with Mr M that the doctrine of judicial immunity did not prevent a Judge from being prosecuted under the Australian Criminal Code but was not satisfied by any of the arguments advanced by Mr M that the Family Court had the power to exercise state or federal jurisdiction in criminal law. The Full Court also confirmed the application of the doctrine of judicial immunity to civil and criminal actions and that judicial immunity confers absolute privilege on judicial officers in the exercise of their judicial functions. The Full Court concluded:

> *The authorities to which her Honour referred and to which we have referred, leave no room for doubt that her Honour was correct in dismissing the appellant's application of 24 August 2005.*[31]

The Full Court then turned to the question of leave to adduce further evidence. That application appeared to have been made in the context of Mr M's intention to cite me, the Chief Justice, for contempt. In dismissing the application, the Full Court said:

[31] Ibid para 52.

> *It is difficult to imagine what "further evidence" the appellant could adduce in relation to the hearing before the Chief Justice on 19 December 2005, and nothing asserted by the appellant provides any assistance in that regard. The transcript of the proceedings of 19 December 2005 is before this Court. There has been no suggestion in the appeal that the appellant was precluded from adducing any relevant evidence in the trial, or that he otherwise failed to adduce any evidence which could have impacted upon its outcome. Nothing to which the appellant now refers could be so regarded.*[32]

While noting that the foreshadowed contempt application was not before the Full Court, the Full Court nevertheless said:

> *… we observe that, having heard the appeal against the Chief Justice's orders of 19 December 2005, and read the transcript of the proceedings of that day, we cannot imagine on what basis leave to bring that application could be granted, there being no rational basis for suggesting that her Honour was acting "extra-judicially" at any time during the course of the proceedings before her. To the extent necessary, as it would appear to be to protect the processes of the Court from abuse, any Judge dealing with the foreshadowed application may well be disposed to amplify the order currently in force against the appellant pursuant to s 118 to refrain him from filing or seeking to file any applications "sighting" or seeking to have a judge of the Court dealt with for contempt.*[33]

Subsequent to the appeal, Mr M filed an application seeking leave to issue contempt proceedings against me. This application was filed prior to the Full Court handing down its judgment.

Correspondence - Mr B

In contrast to the three previous case studies, Mr B is an example of a querulous complainant, as compared with a vexatious litigant.

[32] Ibid para 54.
[33] Ibid para 55.

Mr B first issued proceedings for urgent interim residence of his two daughters in 1999. Since that time there have been a number of applications for interim and final orders with respect to the children, the property of the parties and spousal maintenance. At various stages, both parties have applied for injunctions to restrain the other party from dealing with the matrimonial home and from removing the children from the jurisdiction. Final orders were made in late 2000 giving the wife residence of the children with contact to be agreed. The wife was also granted the proceeds from the sale of the matrimonial home. Mr B did not attend the hearing and is now understood to be living overseas. Since 2000, Mr B has applied to have those orders set aside and residence granted to him as well as orders regarding access to the school and medical reports. Contravention proceedings have also been issued by Mr B against the children's school and subsequently dismissed. Mr B's further application for final orders is yet to be heard. It is understood that Mr B has also initiated proceedings under the Hague convention in the country in which he is now resident, despite one child now having turned 18.

Mr B's commenced irregular correspondence with the Court in 2000, in which a number of allegations were made that the Court was corrupt and that its decisions evinced an anti-male bias. Similar allegations were made by telephone. Mr B's correspondence escalated to daily e-mails (of which multiple copies were often sent) in late 2003 and has continued since that time. Mr B also continues to write letters to the Court. He describes the Court and its officers (judicial and non-judicial) as "the epitome of evil and wickedness", "nasty evil creeps" and "obscene nasty people, quite unworthy and of low moral and ethical standards." He alleges that the Court is biased, corrupt and dishonest and accuses the Court of conspiring with a large number of other agencies (including schools, state health and education departments, police, churches, Ombudsmen, legal practitioner complaints boards and consular staff) to promote and legitimise child abuse. According to Mr B, the mother is able to manipulate 'the system' to prevent the allegations of child abuse being properly investigated and the Court is complicit in perpetuating this "corruption".

Mr B has become increasingly abusive and demanding of Court staff, seeking explanations as to why there are "unacceptable" delays in investigating his allegations and suspending or removing allegedly incompetent judicial officers. Mr B also challenged the qualifications of the psychologist appointed to prepare an expert report and the bona fides of the child representative.

Consistent with Lester and Freckelton's observations of querulous complainants, Mr B is unduly fixated on the outcome of interlocutory applications and invokes a plethora of rules, guidelines and conventions to support his position, both national and international (including the United Nations Convention on the Rights of the Child). He asserts that "non existent" rules were relied upon in one instance, which in his view impugns the legitimacy of the decision making process. Mr B's expectations of the response he should receive from the Court in general and the Chief Justice in particular have become increasingly heightened, having escalated to the stage whereby Mr B "demands" that the Chief Justice immediately investigate all of his claims, suspend judicial and non-judicial officers he alleges have behaved inappropriately pending the outcome of this investigation, and to also investigate and report to him on a variety of other agencies that are complicit in the corruption of the 'Australian system'.

Family Court of Australia responses to self represented and vexatious litigants

Self represented litigants project

The Court undertook a range of initiatives in response to the increasing number of self-represented litigants entering the Family Court. The Court commissioned research into self-representation in family law, which informed future initiatives within the Court. Principal amongst these was the establishment of the *Self Represented Litigants – A Challenge* project in 2000, a two-year initiative which included amongst its goals "to improve current Court services, including practices, procedures, protocols and proformas."

The project identified a range of key activities, namely:

- to review information and publications;
- to establish an integrated and coordinated approach to instituting existing initiatives nationally and review the suitability and development of any partnerships that may be required to ensure they operate effectively;
- to review Court processes and procedures to determine ways to make them clear and understandable;
- to review avenues for producing package material or establishing touch screens in registries;
- to establish national protocols and guidelines with particular reference to SRLs;
- to develop internal and external communication campaigns outlining project activity;
- to develop Rules of Court that are fair, clear and understandable;
- to develop a framework for the evolution of court processes into the 21st century, recognising the changing character and needs of those SRLs who appear before the Court or seek its help in the resolution of conflict.[34]

The two-year project was lead by (now) Deputy Chief Justice Faulks and included representation by registry and client service staff, mediators, deputy registrars and registrars. In its later stages, the project was oversighted by a steering committee. In summarising the primary outcomes of the project, the report states that, in addition to specific outcomes, the project team noticed a significant 'cultural shift' in the perception of and attitude towards self-represented litigants. The report states "the work of the project team has helped ensure that self represented litigants are now a recognised and accepted client group that will be included in any considerations of future strategic developments, not only at the national level but also at the local registry level…".[35] The project team developed a range of initiatives in three main areas: information, collaboration and innovation. Major achievements included the web-based 'step by step

[34] *Self Represented Litigants – A Challenge¸ Project report December 2000-December 2002,* pp. 3-4.
[35] Ibid p. 5.

guide to proceedings in the Family Court' and the facilitation of community education workshops to improve access to the Family Court by self-represented litigants.

As part of the broader combined registry initiative, in which the Family Court of Australia and the Federal Magistrates Court are working together to simplify the path into the family courts system, an information pack for self-represented litigants has been developed. This pack includes:

- a tip sheet
- a check list
- a list of legal terms
- a description of court events in both Courts
- a description of court staff in both Courts
- a list of Court forms
- a list of relevant Court publications
- a contact list
- a feedback form

The kit is currently being trialled in three of the Court's registries.

Guidelines

In 1997, the Full Court in *Johnson v Johnson* (1997) FLC 92-764 laid down guidelines as to a judge's obligations when determining a case where one or more parties are self represented. The Full Court considered relevant authorities and cautioned that general principles concerning the extent to which courts should assist self-represented litigants must be viewed in light of the special circumstances which surround litigation under Part VII of the Family Law Act 1975 (children's cases). The Full Court said that where contact and residence are in issue, the Court has an obligation to conduct as full and complete an inquiry into the relevant issues as possible and not to be inhibited by restrictive procedures. The Full Court considered it necessary for the guidance of judges and the legal profession generally to set out in detail the obligations of trial judges when

hearing cases involving unrepresented litigants. The Full Court considered that trial judges were obliged to:

- inform the litigant in person of the manner in which the trial is to proceed, the order of the calling of witnesses and the right that he or she has to cross-examine witnesses;
- explain to the litigant in person any procedures relevant to the litigation;
- generally assist him or her by taking basic information from witnesses called, such as name, address and occupation;
- explain the effect and possible undesirability of the interposition of witnesses where the other party seeks to deviate from standard procedure, and to advise the party of his or her right to object;
- advise of the right to object to inadmissible material being tendered as evidence;
- inform him or her of the possibility of a claim of privilege;
- ensure that a level playing field is being maintained at all times;
- attempt to clarify the substance of the submissions of unrepresented parties, especially in cases where the substantive issues are ignored, given little attention or obfuscated.

The Full Court also emphasised that it is undesirable for the court to give legal advice to a litigant in person because it may be unfair or have the appearance of unfairness to the other parties and the advice given may not be with the full knowledge of the facts.

The Full Court revisited and revised these guidelines in the case of *Re: F: Litigants in Person Guidelines* (2001) FLC 93-072. The Full Court cautioned:

> *We think that guidelines must not risk compromising the neutrality of the court, or the perception of the Court's neutrality. Such neutrality is a key feature of the adversarial*

> *system. Judicial assistance cannot make up for lack of representation without an unacceptable cost to matters of neutrality*.[36]

The Full Court concluded, however, that "the obligation to provide a fair trial has principle significance for a court of law and it must take some steps to assist a litigant in person in order to do justice between the parties with an eye to the reality of the prevalence and diversity of litigants in person in this jurisdiction".[37] The guidelines laid down by the Full Court are as follows:

- A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial.

- A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross examine the witnesses.

- A judge should explain to the litigant in person any procedures relevant to the litigation.

- A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation.

- If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course.

[36] (2001) FLC 93-072 at 88,275.
[37] Ibid.

- A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise.

- If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights.

- A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated (*Neil v Nott* (1994) 121 ALR 148 at 150).

- Where the interests of justice and the circumstances of the case requires it, a judge may:
    - draw attention to the law applied by the Court in determining issues before it;
    - question witnesses;
    - identify applications or submissions which ought to be put to the Court;
    - suggest procedural steps that may be taken by a party;
    - clarify the particulars of the orders sought by a litigant in person or the bases for such orders.

- The above list is not intended to be exhaustive and there may well be other interventions that a judge may properly make without giving rise to an apprehension of bias.

It is not suggested that the guidelines alone are a complete solution to the myriad problems confronting litigants in person, both individually and in the broader context of the administration of justice. In commenting on the *Johnson* guidelines in a research

report produced in 2000, Dewar, Smith and Banks observed that although the guidelines went some way to addressing the need for Court-wide protocols, they dealt with generally technical issues of evidence and cross-examination and were largely directed at Judges.[38] However, the application of the guidelines as formulated by the Full Court in *Re: F* should improve the experience of testifying in open court for people who are self-represented.

Less adversarial proceedings in children's cases

It is also likely that the effectiveness of the guidelines will be enhanced when used in tandem with other initiatives which seek to ameliorate the more damaging effects of adversarial litigation in family law. Hunter, for example, is critical of the 'deficit model' of approaches to self-represented litigants, where self-represented litigants are required to adapt to 'fit in' with court processes, rather than processes being adapted to accommodate the particular needs of litigants in person. Hunter advocated for modifications to the adversarial system in order to make hearings fairer and more accessible to both litigants in person and other parties.[39]

Hunter describes what she considers to be the most effective example of a judge working with an unrepresented party that she had witnessed in the Family Court. It arose in the context of an unrepresented father's application for contact where the mother was represented by a barrister and a child representative had also been appointed. According to Hunter:

> *The judge altered the order of proceedings so that the mother's barrister presented his case first, but otherwise there was minimal reliance on that barrister to define the issues or determine the orders sought. When it came to the father's case, the judge asked what contact he wanted to have with the child, and led him through his evidence in chief, asking relevant questions for him to answer and giving him an opportunity to comment on the welfare report. The judge also took the father's witnesses through their evidence in chief, then invited the father to ask further questions if he wished to do so. When the*

[38] Dewar, Smith and Banks, op. cit, p. 44.

> *father's witnesses were being cross-examined, the judge cut off the father's attempted interjections with an assurance that the judge would intervene if the mother's barrister asked any questions he was not supposed to. The judge also stopped the mother from giving hearsay evidence on cross-examination.*[40]

Hunter emphasises that at all times "it was made clear that the judge was acting not as a partisan but as a truth seeker." Hunter goes on to state that where both parties are in person and a child representative has been appointed, it may be more appropriate for the judge to rely on the child representative to articulate the issues and provide a framework within which the opposing parties can operate. Where both parties are unrepresented and no child representative has been appointed, Hunter suggests that the parties be provided with a checklist of issues that will need to be addressed in the case and for the judge to take an active role in ensuring that those issues (and only those issues) are addressed by the parties and their witnesses.

Virtually all of the "creative solutions" discussed by Hunter are features of the Family Court of Australia's new, less adversarial approach to conducting child-related proceedings. The essence of this approach, which was first trialled in the Court as the Children's Cases Project, includes a more judicially active presence by the Judge, an enhanced role for the Child Representative and a focus on refining the issues in dispute at an early stage. The Judge plays a leading role in the conduct of the hearing, including determining the issues to be decided, the evidence to be called, the way the evidence is to be given and the manner in which the hearing is conducted. On the first hearing day, the parties assist in the process of identifying those issues that are agreed and those that are in dispute, which are then drawn up in documentary form. Affidavit material is limited in content to that which goes directly to the issues in dispute, as identified on the first day. Likewise, witnesses are only able to be called in relation to those identified issues, and there is allocated to each witness a list of the issues which may form the subject of their evidence. All evidence is conditionally admitted, and the Judge determines the weight to be given. It is not uncommon for an Independent Children's Lawyer to be asked to cross-

[39] Rosemary Hunter, 'Litigants in Person in Contested Cases in the Family Court' (1998) 12 AJFL 171, 177.

examine the parties first, particularly where one or both are represented. This not only significantly reduces the need for parties to cross-examine each other but also assists in ensuring that the focus of the proceedings is at all times on issues relevant to the child's best interests.

Dr Jennifer McIntosh evaluated the impact of the Children's Cases Project on parenting capacity and child well-being. The study compared 45 adults from the CCP pilot and 34 adults from the 'mainstream' group, who were interviewed three months after their matter had been finalised. One of the most remarkable findings was the difference in the two groups in their perception of the Judge. 69% of the CCP group rated their experience of the Judge as positive whereas only 8% of the mainstream group responded in this way. The 92% of the mainstream group who expressed dissatisfaction with the judge described the judge in the following terms:

> *Biased, unduly critical/harsh, unfair, naïve, ignoring, omnipotent, inconsistent.*

The 69% of the CCP group who rated their experience of the judge as positive described the judge as:

> *Excellent, fair, supportive, correct, observant, wise, powerful, strong, helpful, eased the confusion, very nice, listened, open, amazing, wonderful, encouraging, very polite, respectful.*

These findings underline the importance of process in parties' perceptions of litigation. Although the research findings do not differentiate between the experience of self represented and represented litigants in the Children's Cases Program, it is logical to assume that the less adversarial approach would ameliorate the disadvantages identified as common to self represented litigants in traditional adversarial proceedings. As the Family Law Council has observed:

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[40] Ibid.

> *The unrepresented litigant would not be as significantly disadvantaged by the lack of skills, knowledge and objectivity, because the collection of evidence would be undertaken by the judicial officer in consultation with the parties. Further, the judicial officer would arguably have a greater chance to understand each party's position because of the officer's involvement in the case throughout its process. It may well be that the unrepresented litigant would feel that his or her case was better understood in such a process than in a trial in the adversary system.*[41]

Given the concentration of self-represented litigants in parenting disputes as compared with property cases, the less adversarial approach to children's cases and the 'Re F' guidelines in tandem have major potential to improve the experience of self-represented litigants appearing in open court.

Mental Health Support project

It is well recognised that there is a linkage between family separation and mental health. Divorce and separation are consistently rated as some of the most stressful of all life events.[42] There is also clear evidence that divorced and separated people have higher rates of mental health problems than married people, both in the short and long term.[43]

As discussed earlier, available evidence suggests that querulous or vexatious litigants may suffer from a range of psychiatric disorders and mental illnesses, including narcissistic personality disorder, querulous paranoia and schizophrenia. This group of litigants are often disordered in their thinking, are persistent and rude, and often threaten harm to themselves or to others (including Judges and staff of the Family Court as well as their own children).

In order to better respond to Family Court clients' mental health needs, including those of persistent or vexatious litigants, the Family Court has begun a process to develop and

[41] Family Law Council, op cit, p. 20.
[42] B. Rodgers, 'Separation, Divorce and Mental Health', in A. Jorm (ed), *Men and Mental Health*, NH&MRC Social Psychiatry Research Unit, The Australian National University, Canberra, 1995, 105-115, p. 106; B. Rodgers et al, 2004, p. 55.
[43] B. Rodgers et al, ibid, p. 56.

implement procedures aimed at both improving the emotional wellbeing of clients and preventing suicide and fatal assaults.

In October 2004 the Family Court put forward a proposal to obtain funding for a project to assist clients of the Court with their emotional wellbeing and to address suicide prevention. The proposal included a research component to identify points of stress within the procedures of the Court and an intervention component involving proactive and reactive client strategies.

The proposal was accepted by the Department of Health and Ageing (DHA) and the pilot project is currently being funded under the National Suicide Prevention Strategy in accordance with the guiding principles of the Living is for Everyone (LIFE) framework.[44] The pilot aims to test approaches and products which the Court will utilise to improve services to clients affected by mental health issues.

The primary aims of the project are to ensure that Family Court and Federal Magistrates' Court's systems and processes are as supportive as possible of people's mental health and to assist the staff of the Family Court and Federal Magistrates' Court to support the mental health and emotional wellbeing of clients by promoting awareness, providing skills and putting in place supporting infrastructure.

The Family Court's approach to achieving these goals has been informed by a range of projects, initiatives, research papers and stakeholder input. It has also been developed in consultation with experts in the areas of depression, suicide and mental health.

The project approach comprises the following key elements:

- External Referral Service – appropriate referral to community based and government organisations who provide mental health support services (both preventative and responsive)

[44] The LIFE Framework is a strategic framework developed and implemented by the National Suicide Prevention Strategy advocating a 'whole of government and whole of community approach to suicide prevention across all levels of government, the community and business': see the LIFE website at <http://www.livingisforeveryone.com.au/index.php>

- Protocols - development clear guidelines for staff to deal with a range of situations including dealing with clients who threaten harm to themselves or others and crisis response
- Mental Health Literacy: the use of communication mechanisms to improve client awareness and understanding of mental heath and emotional wellbeing during separation.
- Staff Training- raising awareness of mental health, providing FCoA/ FMC staff with the skills required to make referrals to external organisations and deal with clients who present with mental health or emotional wellbeing issues.

The pilot was conducted in the Adelaide and Darwin registries of the Court. These sites were selected for their size, capacity and opportunity to allow a focus upon Indigenous communities. Both registries also have a Federal Magistrates Court presence. The pilot was completed in April 2006 and a preliminary report to DHA has been prepared. The evaluation found that the pilot was a success. It achieved all eleven agreed outcomes and achieved most to a high level. In addition, the Pilot evaluations produced sound evidence on what areas worked well and what areas needed improvement prior to a national implementation. Finally, as well as the agreed outcomes, the Pilot generated a significant change in attitude among staff towards clients. Staff became both more tolerant of and more confident in responding to clients suffering from stress and other mental health issues. As well as improving the client experience, this also reduced staff anxiety in such situations.[45] The Court hopes to expand the initiative on a national basis, dependent upon the availability of funding.

Legislative Developments – Model Vexatious Proceedings Bill

Commonwealth, State and Territory governments, under the aegis of the Standing Committee of Attorneys-General (SCAG), have been considering legal and policy issues associated with vexatious litigants and the proper administration of justice. SCAG

established a working group to consider and report on problems arising in individual jurisdictions with respect to the operation of the existing law and to consider options for reform. SCAG was also interested in developing a nationally consistent approach to vexatious litigants. The starting point for the working group's consideration was the Western Australian *Vexatious Proceedings Restriction Act 2002*, which implemented the recommendations made by the Western Australian Law Reform Commission arising from its *Review of the Criminal and Civil Justice System*.[46] Under section 4 of the Act, where a court is satisfied that a person has instituted or conducted vexatious proceedings or it is likely that the person will institute or conduct vexatious proceedings, the Court may stay the proceedings (or part of the proceedings) and/or prohibit that person from instituting proceedings without leave of the Court. The definition is "vexatious proceedings" is broad. Such proceedings are those:

- which are an abuse of the process of a court or tribunal;
- instituted to harass or annoy, or cause delay or detriment, or for any wrongful purpose;
- instituted without reasonable ground; or
- conducted in a manner so as to harass or annoy, cause delay or detriment, or achieve any wrongful purpose.[47]

The Attorney-General, the Principal Registrar of the Supreme or District Court or, with leave, a person against whom another person has initiated or conducted vexatious proceedings or "a person who has a sufficient interest in the matter" has standing to make an application. The Court can also make an order on its own motion.

Clearly, the Act is significantly broader in scope than section 118 of the *Family Law Act 1975*. In Western Australia, proceedings don't necessarily have to be before the court at the time an order is sought and it would appear that proceedings don't necessarily need to have been initiated at all – the mere likelihood that vexatious proceedings could be

[45] Family Court of Australia, *A Report on the Mental Health Support Pilot in the Family Court of Australia and the Federal Magistrates Court, June 2006*, p. 3.
[46] The Hon. Mr McGinty, Attorney-General, Second Reading Speech, Vexatious Proceedings Restriction Bill 2002 (WA), *Parliamentary Debates*, 20 February 2002, p. 7710.
[47] *Vexatious Proceedings Restriction Act 2002* (WA), s. 3.

initiated can suffice (although it is difficult to conceive of a situation in which a litigant is restrained from issuing proceedings with there being no evidence of having previously conducting litigation that was harassing, groundless or otherwise 'vexatious'). Unlike the Family Court, where proceedings must be dismissed as a condition precedent to restraining a litigant, the Supreme Court of Western Australia is not bound to stay the proceedings before preventing further proceedings from being initiated. The number of parties who can make application is also an obvious point of difference.

Interestingly, section 8 of the Act specifies that if there is a declaration in force that a person is a vexatious litigant or an order in force restraining a party from instituting proceedings that has been made in another jurisdiction, that party is stayed from instituting proceedings in any Western Australian court or tribunal while that order is in force. However, in terms of federal jurisdiction, section 8 only applies to orders made by the High Court and the Federal Court of Australia. Neither the Family Court of Australia or the Federal Magistrates Court are included, meaning that a person subject to a section 118 order would not be prevented from issuing proceedings in a Western Australian court or tribunal.

It is understood that the Western Australian approach to vexatious proceedings informed the working group's consideration of nationally consistent legislation. Through the working group, a model bill entitled the *Model Vexatious Proceedings Bill 2004* was developed. Each jurisdiction can use the model bill as the basis for its own legislation to control vexatious litigants. To date, Queensland is the only jurisdiction that has enacted new legislation to give local effect to the model bill. The *Vexatious Proceedings Act 2005* (Qld) has similarities to the Western Australian *Vexatious Proceedings Restriction Act 2002* (WA) (for example, the parties with standing to apply are the same, and the process for granting leave is effectively the same in both jurisdictions). However, there are some significant differences between Queensland and Western Australia. Firstly, the *Vexatious Proceedings Act 2005* (Qld) requires that the Court be satisfied that a person has "frequently" instituted or conducted vexatious proceedings and does not enable an order to be made on the basis that a person is "likely" to institute vexatious proceedings.

Secondly, the Queensland legislation enables a court to have regard to proceedings commenced and orders made in any Australian court or tribunal in deciding whether or not to make a vexatious proceedings order. There is no provision (as there is in Western Australia) for recognition of orders made against vexatious litigants in other jurisdictions.

The Government is currently consulting with the federal courts about the possibility of adopting appropriate provisions from the *Model Vexatious Proceedings Bill 2004* later in 2006.

Conclusion

For a variety of reasons, the number of self-represented litigants in the Family Court of Australia has increased over the last decade. As a sub-set of self-represented litigants, the number of vexatious litigants has also increased. The Court is mindful of the need to avoid pathologising this particular group of litigants. Nevertheless, their characteristic tendency to appeal interlocutory decisions, to file new, unmeritorious applications, to attempt to bring criminal proceedings against judicial officers and members of staff; to file voluminous, largely irrelevant documentation and to seek ongoing, detailed assistance from Court staff places a significant burden on the Court's judicial and administrative functioning, to the detriment of 'mainstream' litigants. Those who make persistent complaints similarly consume time and effort that could otherwise be devoted to assisting Court clients with legitimate concerns. While the Court has instituted a range of policies and practices which are designed to assist self-represented litigants generally, it is unlikely that these initiatives will deter querulous litigants and complainants from either commencing or continuing their 'campaign' against the Court. The psychological profile of vexatious litigants and the very real likelihood that they are in fact suffering from a form of mental illness fortifies this supposition.

Despite the mechanisms available to the Court to restrain litigants from instituting proceedings without leave, these have not been successful in preventing clients from issuing numerous leave applications or from appealing decisions made in relation to those

applications. The Court's concerns will be communicated to the Government during consultations about giving effect to the *Model Vexatious Proceedings Bill 2004* and it is hoped that they will be accommodated in any new legislation designed to reduce the impact of vexatious litigants on court administration, without unduly restricting freedom of access to federal courts.