

Legal systems abuse and coercive control

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Abstract

This paper considers how legal engagement can be an opportunity to exercise coercive control over a former intimate partner. Drawing on interviews with 65 women who engaged with the legal system as a result of violence in their intimate relationships, this article explores how women's engagement with the legal system is frequently experienced as an extension of an intimate partner's coercive control. It builds on existing research showing how legal processes provide an opportunity for perpetrators to continue and even expand their repertoire of coercive and controlling behaviours post-separation. I refer to this as legal systems abuse. This article explores women's reported experiences and considers how expectations of equality of access to justice and fair hearing; concepts that underpin legal processes, can be reconciled with legal engagements that seek to end coercive and controlling behaviours. The paper concludes that improved understanding of domestic violence as coercive control by legal actors may help to circumvent the opportunities for legal systems abuse.

Keywords

Coercive control, legal systems abuse, domestic abuse, post-separation abuse

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Introduction

It is widely accepted that domestic and family violence often does not end at separation and indeed separation has been identified as a period of heightened risk of further violence for women (Fleury, 2000; Mahoney, 1990; Kaye et al, 2003). However once the parties have separated, many of the methods of abuse previously employed by the abuser may no longer be available. The abuser may have reduced physical access to the survivor and might look for other methods to continue to perpetuate abuse. At the point of separation, a woman who has been abused within the relationship may draw on the law as a resource to protect her from further violence, to assist her to break ties with the perpetrator and to determine issues that cannot be resolved without legal system intervention (Lewis et al, 2001: 109). Such matters may include child contact and property settlement (Elizabeth et al, 2012; Laing, 2016), there may be a need for a protection order and sometimes there are criminal proceedings

that take place after separation. Child protection authorities may also become involved as a result of the abuse (Nielson, 2015). Indeed, both the parties may have important and legitimate reasons to engage with the legal system post-separation.

The loss of opportunities for abuse that existed prior to separation and the engagement in litigation that co-occur around the point of separation creates a kind of perfect storm. While litigation may be an important part of women's search for safety and relationship closure, litigation can provide a new opportunity for perpetrators to continue to perpetrate abuse in a way that is apparently legally justified. Legislative definitions of domestic and family violence usually provide examples of the kinds of behaviours that may be part of domestic violence, including for example: physical, sexual, financial and emotional abuse; stalking and isolation. Unsurprisingly legislation does not explicitly identify legal system abuse as a form of domestic abuse. After all, engaging in the legal system is generally considered a right and legal engagement may be understood as a tool rather than a behaviour. However, similar to other forms of domestic abuse, it is the context in which the behaviour takes place that provides its meaning to the person who is the subject of the abuse (Goodmark, 2012: 46). Thus engagement with the legal system may be experienced by one party as abuse at the same time that the other party justifies their engagement as a right. Przekop (2011:

1056) has acknowledged this tension between courts and judges needing to ensure that perpetrators' rights to access the courts aren't obstructed, while at the same time controlling the parties before them.

The idea that survivors may experience the legal process as a form of secondary victimisation as a result of inappropriate treatment and responses by legal actors, including judges and lawyers, has been recognised by scholars (Herman, 1987; Laing, 2016; Ptacek, 1999; Hunter, 2006). The idea that engagement in litigation by the abuser may be a continuation of abuse has received less attention, although it is of increasing interest to scholars. In the next section of this article I consider the current research about domestic abuse perpetrated through litigation; I refer to this as legal systems abuse, but others have called it 'paper abuse' (Miller and Smolter, 2011) or 'procedural stalking' (Neilson, 2004: 419). I then draw on interviews with 65 women who have engaged with the legal system in the context of domestic violence to consider the wide variety of forms that legal systems abuse takes and the women's experience of litigation as part of on-going abuse (the *Using Law and Leaving Domestic Violence Study*¹). In the final section I consider how expectations of equality of access to justice and fair hearing, that underpin legal processes, can be reconciled with legal engagements that seek to end domestic violence. I conclude that improved

understanding of domestic violence as coercive control by legal actors may help to circumvent the opportunities for legal systems abuse.

Manifestations of legal systems abuse

There is a well-developed literature showing that engagement with adversarial court proceedings may be experienced as a form of revictimisation or secondary abuse by survivors of abuse (Herman, 1987).² In this context, Ptacek (1999) was one of the first to explore the role of judicial officers in domestic violence protection order cases showing how judicial responses may reinforce women's entrapment. Ptacek (1999) and subsequent researchers (Busch et al, 1995; Gills et al, 2006; Hartman and Belknap, 2003; Hunter, 2005) found that some types of judicial behaviour practiced in the courts could be experienced as further abuse by survivors appearing before the court. In particular, he identified that women who experienced magistrates and judges as 'condescending, harsh or otherwise demeaning' found the protection order hearing was a further trauma (Ptacek, 1999: 151). Such judicial behaviours continue to be reported and experienced as re-victimising by some women attending court in relation to domestic violence matters (Anderson, 2015; Tinning, 2006). In the American context, Sack (2004: 1680) has considered how the application of processes by justice system actors such as police and judicial officers, including dual arrests, coercion of

survivors to participate in prosecution, 'failure to protect' children charges and 'aiding and abetting' domestic violence charges, 'can disempower, coerce and further victimise battered women and negatively impact on their experiences of the justice system'.

Researchers typically suggest that many of these concerns may be addressed by a change in the judicial approach to parties which may be brought about through judicial education. In some studies researchers have found that those who feel they have been taken seriously by legal actors including judges and lawyers are likely to be more satisfied with the outcome, regardless of what it is (Klein, 2009: 62; Richman, 2002: 340). Studies have also found that respectful and inclusive approaches may positively affect survivors' mental health (Herman, 2003: 162). While some of the concerns associated with legal systems abuse may be addressed in this way when legal proceedings are in process, a more intractable issue is in preventing the commencement and continuation of legal procedures by perpetrators that have, as their central aim, continued abuse of their victims (Stark, 2007: 400).

The ways in which perpetrators might use legal systems abuse to continue their abuse are perhaps surprising in their potential variety and the level of some perpetrators'

fanatical commitment to them. Drawing on her experience as a lawyer, Paxton (2003: 7) notes that litigants in domestic violence related litigation can be 'obsessively zealous' even giving up their jobs to devote themselves full-time to legal proceedings against a former partner. The potential for legal systems abuse may be exacerbated by Australia's constitutional arrangements. In Australia family law - decisions about property settlement and child contact - are governed by national legislation while child protection, civil protection orders and criminal offences are governed by a patchwork of state based statutes and courts. The result is that parties may be involved in multiple courts at both state and national level at the same time and, due to privacy concerns, there may be limited opportunity for information sharing between courts. In terms of which legal systems are targeted for misuse by perpetrators, a number of studies identify perpetrators' misuse of family law proceedings (Kaspiew et al, 2015; Przekop, 2011; Kaye et al, 2003). One report has noted the prevalence of vexatious litigants in family disputes referring to a client of Legal Aid who had attended court 60 times in one year, and had been involved in proceedings for 19 years (Parliament of Victoria, 2008). In a recent survey of family law practices and experiences in Australia, Kaspiew and colleagues' interviews with practitioners revealed that there continue to be significant concerns about abuse of family law processes (Kaspiew et al, 2015). For instance, a lawyer participating in their study commented: 'We are seeing the courts

being used increasingly for frivolous matters and it does to some extent seem that the courts are increasingly being used as a continuation of abuse for survivors of domestic and child abuse' (Kaspiew et al, 2015: [8.2.3]). In a recent UK study many women reported that their abusers used court processes to continue their abuse including repeated applications designed to deplete their ex-partner's financial resources and lengthy direct questioning of them in court (cross-examination) (Kelly et al, 2014: 115). In their interviews with 21 New Zealand women who were involved in custody disputes, Elizabeth et al (2012: 249, 252) argued that the state - through the family law custody system and its gender neutral approach - facilitates the abusive behaviour of perpetrators.

Other scholars have focussed attention on the abuse of protection order processes. In their research Parkinson and colleagues noted cases where respondents viewed the application for domestic violence orders as a tactic to gain advantage in family law proceedings. A particular concern they noted was that in some cases, applications for civil protection orders were used on legal advice for tactical purposes connected to a family law matter (Parkinson et al, 2011: 32). A number of researchers (eg. Wangmann, 2010; Douglas and Fitzgerald, 2013; Laing, 2010) and reports (ALRC, 2010: 291; VLRC, 2006: 279, 362), have identified and explored the use of reactive

applications for protection orders made by abusive partners in response to their (ex) partner's original application for protection ('cross-applications'), as a form of legal systems abuse. Such cross-applications impact significantly on women who are often required to pay for legal advice and take time at court to defend them (Laing, 2010). Wangmann (2010) found that survivors are sometimes intimidated and may revoke their own applications (sometimes resulting in mutual withdrawal) or consent to cross-orders. Other systems abuses that have been reported include multiple applications for variations of conditions and appeals of protection orders (VLRC, 2006: 363); adding the survivors' relatives as parties to the litigation; making spurious complaints against lawyers and judges; constantly firing lawyers and hiring new ones to extend the litigation (Miller and Smolter, 2011; Nielson, 2015: [6.4.1]) and filing multiple spurious applications in multiple courts (Family Court of Australia and Federal Circuit Court of Australia, 2013: 16).

The experience of these procedures for survivors may be improved with enhanced judicial communication skills that demonstrate respect for the survivor but the procedures themselves cause emotional stress and trauma for survivors and decrease their space for action (Kelly, 2011; Kelly and Westmarland, 2015: 120). In most cases survivors must defend such actions requiring them to attend legal appointments and

court mentions and hearings, prepare responsive materials, engage and often pay for legal advice and representation, take time off work, arrange child care and so on. In the context of family law Neilson (2015: 245) notes that litigation tactics 'not only force the targeted [parent] into continuing contact with the domestic violator, it also depletes resources, increases stress, and interferes with recovery' from domestic abuse. Her comments apply equally to legal systems abuse in whatever system it takes place.

Using law and leaving violence study

Methodology

The perspectives of survivors continue to be critically important to informing appropriate responses to domestic abuse (Kelly and Westmarland, 2015: 117; Wies and Haldane, 2011: 2). In order to understand how the law works we need to know how it is experienced by those who engage with it (Lewis et al, 2000: 123). In this section I draw on interviews conducted as part of a longitudinal qualitative study being undertaken with 65 women in Brisbane, Australia who have experienced domestic abuse and engaged with the legal system. The women were initially approached by their domestic violence support workers or lawyers from a range of organisations in Brisbane, Australia who discussed the proposed study with them. At the time of

recruitment, the women were all over 18 years old, had in the past six months experienced a violent relationship with an intimate partner and engaged with the legal system in some way to respond to the violence. Support workers or lawyers arranged interviews if the woman was interested in participating. A narrative interviewing style was used to encourage the participants to tell their stories and describe their experiences in detail at their own pace and as accurately as possible (Flick, 2007; Powell and Fisher et al, 2005). Where possible women provided copies of their court orders and police documents. Interviews were generally around 90 minutes in length for the first interview and 40 minutes for the second interview and were recorded and transcribed with the participants' consent.³ In some cases a support worker stayed with the interviewee throughout the course of the interview or 'checked in' with her during the interview. In a number of interviews further legal issues were identified and appropriate referrals were made in consultation with the woman and her support worker. The interviews were analysed thematically. Pseudonyms are used throughout this article and some details have been left out to protect the anonymity of the interviewees. This article draws material from the first and second interviews of 30 of the women in the study who reported that their ex-partner had used litigation as a form of abuse post-separation and provided examples.

Litigation as a tool and tactic of abuse: Women's voices

Thirty of the women interviewed for this study clearly identified that litigation was being used by their ex-partner as a tool or tactic for the purpose of continuing the abuse post-separation. For example, Alex explained:

He's using the law as a tool to abuse me. How do you get out of that, because you can't just not turn up - I'm not at the stage where I can't just not turn up, because we haven't had final orders yet.

Many of the interviewees were sceptical about the notion of justice being delivered given their partners abuse of the legal system. For example, Bianca commented that her abusive partner's engagement with the law is 'tactical' and as a self-represented litigant she felt she was 'at a real disadvantage.' Faith, who was involved in a property settlement in the family court, was frustrated that her ex-partner constantly lied in court documents in order to bring applications before the court. She reported that her lawyer told her 'you do realise that at the end of the day, it's whoever is the better actor...' Occasionally the survivors could identify positive outcomes from their ex-partners' abusive use of litigation. Alex's partner Gordon was a serial litigator against her in a number of courts concurrently, she reported on an occasion when Gordon was charged with several counts of breaching a protection order:

His purpose is to keep me engaged by going to court. In fact, he actually has said it ... in two separate court appearances. [For example] he has said 'I don't want those two breaches to be heard together because the more I get her into court the better it is for me'... There was a gasp ... it's the only way he has access to me.

In Alex's example separate trials were refused and Gordon was found guilty of the breach offences. While this was an outcome Alex experienced as a victory, she had to go through an extra hearing on the question of separate trials before returning to court to finalise the matter. This caused increased cost, stress and effort for her.

Adjournments. Some survivors reported that the perpetrator abused the legal system at every step of the process. To begin with, many survivors reported that their abusive partner had requested numerous adjournments in relation to their applications for protection orders and that these adjournments were usually granted. Often an adjournment was granted because the perpetrator had evaded service so final orders could not be made. Jaime explained that she had turned up to court several times only for the matter to be adjourned at the last minute. She explained: 'Police said yes we can't find him because he didn't answer on the phone. They have to serve him personal and put signature. He hides. He said he is not at work.' Another common experience was that an adjournment was requested by the perpetrator so that he

could obtain legal advice. Angelina explained: 'He'll say "I want an adjournment. I've got to get a solicitor. Oh sorry, I didn't get a solicitor this week, can I have another [hearing] in another six months"'. When asked how many times she had gone to court in relation to her domestic violence protection order application before having a hearing, Mary responded: 'Oh wow, every six weeks for 12 months... He was contesting it... Oh, then he had to go away and do an affidavit and then - I don't know what held it up so long. It was definitely from his side and I got to the point where I was like, really?' Similarly, Felicity said '[h]e's been adjourning his breach [of protection order] charges for a year.'

Civil protection orders. Similar to other studies (Douglas and Fitzgerald, 2013; Wangmann, 2010), participants identified another common tactic of legal systems abuse was for perpetrators to make counter allegations and applications for protection orders. Several women reported that their abusive partners reactively applied for protection orders once police had served them with the survivor's application. Some women reported that police often appeared to be well aware of the spurious nature of the cross-application. For example, Hilary explained:

Minutes before we went in the door [of the court], I got served. I was like, oh my god! This policewoman - she was so nice, she was just like, look, I have to do this ... I had to go into the courtroom and they said, well [Ms X] has just been served with this document, she needs to get legal representation. So then it was all adjourned.

Celine commented:

They served me with his counter DV application. The cops stood out the front of my house and said... 'so you knew this was coming'. I said, 'yeah, I've got an application in and this is just his response'. The copper looked at it, read what I had said ... He said, 'this is a joke'. I said, 'yes, I know, but what can I do?' They just said, 'just look after yourself. Keep the doors locked tight and if you need us, ring'.

In this context survivors often claimed that their partners' applications made statements that were untrue. For instance, Charlotte reported: 'Yeah, we both got temporary orders, because he's got me attempting to murder him with a knife. That was the basis of his application, again, all nonsense. So then we both had temporary cross orders in place.' Charlotte then had to contest the perpetrator's cross

application. While ultimately a final protection order was made in favour of the Charlotte, she explained:

‘Tit for tat. It was clearly tit for tat and the magistrate actually used those words when he handed down my protection order... We went after him for costs but we weren't successful. I've got the transcript so it's all there... so there were two days of the trial.’

Jacinta, complained that it was too easy to apply for a protection order: ‘in my mind, if when they get an application you have to bring in some proof that you actually need it. Not just sign here saying that what you said is true, because... his application was full of lies.’ Even when a cross application initiated by the perpetrator is ultimately unsuccessful, women will have already experienced significant extra disruption in their lives as a result, including spending time and often money on obtaining additional legal support and assistance and on attending added court dates. For some women spurious applications had significant impacts on their work. For example, Felicity explained that because of her role at work she was stood down while there was an application against her:

I then had to get [my case] moved from [X Court] to the city [where his application was to be heard]. I had to pay a solicitor to do all of that for me. Then

when it went to mention [the perpetrator] said “no I want to contest this”... I had to pay \$10,000 to... Solicitors to represent me... I'm on forced leave... The magistrate at the time said “mate you're not getting a temporary order. I'm giving her one and we'll put it down for a hearing.” We wrote to [the perpetrator] saying this is ridiculous, you need to withdraw. No, wouldn't withdraw. I had to pay for a barrister and a solicitor to go to hearing. Went to hearing and on the day of it, he withdrew his matter and mine went forward. It was a one-day hearing and the Magistrate granted [a protection order to me]...

In many cases applications for protection orders are initiated by police. This ensures that at court the police prosecutor runs the case on behalf of the police. While this means that there is no need for the applicant to arrange for legal representation there may be other concerns that arise. For example, Margaret explained that she went to court in this context despite the fact that it was a police application because in her experience prosecutors often had little knowledge or understanding about the history of the case and therefore may not see the counter allegations as part of on-going abuse. She said:

... we're working with a very archaic system and in my case because the police took the action against my ex-partner, I am merely a witness to the court proceedings. They have a public prosecutor and that public prosecutor changes

every time I go into court. They don't know me from a bar of soap. So when my ex-partner's solicitor is making all these allegations over and above what happened on the incident, the public prosecutor has no answer because he doesn't know me.

Even when a protection order is made, that is far from the end of the litigation for many survivors. A number of the survivors reported that in cases where cross-orders were made by the court women had been charged with offences of breaching protection orders. For example, Lyn noted: 'he's lodged two contraventions of orders against me, which I've been found not guilty of'. While the outcomes for Lyn were positive, she still had to go through the trauma and practical difficulties of a trial to be found not guilty.

Calling irrelevant witnesses. Several women reported that many of their friends and relatives had been subpoenaed by the perpetrator to give evidence in the perpetrator's case, even though their testimony would not ultimately assist the perpetrator's claims. Where this occurred, interviewees saw this as a form of continued harassment by the perpetrator and this behaviour often lead to stress and concern for the survivor, her friends and family. Many relatives and friends felt compelled to take time off work to come to court. Alex reported she had an older aunt

who thought she had best attend the court as she was worried about the ramifications if she didn't: 'he was allowed once again to subpoena my friends and some of my family ... the police advised ... it'd be very unlikely that they would get arrested for not appearing'. On many occasions perpetrators had adjourned matters numerous times and set matters down for trial only to consent to orders on the day of the hearing. Faith explained that she was not legally represented and she applied for a protection order which her legally represented abusive partner had listed as a contested hearing. She reported that on the day of the hearing he consented to the order. Faith stated she:

... had seven witnesses, I'm sitting outside with an affidavit, we had this huge thing that I had to get in on time. He put nothing in, nothing and so when we got to trial he said, well I've got nothing... So anyway he was able at that point to still consent [to an order] without admission [to abuse]. So even though... I had seven witnesses... I wanted it proven... we just kept getting adjourned so many times and then finally went to hearing... he took me right through, right through until the end...

Family law. Many researchers have identified the abuse of the legal system in the context of family law (Elizabeth et al, 2012; Kaspiew et al, 2015; Kelly et al, 2014; Laing,

2016) and many of the survivors interviewed in this study also identified excessive litigation and seemingly endless returns to court as a result of adjournments, applications for variations of conditions and appeals of orders in the family court. Some of the interviewees also identified problems with mediation. Mediation is a prerequisite in most family court disputes involving children in Australia although special processes for mediation are usually applied where domestic violence is a concern (Field, 2010). Some of the women interviewed explained how mediation presented yet another opportunity for abuse. Felicity explained:

All of these times I had to take [time] off university or work to attend... five times I had to take off to go out there and meet with them and put all these proposals in place... mediation usually lasted 15 minutes. During the [last] mediation... [the mediator] said 'I'll write a certificate'... that mediation had failed... but I had attended on five separate occasions.

Helen emphasized that her abusive ex-partner had deliberately extended the time in the mediation:

In the end... my lawyer said, right pens down. You guys draft something. We're not wasting any more money here... we were there for 10 hours... [the mediator] told me seven per cent of people go to court, but they should have known that I was going to be in that seven per cent... I spent [over \$10,000] on that day alone

at mediation. [The solicitors knew the outcome] was unjust and they were like well, they would have fought it but they knew that the reality of the system was I would be coming out poorer.

Helen also expressed concern that her ex-partner was represented by a lawyer and that his lawyer seemed willing to extend the mediation, and thus increase costs, despite the fact that her ex-partner was not willing to negotiate.

Further examples of legal systems abuse. Survivors in this study reported an apparently endless variety of forms of abuse associated with legal engagement. To illustrate, Ingrid explained how she shared a lease for the house she had lived in with the perpetrator. She had moved into a women's refuge with their child and, despite her requests, her ex-partner refused to release her from the lease and insisted that she continue to pay rent even though others had moved in with him. She applied to a small claims tribunal to have her name removed from the lease, when he failed to attend the hearing her application was allowed. He was subsequently able to have her name reinstated on the lease on the basis that he had the wrong time for the hearing. This led to recommencement of the litigation. In the end the litigation lasted longer than the lease. While the lease ran out after a year, during that period it was impossible for Ingrid to rent alternative accommodation as her profile identified her as being a

current lessor in arrears. Alex reported that she was sued for defamation by her ex-partner for a significant sum. She arranged legal representation to defend the action, which required two court appearances. While the suit ultimately failed, Alex reported that the experience was extremely stressful and time consuming. Her lawyer successfully sought costs but they were never paid. Alex does not plan to pursue the costs because it would require her on-going engagement with her abuser through legal processes. Margaret, in her 60s when she started her relationship with her abuser, reports 'he has also taken out a caveat on my home despite owing me thousands of dollars when he reneged on paying the mortgage... this ongoing legal battle is destroying me.' Alex reported that although she and her ex-partner were going through a property settlement in the family court, he had also started an action in a small claims tribunal for the 'return' of money. The matter was thrown out but the application required Alex to arrange a lawyer, prepare material and attend at the tribunal twice.

Strategies for change: Discussion

Many of the women who provided examples of legal systems abuse in this study were able to successfully defend cases brought against them, however this required them to contribute significant personal and material resources to a claim they, at least, knew

was spurious from the outset. For many it was difficult to understand how the legal system could be abused in this way.

Available legal responses to systems abuse. A number of responsive legal strategies already exist and can, at least in theory, be used to minimise the impact and extent of legal systems abuse. However, many existing options have significant limitations in the context of domestic abuse. For example, women may seek to have cases thrown out as an abuse of process because of double jeopardy⁴ or on the basis that the action is malicious and they may respond with their own legal actions including counter civil suits. In the case of *Baron v Walsh* [2014] WASCA 124 the parties had separated after a six-month relationship. William Walsh subsequently instituted numerous court proceedings and various complaints to official bodies about Alison Baron. In the specific case Walsh unsuccessfully appealed against the grant of a protection order. In this context, the court recognised that the use of 'legally available procedures' if used or threatened with an improper purpose could amount to a malicious prosecution or an abuse of process or a criminal offence (at [63]). A range of criminal complaints might exist in the context of legal systems abuse. For example, it may be possible for police to charge harassment, threats or stalking type offences and criminal complaints of false evidence, allegation or denial may result in charges of criminal offences

including perjury, false swearing or false testimony. However, in practice survivors are unlikely to take discrete legal actions against their abusive partners in order to respond to legal systems abuse, in part because they will usually require the survivor to have some form of continued contact with the abuser, albeit through court processes. While this is exactly what may be desired by many abusers it is equally likely to be strongly resisted by survivors. Many of the available legal options will require the survivor to go through the trauma of engaging with police, giving evidence against the perpetrator and to navigate complex litigation, often taking significant time and requiring legal advice and support which is regularly unavailable and unaffordable. While costs awards might be made in favour of the survivor of abuse these will often never be paid unless the victim is prepared to embark on still further proceedings to recover them.

Restraining the perpetrator from future litigation. In some cases, survivors might seek to restrain the perpetrator from future litigation, sometimes leading to litigants being identified as ‘frivolous’ or ‘vexatious’, however this outcome is extremely difficult to achieve (Freckleton, 2009: 723). Very few people are ultimately excluded from litigation and it is likely that most abusers in the context of domestic abuse / legal systems abuse would not reach the required threshold for exclusion. Although there have been attempts to modernise the approach to excluding people from litigation,

including introducing a graded series of litigation restrictions in some places (Freckleton, 2009: 727), this approach is unlikely to be particularly helpful for survivors of abuse who often report that legal systems abuse is perpetrated across a range of systems at different levels by perpetrators. Notably also, any relaxation of the procedures associated with preventing a person from litigation could have unintended consequences for abused women. Many survivors of abuse need to make frequent applications to courts to change conditions of orders in response to the changing behaviours of the perpetrator and to enforce parenting orders and maintain their safety (AIJA, 2016).

Justice personnel and behaviour change. Legal systems abuse is likely to have less emotional impact and be more tolerable for survivors where police, lawyers and judicial officers take an empathetic approach to the survivor and ensure they do not dismiss or undervalue the impact of domestic abuse and through reassuring survivors that it is not her fault (Ptacek, 1999). However, while improving the experience of court processes for survivors is important, ideally spurious applications should be blocked from the outset, not only to avoid secondary victimisation to the survivor but also to ensure that the legal system is not seen by the public to be facilitating abuse (Elizabeth et al, 2012: 255).

Recognising coercive control. The developing understanding of domestic abuse as coercive and controlling behaviour may allow for cautious optimism about how the legal system responds in the context of domestic abuse (Lewis et al, 2001: 106). Coercive control has been identified as underpinning domestic violence for some time (Pence and Paymar, 1993; Johnson, 1995). However, in recent times many jurisdictions, including Australia, England and Wales (UK), Canada and New Zealand, are increasingly accepting that, at its core, domestic and family violence is a gendered phenomenon encompassing a complex and continuing pattern of coercive and controlling behaviour that deprives the victim of her liberty and her autonomy (Stark, 2007). This understanding is now reflected in a number of state based civil domestic violence order statutes in Australia and in Australia's *Family Law Act*.⁵ The criminal offence of coercive and controlling behaviour, introduced in 2015, and UK government definitions of domestic and family violence have referenced coercive control since 2013.⁶ In Canada (Department of Justice, 2015) and New Zealand (Ministry of Justice, 2015: 6) governments have also begun to refer to coercive and controlling behaviour when discussing domestic violence. Legal recognition of domestic violence as coercive control may encourage justice system actors to look for, and identify, coercive controlling behaviour and this may in turn help to reduce the incidence of legal

systems abuse. However, history tells us that we should be cautious in expecting that legislative change will guarantee cultural change. For example, while Eastal and Carline have argued for various legislative reforms to laws around sexual and domestic violence they have also recognised the limitations and unintended interpretations that sometimes follow from law reform (2014).

Despite this caveat, there are several reasons why the greater recognition of domestic violence as a complex and ongoing pattern of abuse that is coercive and controlling of the survivor may help to deal with legal systems abuse. It is likely that justice system actors including judicial officers, prosecutors and lawyers will make more appropriate decisions when they understand that domestic violence is rarely a single incident rather that it is manifested in a pattern of coercive control. An understanding of domestic abuse as coercive control also makes it easier to understand why domestic abuse often continues post-separation. Post-separation litigation can be seen as part of the on-going effort to maintain control over the survivor (Miller and Smolter, 2011: 647). Studies have demonstrated that a failure to understand domestic violence as coercive control may contribute to inadequate risk assessments and the legal system operating, in effect, as a secondary abuser (ALRC, 2010: 58; Klein, 2009: 62). Where justice system actors understand the dynamics of coercive control, they will not begin their considerations and deliberations with an assumption that a legal application is, in

itself, a neutral behaviour and so they may make more appropriate decisions in response to adjournment applications, in dealing with cross-applications for protection orders and in making them, in rejecting subpoenas and disallowing matters to proceed (ALRC, 2010: 291; Neilson, 2004: 427). Hopefully, when decision makers understand domestic abuse as coercive control they will more readily look for evidence of the power and control dynamics of the relationship and take more care in their scrutiny of past conduct of the parties and the allegations of abuse couples may make against each other. Such consideration should lead to more accurate assessment of how the legal system can appropriately respond (Neilson, 2004: 425).

A proper understanding of the coercive and controlling dynamics of a relationship where there is domestic abuse takes time and includes early preparation and attention to background material such as the content of applications, affidavits and other statements (Mack and Roach Anleu, 2004: 34). In many cases the time allocated to domestic abuse cases will be a question of state policy but providing insufficient time for case preparation is short-sighted and may ultimately contribute to delays, inappropriate decision-making and endanger the very people the legal system is supposed to protect. Based on his review of multiple studies Klein (2009: 62) concluded that judicial attention to materials before trial will help them address the

risk to survivors posed by alleged abusers and will result in quicker case resolution and decrease re-abuse by defendants.

Lawyers and ethics. In some of the interviews from the *Using law and leaving violence study*, women identified that the perpetrators' lawyers were complicit in legal systems abuse. The Australian legal system, along with other common law based systems, is an adversarial system meaning that advocates represent their own, or their client's, interest before an impartial decision-maker. Notwithstanding this, legal ethics operates in the background of lawyers' decision-making and advice. While they have a duty to the party they represent their primary duty is to the administration of justice. Drawing on the observations made by Elizabeth et al (2012: 252), the failure of legal actors to censure and regulate legal systems abuse 'grants the offending party carte blanche—they are free to continue to engage in dominating and coercive tactics in the knowledge that they are unlikely to be sanctioned by the state'. Similarly, in their analysis of systems abuse Miller and Smolter (2011: 646) conclude that legal advocates need to document and address this form of abuse when it is experienced by their clients; they also recommend that legal systems abuse be added to training materials to assist in acknowledging the issue and encouraging lawyers to use it as evidence of continued abuse.

Co-ordination and information sharing. The women in this and other studies have identified how the lack of co-ordination within the legal system facilitates coercive control (Laing, 2010: 37). In many contexts decision-makers have the power to find out and identify whether other relevant legal actions are on foot. This should be done if possible as part of case preparation before requiring parties to come to court, subpoena witnesses, arrange legal representation, child care and so on. In some cases parties can be required to disclose information to the court⁷ and decision-makers should be proactive in ensuring parties disclose relevant information to courts by asking questions of the parties and their representatives to minimise court attendances and the overlap of processes. In some cases, information will clarify why an application or a matter should be brought on early, adjourned or sometimes dismissed and this may reduce the need for parties to attend courts and respond to allegations. In understanding domestic abuse as coercive control, decision-makers will be able to better determine when legal processes are spuriously being justified as a legal right while being primarily used for, and experienced by survivors, as further abuse.

Conclusion

Equality of access to justice and fair hearing must be protected, as any weakening of these protections may have negative implications for abused women who use legal processes to ensure their safety and to progress their rights. However, when domestic abuse is understood as coercive control it may be easier to determine when the legal system is being used as a method to perpetuate abuse and this understanding may strengthen the capacity of legal actors, and therefore of legal processes, to contribute to ending, rather than facilitating, the continuation of coercive and controlling behaviours. In his closing comments to his key text on coercive control Stark (2007: 403) identifies this hopeful challenge for law:

For the millions of women who are...coercively controlled by their partners, the law is just when it becomes part of [women's] safety zone, when they experience a synchronicity of their struggle to be free of their partner and their larger struggle to realize their capacity as women, when being *in* the law, calling the police or appearing before a judge ... becomes for them a moment of autonomy, in which their voice is not only heard but magnified and when their personal power...is recognised as a political asset.

The survivors' comments identified in this article have documented how the legal system continues to be harnessed by perpetrators as a tool to extend coercive control beyond separation. To date, the definition of domestic and family violence as coercive

control is a relatively new to legislation. As the understanding of domestic violence as a pattern of coercive control becomes more deeply embedded in the legislative tools, training and practices of justice system actors there should be a greater recognition of legal systems abuse and lawyers, prosecutors and judges will be better equipped to make more proactive and appropriate decisions to ensure that the legal system is experienced as a tool to improve safety rather than perpetuate abuse.

Biography:

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Notes

¹ For further information about this study, including more demographic information about the participants, see the study website at: <http://www.law.uq.edu.au/using-law-and-leaving-domestic-violence>.

² I have referred to women who have experienced abuse and engaged with the legal system as survivors to recognise that they have taken action against their abuser (Lewis et al, 2001: 106).

³ The study was approved by the University of Queensland, Human Ethics Committee.

⁴ For example they might argue that the matter has already been finalised through previous litigation.

⁵ See *Family Law Act 1975* (Cth) s 4AB; *Family Violence Protection Act 2008* (Vic) s. 5; *Domestic and Family Violence Protection Act 2012* (Qld) s.8

⁶ See *Serious Crime Act 2015* (UK) c 9, s 76(2). See also Home Office; 2012.

⁷ Note that legislation has recently been introduced in Queensland requiring disclosure of cross applications, see clause 5, *Domestic and Family Violence Protection and Another Act Amendment Act 2015* (Qld).