

# ALRC – Review of the Family Law System

## Submission by Richard Chisholm

May 2018

<b>1. Introduction</b> .....	2
<b>2. Part VII generally</b> .....	2
<b>3. Recovery orders and parenting orders</b> .....	2
<b>4. Parentage provisions</b> .....	3
<b>5. Cost and accessibility</b> .....	3
<b>6. Mandatory mediation and s 60I</b> .....	4
<b>7. Recommendations in previous reports</b> .....	7
<b>8. Compliance with parenting orders</b> .....	9
Introduction .....	9
Well-known problems in enforcement .....	10
The underlying challenge of facilitating co-operative parenting.....	10
Post-parenting situations may be easy, difficult or impossible .....	11
Re-thinking the law on compliance with parenting orders .....	11
Proposed re-draft of Part VII Div 13A.....	15
Commentary on draft .....	24
History of Div 13A: the main developments .....	33

## **1. INTRODUCTION**

This submission sets out some comments on particular topics that are raised by the Issues Paper. It starts with topics that are briefly treated, often because they are covered in previous publications, which are cited. The last of these topics is mandatory mediation, which includes a proposed re-draft of s 60I.

By the far the largest part of this submission relates to the last topic, compliance with parenting orders. This is an ongoing project, and in essence the submission is based on the limited work I have done to date.

There are two main aspects. The first relates to the existing law, contained in Division 13A of Part VII. In my view this has become hopelessly complex and confusing and needs wholesale review. Accordingly, the submission includes a proposed re-draft of the subdivision, with accompanying commentary, and a paper on the legislative history (not quite finalised).

The second aspect explores whether recent work on what are called ‘behavioural insights’ might suggest new ways in which the family law system could better encourage compliance with parenting orders. At the time of writing this submission, I am working on this topic, which I consider fascinating and important.

## **2. PART VII GENERALLY**

Some years ago I published a proposed re-draft of the key provisions of Part VII.<sup>1</sup> Broadly I recommend that proposal, although of course it may need improvement and I would be happy to help with that task.

## **3. RECOVERY ORDERS AND PARENTING ORDERS**

I will provide with this submission a case note accepted for publication by the AJFL. For the reasons there set out, I recommend the following addition to the definition of ‘parenting order’:

---

<sup>1</sup> “Rewriting Part VII of the Family Law Act: A modest proposal” (2015) 24/3 *Australian Family Lawyer* (available at [https://www.familylawsection.org.au/images/documents/australian-family-lawyer/AFL\\_Vol24\\_3\\_ModestProposal.pdf](https://www.familylawsection.org.au/images/documents/australian-family-lawyer/AFL_Vol24_3_ModestProposal.pdf)).

*To avoid doubt, the following orders are not parenting orders: orders or declarations provided for in Division 4, ss 65L, 65LA, Divisions 7, 8, 9 and 10, and Division 12 Subdivision E.*

#### **4. PARENTAGE PROVISIONS**

The provisions relating to parentage of a child in particular situations such as surrogacy and artificial conception (notably ss 60H and 69 HG) are complex and unsatisfactory. They clearly require amendment. One problem is that they specifically address some situations and leave others in doubt. It would be helpful if under the amendments the Act specifically included people as ‘parents’ under the Act, rather than saying that a child ‘is the child of’ a person.

In some situations, serious policy questions arise as to parentage. There is an extensive and valuable literature on this topic. Perhaps the Commission will not be in a position to make a comfortable recommendation. In this event, I suggest it would be helpful for the Commission to recommend an appropriate form for legislative amendment for each possible answer to the policy issues. That way, even if issues remain to be decided, the law can be clear once Parliament has decided what outcome it wants.

#### **5. COST AND ACCESSIBILITY**

A great challenge is to make the system more accessible. At present the cost of proceedings under the Act is sometimes prohibitive, and surely prevents many people from obtaining justice. I don’t have any easy answers, but I urge the Commission to treat this as a major issue.

One issue is the costs of private legal advice and representation. It may be that some lawyers’ fees are unreasonably high, and that the system of costs regulation needs attention. Another issue may be that the legal work is extensive and complicated in part because of the complexities of the law and the various legal events involved in litigation. If so, anything that could be done to simplify matters would help.

I believe we should seriously consider more drastic measures that would provide a measure of justice in situations where otherwise there might be none at all. I have in mind the possibility of simpler substantive law for smaller financial cases, perhaps

including presumptions. If the law about financial agreements were satisfactory – another big issue – it would be more reasonable to subject people to a simpler system, which they could avoid by making a financial agreement. Another method might be a more vigorous approach to costs orders, perhaps including presumptions and default rules.

Children’s case present special difficulties. Simplifying the legislation would help. We should examine the current experiment with parenting management cases, although a shadow of unconstitutionality hangs over that. In evaluating the that scheme, we should keep in mind that sometimes such measures are applied in cases that would not otherwise have gone to litigation, which means they don’t relieve the burden on courts.

There might be merit in providing for time-limited proceedings in some cases, perhaps where parties consent; or perhaps with vigorous use of costs orders where cases go over the allotted time.

## **6. MANDATORY MEDIATION AND S 60I**

I would urge reconsideration of the s 60I mechanism. I believe that the present law is confusing and wastes people’s time.<sup>2</sup> It seems likely that the various categories of certificates are not much use to courts in many cases, because it is not clear how they would come into evidence. It might be procedurally unfair for the court to accept a certificate as evidence on a contested matter (for example that a party did not make a reasonable attempt to resolve the issues), since the person making the statement is not a witness and would not ordinarily be available for cross-examination. I believe most judges do not read them, perhaps for this reason. However, deciding what category of certificate to issue does cause work and worry for mediators.

---

<sup>2</sup> There is some research evidence on the use of s 60I: Bruce Smyth, Wendy Bonython, Bryan Rodgers, Elizabeth Keogh, Richard Chisholm, Ross Butler, Robyn Parker, Matt Stubbs, Jeromey Temple, Shelby Higgs Howarth, Catherine Caruana & Maria Vnuk, *Certifying mediation: A study of section 60I certificates: Summary Report commissioned by Interrelate and co-funded by the Australian Government Attorney-General’s Department* (ANU Centre for Social Research & Methods, CSRM Working Paper No 2/2017).

I urge the Commission to consider a simpler alternative. The key, I believe is, to abandon the idea that the mediators should provide a certificate that informs the court about the case. Some time ago I attempted to formulate a simpler way of providing for mandatory mediation, and while I have not yet exposed this to colleagues for discussion, I draw it to the Commission's attention.

*SUBDIVISION XXX: ATTENDING FAMILY DISPUTE RESOLUTION BEFORE APPLYING FOR A PART VII ORDER*

**Object of Subdivision**

Section 1. The object of this Division is to promote participation in family dispute resolution by providing that except in certain circumstances a person seeking an order under Part VII ('the applicant') must file a notice to the effect that the applicant has participated in family dispute resolution, or has been unable to do so.

**Applicant for order under Part VII must file notice about family dispute resolution**

Section 2. (1) Except in the circumstances described in section 3, a court must not hear an application for an order under Part VII unless the applicant files in the court a notice stating either

- (a) that the applicant has attended family dispute resolution with a family dispute resolution practitioner in relation to the issue or issues that the order would deal with and has made a genuine effort to resolve the issue or issues; or
- (b) that the applicant has been unable to participate in such family dispute resolution because of circumstances beyond the control of the applicant;

(2) A failure to comply with section 2 does not affect the validity of the proceedings or any order made in the proceedings.

**Exceptions to the obligation under s 2 to file a notice about family dispute resolution**

Section 3. An applicant has no obligation to file a notice under s 2 in any of the following circumstances:

### *Consent order*

The applicant is applying for the order to be made with the consent of all the parties to the proceedings.

### *Responding to another application*

The applicant is applying for the order in response to an application by another party to the proceedings.

### *Child abuse*

The court is satisfied that there are reasonable grounds to believe that there has been abuse of the child by one of the parties to the proceedings, or there would be a risk of the child being abused if there were to be a delay in applying for the order.

### *Family violence*

The court is satisfied that there are reasonable grounds to believe that there has been family violence by one of the parties to the proceedings, or there is a risk of family violence by one of the parties to the proceedings.

### *Urgency*

The application is made in circumstances of urgency.

### *Certain contravention applications*

All the following conditions are satisfied:

- (i) the application is made in relation to a particular issue;
- (ii) a Part VII order has been made in relation to that issue within the period of 12 months before the application is made;
- (iii) the application is made in relation to a contravention of the order by a person;
- (iv) the court is satisfied that there are reasonable grounds to believe that the person has behaved in a way that shows a serious disregard for his or her obligations under the order.

### *Incapacity*

One or more of the parties to the proceedings is unable to participate effectively in family dispute resolution (whether because of an incapacity

of some kind, physical remoteness from dispute resolution services or for some other reason).

*Other circumstances specified in the regulations*

Other circumstances specified in the regulations are satisfied.

**Court to consider making certain orders where applicant fails to comply with section 2**

Section 4. If none of the exceptions in section 3 applies, but the applicant applies for a Part VII order without complying with section 2, the court may make such order as it sees fit, and must consider making one or more of the following orders:

- (a) an order that the person attend such family dispute resolution before the court deals with the application;
- (b) an order that the application not be proceeded with until the applicant files a notice in accordance with s 2;
- (c) if proceedings are delayed or costs increased due to a failure of an applicant to comply with the obligation file a notice under s 2, a costs order against the applicant.

## **7. RECOMMENDATIONS IN PREVIOUS REPORTS**

Unsurprisingly, and again subject to any need for reconsideration and improvement, I propose the various reforms set out in the following reports:

*The sharing of experts' reports between the child protection system and the family law system* (Commonwealth Attorney-General's Department, March 2014). Accessible at:

<http://www.ag.gov.au/FamiliesAndMarriage/Families/Pages/Familylawandchildprotectioncollaboration.aspx>

*Information-Sharing in Family Law & Child Protection: Enhancing Collaboration* (Commonwealth Attorney-General's Department, March 2013). Accessible at:

<http://www.ag.gov.au/FamiliesAndMarriage/Families/Pages/Familylawandchildprotectioncollaboration.aspx>

*Family Courts Violence Review* (Commonwealth Attorney-General's Department, 27 November 2009). Accessible at:

<http://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Pages/Researchonsharedcareparentingandfamilyviolence.aspx>



## 8. COMPLIANCE WITH PARENTING ORDERS

### Introduction

Although this topic is not much discussed in the Issues Paper, I note that the Commission's Terms of Reference refer to "the need to ensure compliance with family law orders..." and that the Commission is asked to consider reforms in relation to "any other matter related to these Terms of Reference". The issues of compliance with parenting orders is of great importance, especially as many applications are brought and/or defended by unrepresented litigants. I believe it is a frequent complaint that the family law courts do not enforce their orders. Of course this is true in the sense that in the absence of a public body having responsibility for compliance with parenting orders, the courts cannot do anything about noncompliance unless the other party brings fresh proceedings relating to the contravention. But the complaint probably also reflects people's frustration with the family law system in general, and if so it must contribute to a more general disenchantment with the idea that the family law system can provide attainable justice. Addressing this topic is acutely difficult, but in my view it should be a significant part of the ALRC's review.

After some general observations, the following discussion raises the question whether the family law system could benefit from insights provided by a great deal of recent research on human decision-making, which have already influenced some other areas of law and public administration, sometimes under the name of "nudge" theory. This discussion is tentative and incomplete, since my work in the area is at an early stage. However I hope it is sufficient to persuade the Commission that the topic is worth further consideration.

This discussion is followed by a much more familiar kind of legal analysis, namely a critique of the existing legislation and a proposed re-draft, with supporting explanation, and a historical background.<sup>3</sup> Part VII div 13A as presently drafted is needlessly complex, difficult to understand, and impossible to defend. Whether or

---

<sup>3</sup> The historical discussion is not as complete or as polished as I would prefer, but I hope it will be of some use to the Commission.

not the suggested re-draft finds favour, a complete revision of this part of the Act is essential.

### **Well-known problems in enforcement**

While it is inevitable and right that there should be penalties for breach of parenting orders, there are well-known problems in making them effective. The problems often referred to in the literature are, notably:

- Because there is no enforcement agency (in contrast with the position in relation to child support) it is necessary for the other party to commence contravention proceedings in relation to each alleged breach of the orders.
- The parties are often highly emotional about the issues, as where the contact<sup>4</sup> parent believes that the residence parent wishes to alienate the child from him or her, and as where the residence parent feels that the contact parent lacks parenting ability or has motives other than promoting the child's best interests. Both parents may feel that the other has made allegations that are hurtful and unjustified, and, often, malicious.
- Many parents are unable to present their cases adequately (especially given the technical requirements of the law) and may not be able to afford private lawyers or obtain legal aid.
- When the court comes to consider penalties, it will often face the problem that the penalty will worsen the child's situation (most obviously, sending the residence parent to prison, but also fines or other measures).

### **The underlying challenge of facilitating co-operative parenting**

While these and other problems are well known, another problem is rarely mentioned. This problem is that children may not benefit from *inflexible* adherence to parenting schedules. Even if the orders are appropriate when made, family circumstances soon change, and it will be in the children's interests for sensible adjustments to be made. In other words, what children really need is *co-operative parenting*, responsive to the children's changing needs, under the general framework set by the orders. The imposition of penalties, however carefully crafted, seems unhelpful in achieving this objective. The existing legal provisions for post-order

---

<sup>4</sup> I use that word, and also 'residence parent' for convenience, although the present legislation does not.

counselling and for correcting parenting orders are valuable. But there might be other useful measures that could improve the situation, as indicated below.

### **Post-parenting situations may be easy, difficult or impossible**

No doubt many parents are able to work out satisfactory and child-centred arrangements. For them, compliance with orders will be the norm, and soon they will modify the arrangements to fit in with changing situations and the children's changing needs.

At the other extreme, there will no doubt always be cases in which ensuring compliance, let alone co-operative parenting, is virtually impossible. Examples are cases where one or both parties have mental illnesses, or substance dependence problems, that make it impossible for them to comply with the orders. Other examples include cases where a parent believes that the other parent poses a serious risk or threat to the child but is required by the orders to make the child available. I have no answer to such problems. While we should do what we can to protect children in these families, we should not do so in a way that leaves inadequate resources to families where the help might make a greater contribution to the welfare of children and families.

Between the ends of this spectrum will be cases whether there are problems with compliance, and/or with co-operative parenting, but with appropriate support, the families can achieve an acceptable level of compliance and adaptation. It is in these cases, I suggest, that it will be most beneficial if the post-order laws services and services can be improved.

### **Re-thinking the law on compliance with parenting orders**

In my submission the law on compliance could be improved by taking advantage of what is now known about how people make decisions. A great many new insights can be found in the work of scholars such as Daniel Kahnemann, research on brain imaging, and related developments.

The present law relies heavily on deterrence, and although there should be a place for it, recent research indicates that there are limits to the effectiveness of deterrence. A simple and classic experiment illustrates the point. Child care centres introduced fines for parents who were late in collecting their children late. What then

happened was that the rate of late collections *increased*.<sup>5</sup> This illustrates the underlying insight, that the traditional view of decision-making, that we weigh the losses against the gains – the idea that underlies deterrence – is not an adequate account of how people actually make decisions. In reality, our decisions are influenced by other things and by mental processes of which we are often unaware. Recent work on ‘nudge theory’ and ‘responsive regulation’ illustrates the possibility of improving the effectiveness of the system by using measures based on a more realistic understanding of how people actually make decisions.

An example of such research is what is sometimes called ‘anchoring’. Research suggests that people focus on vivid images. This is so even if the image is of something undesirable.

Existing approaches could be reconsidered in the light of this insight. For example, the family courts publish pamphlets emphasising the penalties that can be imposed for breach of orders. This, however, might focus the person’s mind on disobedience. The ‘anchoring’ heuristic suggests that it might be more productive if the court’s literature featured people *complying* with orders. This line of thought might suggest that it would be good to accompany orders by illustrations, perhaps videos, illustrating parents overcoming difficulties and managing to work out ways of complying with parenting orders or agreeing on child-focused adaptations to changing circumstances. The overall impact could be to treat compliance as a given, and help people achieve it.

Other areas could also be drawn upon. For example, scholars have identified strategies that some people use to enable them to feel comfortable about doing what is wrong: ‘moral disengagement’. There may be ways in which we could change the family law system so that it makes it more difficult for people to feel comfortable about breaching court orders.

The wording of parenting orders could be considered in this context. Many orders are worded in a way that does not appear to impose any legal duty on the contact parent. If a residence parent sees the order as creating obligations only on that parent, and giving the contact parent the option of seeing or not seeing the child, that

---

<sup>5</sup> Uri Gneezy and Aldo Rustichini, ‘A Fine is a Price’ (2000) 29 *J. Legal Stud.* 1.

resident parent might feel that the order is unfair, leading to the parent feeling that non-compliance might be a defensible response to an unfair order. I note that Justice Austin often makes parenting orders that use a formula such as this: “*Both parents shall take all reasonable measures to ensure that (the child spends specified time with each parent)*”. An order in those terms makes it clear that both parents have a responsibility to take measures to promote the child’s best interests. The more common wording, using the passive voice (“*The child shall live with.... and spend time with...*”) does not do this.<sup>6</sup>

The work of the NSW “nudge unit” (<https://bi.dpc.nsw.gov.au/>) appears to have dramatically improved compliance with legal requirements by such simple measures as improving the wording on certain documents, such as notices that a fine must be paid.<sup>7</sup> Such work may well suggest fruitful ideas for improvements in family law. It certainly reinforces the importance of having clear legislation and court orders.

The law about compliance with parenting orders should be considered together with issues about post-order support for families. Ideally, the legal framework should be support the work of service providers who seek to help the parties focus on finding reasonable accommodations and focusing on the interests of the children.

As indicated in the historical discussion, the development of this area of law has led to the law having these main components:

- Various penalties for non-compliance, all based on the idea of deterrence;
- Opportunities for the relevant parenting orders to be corrected or improved;
- Opportunities for the parties to receive counselling, or requirements that they do.

While these three components must remain, my present submission is that the Commission should explore ways in which the family law system – including the law,

---

<sup>6</sup> See also *Parenting orders – What You Need to Know* (Commonwealth Attorney-General’s Department, 2016) available at <https://www.ag.gov.au/Publications/Pages/Parenting-orders-what-you-need-to-know.aspx>.

<sup>7</sup> For example, the unit redesigned payment notices to create a clear call to action (through a “Pay Now” stamp); simplified the language; clearly communicated the consequences of not paying the tax or fine; used colour to create a sense of increasing urgency to act, shifting from blue to red as people move further into enforcement action; and included messages that the majority of people pay their fines and tax on time.

but also the activities of family law professionals – could draw on recent understanding of human decision-making so that the system does a better job of encouraging compliance with parenting orders, and more importantly, facilitating post-order cooperative parenting.

## **Proposed re-draft of Part VII Div 13A**

### **SUBDIVISION A: GENERAL**

#### **1: Meaning of contravene an order**

A person is taken to have contravened a parenting order if:

- (a) the person is bound by the order and has intentionally failed to comply with it, or has made no reasonable attempt to comply with it; or
- (b) the person has intentionally prevented compliance with the order by a person who was bound by it, or has aided or abetted a contravention of the order.

#### **Note:**

Parenting orders may be subject to a subsequent parenting plan (see section 64D). This means that an action that would otherwise contravene a parenting order may not be a contravention, because of a subsequent inconsistent parenting plan. Whether this is the case or not depends on the terms of the parenting order.

#### **2: Standard of proof**

In proceedings under this Division,

- (a) the court may make an order under s 11 (community service; fine; imprisonment) against a person only if satisfied beyond reasonable doubt that the person contravened the parenting order.
- (b) In relation to other matters, the standard of proof is proof on the balance of probabilities.

### **Subdivision B: Measures available to address underlying problems**

#### **3: Court may vary an existing parenting order, order additional time, or refer parties to a program**

At any stage of proceedings under this Division, if it considers it desirable to do so, the court may do any of the following:

- (a) vary a parenting order;

- (b) suspend the operation of the whole or any part of a parenting order for a specified time.
- (c) where a child has not spent time with a person as required by a parenting order, make an order that the child spend time with a person in lieu of the time that did not take place under the parenting order;
- (d) recommend or make an order requiring that one or more parties attend a post-separation parenting program or other specified program to support compliance with, or resolve difficulties relating to, a parenting order.

#### **4: Service provider to be notified**

(1) If the court makes an order under section 3(d), unless the court otherwise orders the principal executive officer of the court shall

- (a) ensure that the provider of the program concerned is notified of the making of the order, and
- (b) request the provider to inform the court, and the other party or parties to the proceeding, if the provider considers that a person ordered to attend the program is unsuitable to attend it, or has failed to attend the entire program.

(2) The court may make such orders as it considers appropriate if a person ordered to attend the program has been assessed as unsuitable to attend it, or has failed to attend any part of the program.

#### **Subdivision C: Reasonable Excuse**

##### **5: No order to be made under s 9 or s 10 if contravener proves reasonable excuse**

(1) No order is to be made under s 9 or s 10 of this Division where a person who has contravened a parenting order satisfies the court that he or she has a reasonable excuse for the contravention.

(2) The circumstances in which a person has a reasonable excuse for contravening a parenting order include, but are not limited to, the circumstances set out in sections 6 and 7.

Note 1: Even when a person has a reasonable excuse for contravening an parenting order, the court has power to make the orders provided for in section 3.



Note 2: The court's power to make costs orders under s 117 may be exercised in cases where a person has a reasonable excuse for contravening a parenting order (as well as in other cases).

**6: Reasonable excuse where the person did not understand the obligations under the order and ought to be excused**

(1) A person has a reasonable excuse for contravening a parenting order if the court is satisfied:

- (a) that the person contravened the order because, or substantially because, at the time of the contravention he or she did not understand the obligations imposed by the order; and
- (b) that the person ought to be excused in respect of the contravention.

(2) If a court decides that the person had a reasonable excuse for this reason, the court shall explain, in language the person is likely to understand, the obligations imposed by the order and the possible consequences if the person fails to comply with the order in future.

**7: Reasonable excuse where contravention was reasonably believed necessary to protect health or safety**

A person ('the respondent') has a reasonable excuse for contravening a parenting order if the court is satisfied

- (a) that at the time of the contravention the respondent believed on reasonable grounds that the person's actions were necessary to protect the health or safety of a person (including a child), and
- (b) that any period during which, because of the contravention, the child did not live with or spend time with a person in accordance with the parenting order was not longer than a period of time the court considers was reasonably necessary to protect the person's health or safety.

Subdivision D: Orders where person has contravened a parenting order and has not proved a reasonable excuse

**8: Principles relating to making orders under sections 9 and 10**

In considering what orders if any to make under s 9 or s 10, as well as having regard to other relevant matters the court should have regard to

- (a) the importance of compliance with parenting orders;
- (b) the seriousness of the contravention;
- (c) whether the person who contravened the order had previously been found by a court exercising power under this Act to have contravened a parenting order, or had behaved in a way that showed a serious disregard of obligations under the order;
- (d) the likely effects of the order on any child or other person; and
- (e) the behaviour of any person with whom the child is live or spend time under the parenting order.

**9: Orders for less serious contraventions: compensation; bond**

In proceedings under this Division, if

the court is satisfied that a person has contravened a parenting order; and

the person does not satisfy the court that he or she has a reasonable excuse;

the court may, subject to this Division, make one or more of the following orders:

- (a) where the respondent’s contravention resulted in a person not spending time with a child or living with a child as provided in the order, **an order requiring the respondent to compensate** the person for some or all of the expenses reasonably incurred as a result of the contravention; and
- (b) **an order requiring a person to enter into a bond**, as provided in s 11.

**10. Orders for more serious contraventions: community service; fine; imprisonment**

(1) In proceedings under this Division,

- (a) if the court is satisfied beyond reasonable doubt that a person has contravened a parenting order; and
- (b) the person does not satisfy the court on the balance of probabilities that he or she has a reasonable excuse,

the court may, subject to this Division, make one or more of the following orders:

- (c) any order referred to in s 9;
- (d) an order requiring a person to perform community service, as provided in s 12; or
- (e) an order imposing a fine, of not more than 60 points; or
- (f) an order imposing a term of imprisonment, as provided in s 13.

(2) The court shall not make an order under this section if it considers that it would be more appropriate to deal with the matter by way of an order under any section 3 or section 9.

### **11: Matters relating to bonds**

When the court makes an order under section 9 requiring the person who committed the contravention to enter into a bond:

- (a) The bond is to be for a specified period of up to 2 years, and may be with or without surety, and with or without security.
- (b) The court may impose one or more conditions, including conditions that require the person:
  - (i) to attend appointments with a family consultant; or
  - (ii) to attend family counselling; or
  - (iii) to attend family dispute resolution; or
  - (iv) to be of good behaviour.
- (c) The court shall explain to the person, in language the person is likely to understand:
  - (i) the purpose and effect of the requirements; and
  - (ii) the consequences that may follow if the person fails to enter into the bond or enters into the bond but then fails to act in accordance with it.

### **12: Matters relating to community service orders**

(1) The court may make a community service order under s 10 if

- (a) the proceedings are heard in a State or Territory where laws of that State or Territory provide for a community service order of any kind to be made against a person convicted of an offence; and
  - (b) an agreement under section 70NFI is in force in the State or Territory.
- (2) The order may not regulate the person's conduct beyond 500 hours or such lesser period as is prescribed in relation to the State or Territory.
- (3) The order ceases to have effect 2 years after it was made, or after such lesser period as is specified in the order.
- (4) To the extent provided by the regulations, the laws of the State or Territory with respect to a community service order made under those laws apply in relation to the order.
- (5) Before making the community service order, the court shall explain to the person, in language the person is likely to understand,
- (a) the purpose and effect of the proposed order;
  - (b) the consequences that may follow if the person fails to comply with the order or with any requirements made in relation to the order; and
  - (c) that the proposed order may be revoked or varied (if that is the case) at any time during the term imposed.
- (6) If the community service order was made by the Family Court of Australia or the Federal Circuit Court of Australia, either of those courts may vary or discharge it. If the order was made by any other court, that court and the Family Court of Australia may vary or discharge it. The court may give directions as to the effect of the variation or discharge that the court considers appropriate.
- (7) An arrangement made under section 112AN for or in relation to the carrying out of sentences imposed, or orders made, under Division 2 of Part XIII A is taken to extend to the carrying out of sentences imposed, or orders made, under this Subdivision.

### **13: Matters relating to imprisonment**

(1) The court may under section 10 sentence the person to a term of imprisonment expressed to be:

(a) for a specified period of 12 months or less; or

(b) for a period ending when the person:

(i) complies with the order concerned; or

(ii) has been imprisoned under the sentence for 12 months or such lesser period as is specified by the court;

whichever happens first.

(2) A court must not sentence a person to imprisonment under s 10 unless it is satisfied that, in all the circumstances of the case, it would not be appropriate to deal with the contravention by making other orders under this Subdivision.

(3) If a court sentences a person to imprisonment under s 10, the court must state the reasons why it is satisfied it would not be appropriate to deal with the contravention by making other orders under this Subdivision. However a failure by a court to comply with this subsection does not invalidate a sentence.

(4) A court that sentences a person to imprisonment under s 10 may:

(a) suspend the sentence upon the terms and conditions determined by the court;  
and

(b) terminate such a suspension.

(5) A court, when sentencing a person to imprisonment under s 10, may, if it considers it appropriate, direct that the person be released upon entering into a bond described in subsection (6) after the person has served a specified part of the term of imprisonment.

(6) A bond for the purposes of subsection (5) is a bond (with or without surety or security) that the person will be of good behaviour, for a specified period of up to 2 years, and/or comply with the terms of a specified order of the court.

(8) A court that has sentenced a person to imprisonment under s 10 may at any time order the release of the person if it is satisfied that the person will, if released, comply with the court's orders.

(9) To avoid doubt, the serving by a person of a period of imprisonment under s 10 for failure to make a payment under a child maintenance order does not affect the person's liability to make the payment.

**14: Imprisonment not to be imposed for a child maintenance contravention unless contravention intentional or fraudulent**

The court must not make an order imposing a sentence of imprisonment on a person under s 10 in respect of a contravention of a child maintenance order made under this Act unless the court is satisfied that the contravention was intentional or fraudulent.

**15: Imprisonment not to be imposed for certain contraventions relating to child support**

The court must not make an order imposing a sentence of imprisonment on a person under s 10 in respect of:

- (a) a contravention of an administrative assessment of child support made under the *Child Support (Assessment) Act 1989*; or
- (b) a breach of a child support agreement made under that Act; or
- (c) a contravention of an order made by a court under Division 4 of Part 7 of that Act for a departure from such an assessment (including such an order that contains matters mentioned in section 141 of that Act).

Subdivision E: other matters

**16: Relationship between this Division and other laws**

(1) This section applies where an act or omission by a person who is the subject of proceedings under this Division is also the subject of a prosecution for an offence against any law.

(2) If the person is prosecuted in respect of the act or omission, the court shall dismiss the proceedings under this Division, or adjourn them until the prosecution has been completed.

(3) Nothing in this Division renders a person liable to be punished twice in respect of the same act or omission.

**17: Arrangements with States and Territories for carrying out of sentences and orders**

An arrangement made under section 112AN for or in relation to the carrying out of sentences imposed, or orders made, under Division 2 of Part XIII A is taken to extend to the carrying out of sentences imposed, or orders made, under this Subdivision.

**18: Division does not limit operation of section 112AP (contempt)**

Nothing in this Division is intended to limit the operation of section 112AP (contempt).

**19: Matters relating to costs applications**

(1) In any application for costs under s 117 arising from proceedings under this Division, the court may consider, among other relevant matters, any previous contravention proceedings between the parties and the outcome of those proceedings.

(2) The court shall make an order for costs under s 117 against a person who is found to have contravened an order and has not satisfied the court of a reasonable excuse unless the respondent satisfies the court that such an order should not be made.

## **Commentary on draft**

This commentary first discusses some general issues and then discusses each provision.

### **General**

The first purpose of this proposed re-draft is to enable the Division to be more easily understood.

This second purpose of this re-draft is to make some limited changes of substance, notably the following:

- The power to order additional time is available in contravention proceedings whenever a child has not spent time with a person as a parenting order required.
- The power to order parties to attend a post-separation etc program is now available at any stage of Div 13A proceedings, and the court also has a power to recommend such attendance.
- The complex provisions about costs have been replaced by a rebuttable presumption favouring a costs order under s 117 against a contravener.

The draft could readily be amended to remove or modify these changes of substance if they are not accepted. Whatever decision might be made about these policy changes, the re-draft is intended to make Division 13A shorter and easier for lawyers and non-lawyers to understand.

Although the draft is much shorter than the Division 13A at present, it could be made shorter still if some of the more detailed provisions could be omitted. Omitting those provisions, however, involves policy decisions and this exercise is designed to make little or no substantive change in the substance of the law.

### **Different standards of proof retained**

The current law applies the criminal standard of proof to some orders and not to others (s 70NAF). Although the combination of the two standards appears to have led to difficulties (*Elsebeth & Peter; Mark & Peter; and John & Peter* [2007] FamCA 655), there are plausible reasons for the different standards (the criminal standard



being applied to the more punitive orders), and this draft retains the current approach.

### **Costs**

The present law creates separate powers to make costs orders in Div 13A, and imposes certain requirements. ( For convenience, the costs provisions of the existing law are set out below).

The proposed draft removes most of these provisions. The power to make costs orders under s 117 would apply to Div 13A proceedings as it does to other proceedings. However under the draft, s 19 provides that the court may consider, among other relevant matters, any previous contravention proceedings between the parties and the outcome of those proceedings. It also creates a presumption that a costs order should be made under s 117 against a person who is found to have contravened an order and has not satisfied the court of a reasonable excuse unless the respondent satisfies the court that such an order should not be made.

#### *The existing costs provisions*

The existing provisions relating to costs are somewhat complex. The following paragraphs attempt to summarise the more important provisions and to indicate what policies seem to underlie them.

Under the present law, the court may order the applicant to pay costs where no contravention has been established: s 70NCB(1). And it *must consider* making such an order where the applicant had previously brought unsuccessful<sup>8</sup> proceedings: s 70NCB(2). Similarly, if there is a reasonable excuse, and no make-up time with a child is ordered, the court may order the applicant to pay costs, and *must* do so if the applicant had previously brought unsuccessful proceedings: s 70NDC. *[The underlying policy appears to be to deter people from using contravention proceedings unreasonably, or to harass].*

If there has been a less serious contravention, the court may order the contravener to pay costs: s 70NEB(1)(f). *[Policy: deter people from contravening].* But if the

---

<sup>8</sup> In this sentence 'unsuccessful proceedings' is a shorthand reference to more elaborate provisions.

court makes no other orders in relation to the contravention, the court may order that the applicant pay costs: s 70NEB(1)(g); and *must* do so if the applicant had brought unsuccessful proceedings before: s 70NEB(1)(7). [*Policy: deter people from using contravention proceedings unreasonably, or to harass*].

If there has been a serious contravention, court must order the contravener to pay costs, 'unless the court is satisfied that it would not be in the best interests of the child concerned to make that order'. [*Policy: strongly deter people from seriously contravening*].

An alternative draft if - contrary to this proposal - the substance of the present law on costs is to be retained

If it were decided to *retain the present legislative policy*, the costs provisions would inevitably be a little more complex than in the proposed draft, but could be expressed more clearly than in the existing legislation. It would be an improvement to keep s 117 as the source of costs orders, but include guidelines in Div 13A, and amend s 117 by adding something to the effect that in Div 13A proceedings, the costs provisions of Div 13A would apply. On this approach, if the intention were to retain the present underlying policies, the provisions in Div 13A might be somewhat as follows:

#### Section xx Costs

- (1) *Without limiting the matters that the court takes into account in any application for costs under s 117, in proceedings under this Division the following provisions apply.*
- (2). *If the court finds that a person (the respondent) has contravened a parenting order and the respondent does not satisfy the court that he or she had a reasonable excuse:*
  - (a) *the court shall consider making a costs order against the respondent; and*
  - (b) *if the court has made an order against the respondent under s xx, the court shall make such a costs order unless satisfied that making such an order would not be in the best interests of the child.*
- (3) *The court shall consider making an order that the applicant pay some or all of the respondent's costs if the court*

(a) *finds that an alleged contravention by a person ('the respondent') has not been established, or that there was a reasonable excuse for the contravention, or*

(b) *finds that there has been a contravention but makes no orders under s xx in respect of the contravention; and*

*that the person who brought the proceedings (the applicant) had previously brought unsuccessful proceedings under this division against the respondent,*

*(4) For the purpose of this section, unsuccessful proceedings means...[in substance, that no contravention was established, or that there was a reasonable excuse, or that no significant order was made against the respondent].*

### **Comments on particular provisions of the draft**

#### **Note to s 1: Meaning of contravene a parenting order**

A slightly simplified version of s 70NAC.

The subdivision is essentially about parenting orders, and this draft uses that term rather than 'an order under the Act affecting children'. Contravention of any other orders relating to children, such as injunctions, would on this draft be dealt with under the ordinary contravention provision, s 112AD. This seems appropriate, there being no obvious advantage in having Div 13A apply to other orders that have some connection with children. Making the Division apply to parenting orders is simple and easy to understand, whereas the existing term, 'order under the Act affecting children', is not intuitive and requires the reader to look up other sections of the Act.

The words 'for the purposes of this Division' are not strictly necessary and have been omitted in the interests of brevity.

Subsection (2) is substantially the same as s 70NAC, as is the note.

#### **Note to s 2: Standard of proof**

Based on 70NAF. The substance is the same, ie the criminal standard of proof applies in relation to fines, community service orders and imprisonment, and the civil standard for other (less punitive or less severe) orders.

In relation to the criminal standard, the draft uses 'that the person contravened the parenting order' rather than the wording of the existing 70NAF(2) ('that the grounds for making the order exist').

Note to s 3: Court may vary an existing parenting order, order additional time, or refer parties to a program

The title to subdivision B ('Measures available to address underlying problems') of the draft is new. The orders in paras (a) to (d), being non-punitive, are now available at any point in contravention proceedings.

Para (a) is based on s 70NBA(1). Subsection s 70NBA(2) is difficult to understand and has been omitted from the proposed draft.

Para (b) seems useful, but could readily be omitted.

Para (c) is based on s s 70NBD and also s 70 NEB(1)(b). This provision raises a difficult question of principle, namely whether it should be categorised as a parenting order with all the consequences that flow from that. Under the proposed draft, it probably would be a parenting order - see the definition of 'parenting order' in s 64B. If so, then the paramount consideration principle and all the other provisions in Part VII would apply. If it is not to be a parenting order, the legislation would need to say something about what principles are to apply.

This raises the question whether the purpose of the order is to benefit the child or to compensate the party for missing out on time with the child.

The present provisions of Div 13A are inconsistent on this topic. Sections 70NDB(1) and 70NEB(1)(b) refer to a 'further parenting order that compensates the person...'. Although such an order is expressed to be a *parenting* order, the definition of that term in s 64B does not expressly include compensating a person, and the idea of compensating the adult seems difficult to reconcile with the operation of the paramount consideration principle which applies to parenting orders. If it is a parenting order, it would have to be an order made in the best interests of the child - s 60CA - and thus it makes no sense to provide, as does subs (5), that the order should not be made if it is not in the best interests of the child.

It is not possible to settle the wording of this section satisfactorily until a policy decision has been made about the whether such orders are to be treated as parenting orders, or whether they are made for the purpose of compensating that adult who has missed out on time with the child. The draft under which the order is a parenting order and the wording of 'compensating' has been replaced by 'time in lieu of the time that did not take place under the parenting order'.<sup>9</sup>

Para (d) reflects s NEB(1)(a), but adds the power to recommend.

Note to s 4: Service provider to be notified

Based on s 70NEB(3) and 70NEG.

Note to s 5: No order to be made under s 9 or s 10 if contravener proves reasonable excuse

The provisions relating to reasonable excuse are now together in Subdivision C.

Section 5 is based on s NAE. There is no change of substance. New Note 1 seems useful, and new Note 2 stems from the decision not to have separate provisions for costs orders in Div 13A.

Note to s 6: Reasonable excuse where the person did not understand the obligations under the order and ought to be excused

Based on s 70NAE(2) and (3).

Note to s 7: Reasonable excuse where contravention was reasonably believed necessary to protect health or safety

Based on s 70NAE(5).

Note to s 8: Principles relating to making orders under sections 10 and 12

This provision is new, but the principles are intended to reflect the policies implicit in the existing provisions. Section 8 (b) removes any need to complicate the Division

---

<sup>9</sup> If the other policy is to be embraced, then the order should not be characterised as a parenting order. The provision could say, for example, that the order could be made in order to compensate the adult but should not be made if it would be contrary to the best interests of the child.

by dividing it into two subdivisions dealing separately 'less' serious' and 'more serious'.

Note to s 9: Orders for less serious contraventions: compensation; bond

Section 9 is based on s 70NEA and 70NEB. It sets out the orders not requiring proof on the criminal standard.

The power under s 70NEB(1)(a) to refer parties to a program is not in s 10 because it is now in s 3.

The power to adjourn so the parties can obtain a parenting order (s 70NEB (1)(c)) has been omitted. Because of the powers in s 3, there seems no need for this provision.

The draft also omits the provision about failure to enter into a bond: s 70NEB(1)(da). Such a failure is a breach of a court order and is therefore covered by s 112AD and the other provisions of Part XIII A.

Note to s 10: Orders for more serious contraventions: community service; fine; imprisonment

Sets out orders for which the criminal standard of proof is required. Additional provisions relating to these orders are dealt with in succeeding provisions. No change of substance.

Note to s 11: Matters relating to bonds

Based on s 70 NEC. No change of substance.

Note to s 12: Matters relating to community service orders

Based on s 70NFB(2)(a), No change of substance.

Note to s 13: matters relating to imprisonment

Based on s 70NFB(2)(e), s 70NFG. No change of substance.

Note to s 14: imprisonment not to be imposed for child maintenance contravention unless contravention intentional or fraudulent

Based on s 70NFG(9) and s 70NFB(4). No change of substance.

Note to s 15: imprisonment not to be imposed for certain contraventions relating to child support

Based on s 70NFB(5). No change of substance.

Note to s 16: Relationship between this Division and other laws

Based on s 70NFH. No change of substance.

Note to s 17: Arrangements with States and Territories for carrying out of sentences and orders

Based on s 70NFI. No change of substance.

Note to s 18: Division does not limit operation of section 112AP

Based on s 70NFJ (which should refer to s 112AP rather than s 105). No change of substance.

Note to s 19: Matters to be considered in relation to costs applications

This is a new provision, replacing a number of provisions about costs, for the reasons discussed above.

## EXISTING COSTS PROVISIONS IN DIV 13A

### 70NCB Costs

- (1) The court may make an order that the person who brought the proceedings (the *applicant*) pay some or all of the costs of another party, or other parties, to the proceedings.
- (2) The court must consider making an order under subsection (1) if:
  - (a) the applicant has previously brought proceedings in relation to the primary order or another primary order in which the applicant alleged that the respondent committed a contravention of the primary order or that other primary order; and
  - (b) on the most recent occasion on which the applicant brought proceedings of the kind referred to in paragraph (a), the court before which the proceedings were brought:
    - (i) was not satisfied that the respondent had committed a contravention of the primary order or that other primary order; or
    - (ii) was satisfied that the respondent had committed a contravention of the primary order or that other primary order but did not make an order under section 70NBA, 70NDB, 70NDC, 70NEB or 70NFB in relation to the contravention.

### 70NDC Costs

- (1) If the court does not make an order under section 70NDB in relation to the current contravention, the court may make an order that the person who brought the proceedings (the *applicant*) pay some or all of the costs of another party, or other parties, to the proceedings.
- (2) The court must consider making an order under subsection (1) if:
  - (a) the applicant has previously brought proceedings in relation to the primary order or another primary order in which the applicant alleged that the respondent committed a contravention of the primary order or that other primary order; and
  - (b) on the most recent occasion on which the applicant brought proceedings of the kind referred to in paragraph (a), the court before which the proceedings were brought:
    - (i) was not satisfied that the respondent had committed a contravention of the primary order or that other primary order; or
    - (ii) was satisfied that the respondent had committed a contravention of the primary order or that other primary order but did not make an order under section 70NBA, 70NDB, 70NEB or 70NFB in relation to the contravention.

### 70NEB Powers of court

- (1) If this Subdivision applies, the court may do any or all of the following:
  - (f) make an order that the person who committed the current contravention pay some or all of the costs of another party, or other parties, to the proceedings under this Division; and
  - (g) if the court makes no other orders in relation to the current contravention—order that the person who brought the proceedings in relation to the current contravention pay some or all of the costs of the person who committed the current contravention.

[...]
- (7) The court must consider making an order under paragraph (1)(g) if:
  - (a) the person (the *applicant*) who brought the proceedings in relation to the current contravention has previously brought proceedings in relation to the primary order



- or another primary order in which the applicant alleged that the person (the *respondent*) who committed the current contravention committed a contravention of the primary order or that other primary order; and
- (b) on the most recent occasion on which the applicant brought proceedings of the kind referred to in paragraph (a), the court before which the proceedings were brought:
    - (i) was not satisfied that the respondent had committed a contravention of the primary order or that other primary order; or
    - (ii) was satisfied that the respondent had committed a contravention of the primary order or that other primary order but did not make an order under section 70NDB, 70NDC, 70NEB, 70NFB or 70NBA in relation to the contravention.

#### **70NFB Powers of court**

- (1) If this Subdivision applies, the court must, in relation to the person who committed the current contravention:
  - (a) make an order under paragraph (2)(g), unless the court is satisfied that it would not be in the best interests of the child concerned to make that order; and
  - (b) if the court makes an order under paragraph (2)(g)—consider making another order (or other orders) under subsection (2) that the court considers to be the most appropriate of the orders under subsection (2) in the circumstances; and
  - (c) if the court does not make an order under paragraph (2)(g)—make at least one order under subsection (2), being the order (or orders) that the court considers to be the most appropriate of the orders under subsection (2) in the circumstances.
- (2) The orders that are available to be made by the court are:
  - [...]
  - (g) to make an order that the person who committed the current contravention pay all of the costs of another party, or other parties, to the proceedings under this Division; or
  - (h) to make an order that the person who committed the current contravention pay some of the costs of another party, or other parties, to the proceedings under this Division.

## **History of Div 13A: the main developments<sup>10</sup>**

### **Pre 1975**

Before the Family Law Act 1975 the area of family law was mainly dealt with by state and territory laws, except for the Matrimonial Causes Act 1959 and the Marriage Act 1961. There were no specific provisions about breach of what are now called family law orders, or parenting orders, and there seems little or no evidence available about what happened when people failed to comply with court orders in family law matters. It was possible to enforce order for payment of money by attaching a person's wages and taking their property. That kind of enforcement

---

<sup>10</sup> This historical discussion remains to be completed.

aside, during this period, breach of court orders was no doubt dealt with under the law of contempt of court (“contempt”). It is a topic that does not seem to have attracted interest.

### **1975 – 1988: the early approach under the Family Law Act 1975**

In the original Family Law Act 1975 there were three provisions relating to contraventions.

**Section 70** dealt specifically with contravention of children’s orders. It was headed “Interfering with child subject to custody order”.

Subsection (6) dealt with contraventions of custody and access orders. It provided that if a court was satisfied that a person had knowingly and without reasonable cause contravened or failed to comply with a provision of section 70, the court could

“(a) order that person to pay a fine not exceeding \$1,000;

(b) require that person to enter into a recognizance, with or without sureties, in such reasonable amount as the court thinks fit, that that person will comply with the relevant order, or order that person to be imprisoned until that person enters into such a recognizance or until the expiration of 3 months, whichever first occurs;

(c) order that person to deliver up to the court that person's passport and such other documents as the court thinks fit; and

(d) make such other orders as the court considers necessary to enforce compliance with this section.”

Subsection (7) provided that nothing in the section should render anyone liable to be punished twice in respect of the same offence and subsection (6) did not prejudice the power of a court to punish a person for contempt of court.

Two other sections may be briefly noted. First, the 1975 Act provided in **s 108** for punishment for contempt for ‘for wilful disobedience of any decree made by the court in the exercise of jurisdiction under this Act’. The regulations could ‘provide for practice and procedure as to charging with contempt and the hearing of the

charge.<sup>11</sup> The punishment could be ‘by committal to prison or fine or both’, and the court could make an order for punishment on terms, suspension of punishment, or the giving of security for good behaviour. Where a person was committed to prison, the court could order discharge before the expiry of the term.

Secondly, **s 114** gave the court power to grant injunctions, and the power to punish breach of such injunctions: the court could impose a fine, or impose a bond (‘recognisance’), or require the delivery of documents, or ‘make such other orders as the court considers necessary to enforce compliance with the injunction or order’.

### **Underlying rationale in period 1975 – 1988**

The law’s response during this period applied traditional approaches to enforcement of court orders. The ultimate objective seems to be that people should comply with orders (There is no suggestion that the objective might be co-operative parenting).

The first underlying rationale seems to have been that people are more likely to comply with orders, if the law makes them suffer if they fail to do so. The specific assumption seems to be that a person will comply with an order if it is more painful, or unpleasant to disobey it. This applied to the penalties of a fine, and imprisonment. These are the penalties not only for breaches of the custody and access orders, but also for breaches of other orders made to support them, for example, breach of an injunction, or a bond, or breach of an order to give up a passport.

We can call this rationale ‘deterrence’. It has at least three applications. First, it could apply to induce a person to comply with an order,<sup>12</sup> as where the court orders that a person be imprisoned until he or she complies with an order.<sup>13</sup> Second, it could deter the person from future breaches of the same order, as where the court punishes a person for breach of an access order, and the person has a continuing obligation under the order, for example to deliver the child to the other parent each

---

<sup>11</sup> Subsection (2).

<sup>12</sup> In family law, this will often require complying with future obligations arising under an existing order, eg obligations to hand a child over on particular days of the week in the future: ALRC Summary at para 89.

<sup>13</sup> Thus the ALRC Contempt Report distinguishes between ‘coercion’ and ‘punishment’: para 508. This distinction is not critical for present purposes, however, since in each case the law operates by way of deterrent, imposing a penalty that makes it more painful to disobey the order than comply with it.

fortnight. Third, it could deter the person, or other persons<sup>14</sup> from disobeying other children's orders.<sup>15</sup> because orders in family law matters often impose recurring obligations, a suspended sanction may be imposed in respect of past disobedience of an order with the aim of securing compliance with future obligations under the order.

A second possible objective of sanctions is punishment in the sense of retribution. Dealing with contempt law in general, the ALRC pointed out this can sometimes be a purpose of sanctions for contempt of court consisting in breach of court orders. Where the disobedient party has complied with the order, or the order can no longer be complied with, the primary goal of contempt proceedings is "is to punish the contemnor for past disobedience".<sup>16</sup> The imposition of the punitive sanction, wrote the ALRC, is "justified in terms of upholding the authority of the court with a view to maintaining the effectiveness of court orders".

We have seen that in this period the provisions of the Family Law Act 1975 dealing with non-compliance were essentially manifestations of the law of contempt of court. As we have seen, although proceedings for contempt are distinctive in that they can impose a sanction on a 'coercive' basis, ie to compel compliance with an order, their underlying rationale is substantially the same as that of the criminal law. It follows that the underlying rationale of the early provisions of the Family Law Act 1975 was essentially the same as that of the criminal law, being mainly based on deterrence and, perhaps, retribution.<sup>17</sup>

### **Experience in 1975 – 1988**

What happened during this period? To what extent did people actually comply with children's orders?

---

<sup>14</sup> This function of the criminal law is known as 'general deterrence'.

<sup>15</sup> As the ALRC points out, 'The sanction serves similar purposes to those imposed for a breach of the criminal law: in particular, deterrence (specific and general) and retribution': para 515. General deterrence is also the method used if the objective is 'maintaining the effectiveness of court orders': ALRC para 519.

<sup>16</sup> ALRC Summary, para 78.

<sup>17</sup> As the ALRC neatly put it, "The main aims of the imposition of sanctions for non-compliance with orders made in family law are, as in other types of proceedings, coercion and deterrence": Summary, para 89.

We have little published information.<sup>18</sup> The best sources of info would seem to be the 1987 ALRC Contempt Report and the FLC report Access – Some Options for Reform (1987).

### ***The 1987 ALRC Contempt Report***

The ALRC carried out significant research in connection with its Contempt report. As well as research on the law and practice of disobedience contempt in the Family Court, it comprised

- a survey of 34 judges (of a possible 43) of the Family Courts of Australia and Western Australia, collecting basic information on the contempt workload of the two Courts, and judicial views about the law and reforms to it;
- a general questionnaire on contempt administered to magistrates throughout Australia;
- a review of the Family Court of Australia's sentencing records kept at the Principal Registry;
- discussions with the Family Court Judges' Law Reform Committee, the Family Law Council and family law practitioners' associations;
- the material contained in 66 and 53 oral written submissions; and
- interviews by officers of the Commission of over two hundred people, including judges, magistrates, lawyers, counsellors, community workers and present and former clients of the system.

The ALRC found that the Family Court was more involved with contravention proceedings than other courts. Part of the explanation related to the characteristics of the orders and parties' obligations under them, namely "the need for personal compliance, the need for compliance on numerous occasions within the context of continuing contact between the litigants and the intensity of feeling generated by litigation in family matters". However another part of the explanation was that

---

<sup>18</sup> The ALRC noted that there was a significant lack of academic literature on the subject of contempt in family law: para 588.

“enforcement powers other than contempt were not conferred as comprehensively as they might have been”. The Commission thought that this was due to optimistic expectations as to the success of counselling and other conciliatory methods employed by the Court, and the assumption contempt powers were “weapons which would only have to be deployed in isolated instances”.<sup>19</sup>

The Commission’s researches showed that contempt cases were frequently put aside, or “shunted” rather than being finally determined. The Commission wrote:

*this phenomenon of undetermined contempt and quasi-contempt applications is attributable in significant measure to pressures exerted by judges or magistrates dealing with the case. Spouses are actively encouraged to postpone the hearing of such applications and to attempt to resolve their dispute through some alternative means, usually involving counselling and negotiation. In this sense, the application is ‘shunted’ to one side. This creates what would seem to be a unique result within contempt law and practice: namely, that a court is consciously shying away from imposing sanctions on those who deliberately refuse or fail to obey its orders.*

The Commission also found that the penalties Court judges and magistrates dealing with family law tended to be lenient, showing “a significant preference for reprimands and bonds as against fines or imprisonment”.<sup>20</sup>

The Commission saw the court as in a dilemma:

*The Family Court is in fact confronted with a dilemma. Its contempt and quasi-contempt powers are prominent within the Act, are frequently invoked by spouses and are capable, if used to the full, of resulting in harsh punishment. But such punishment is not in accordance with the spirit of the Court and it will not necessarily resolve the deeper problems within the relationship between the spouses. The Court therefore tries to ‘hold back’ in many cases. It ‘shunts’ or, when non-compliance is ultimately proved, it imposes a lenient sentence. This creates a popular impression that the Court is a ‘soft’ institution, which will not take firm steps to enforce its authority. Such an impression may be enough of itself to increase the incidence of non-compliance, thereby giving rise to further situations where the Court appears ‘soft’, and producing a vicious circle.<sup>21</sup>*

---

<sup>19</sup> Para 597.

<sup>20</sup> 599.

<sup>21</sup> 600.

The Commission considered that the dilemma was enhanced because of the need to consider the interests of children:

*Situations arise where the merits of the case between the spouses, and the Court's own interest to preserve its authority, point towards the imposition of a severe sentence for non-compliance, but concern for the welfare of the children suggests a more lenient approach.<sup>22</sup>*

### **The Commission's recommendations**

The Commission's recommendations included many technical matters that do not need to be set out here. For present purposes, the most important recommendations are as indicated. The recommendations give rise to issues which will be discussed elsewhere. At this stage, the recommendations will be listed together with a brief note on the extent to which they have been implemented.

### **General recommendations for non-compliance proceedings**

Contempt sanctions should be minimised, and therefore "the range of alternative enforcement procedures available within the Family Court should be as wide as possible and the Court should have sufficient resources to render them effective".

Implemented? The range of procedures available has indeed been expanded.

There are now significant resources, although their funding remains a problem.

Because orders in family law matters often impose recurring obligations, a suspended sanction may be imposed in respect of past disobedience of an order with the aim of securing compliance with future obligations under the order.

Implemented? Yes, in that suspended sentences are possible, although the aim of securing future compliance is not legislatively specified.

In family matters, it is particularly important that the full range of sentencing options - including weekend detention and community service orders - should be available.

Implemented? Yes.

---

<sup>22</sup>

601.

Variation of an order should not, however, be seen as an appropriate sanction, even if this may appear to achieve a coercive or deterrent aim.<sup>23</sup>

Implemented? Yes – the variation of a parenting order must treat the child’s best interests as paramount, and this would preclude a coercive or deterrent aim.

There should be a single unified procedure (non-compliance proceedings) for the enforcement of orders made in family law, replacing the existing ‘hierarchy’ of contempt and quasi-contempt provisions.<sup>24</sup>

Implemented? Yes.

### ***Access recommendations***

In relation to access orders, after a detailed and illuminating analysis of the issues they pose, the Commission made the following recommendations, in substance:

The court should always make a formal finding as to breach and intent, irrespective of ‘reasonable cause’ or other considerations. mental ell [check]

Implemented?

The law should spell out the relatively narrow range of circumstances in which, despite a finding of breach coupled with the necessary mental element, the court should be required not to impose any sanction.

Implemented? Yes.

The law should also list certain considerations as relevant to the exercise of the court’s discretion in imposing sanctions for breach of an access order. These should comprise the benefits derived for a child from maintaining contact with both parents, the child’s reactions to access and the effect on the child of any sanction imposed on the custodial parent. The existence of prior maintenance default should not be included in the list.

---

<sup>23</sup> The FLC strongly supported this recommendation – see 5.19 – while noting that ‘exceptional cases where continued obstruction of access might be resolved by a change of custody’.

<sup>24</sup> Summary, 90.



Implemented? No – there is no such legislative list.

Where non-compliance proceedings are instituted for the first time in respect of an access order, sanctions should not be imposed until the parties have first been directed to attend confidential counselling and adequate time has elapsed to permit counselling to have full effect, unless counselling has already occurred since the order was made or the court is satisfied that, in the special circumstances of the case, it should be dispensed with.

Implemented? Yes in substance.

Where the custodial parent has abducted and concealed the child, resulting in continued and total denial of access, the Family Court should have power to issue a warrant to a police officer for the arrest of the custodial parent.

Implemented? Yes (?)

Finally, although the variation of a subsisting order should not be decreed as a formal sanction for noncompliance, the Family Court, when hearing proceedings to vary an access order, should consider making a temporary order for increased access as compensation for access that has been wilfully and unjustifiably denied.

Implemented? Yes, although the power to vary is not limited to temporary orders.

### ***Custody recommendation***

Where an access parent removed the child from the custodial parent, the court should be required to refrain from imposing sanctions in certain limited circumstances.<sup>25</sup>

Implemented? Yes.

---

<sup>25</sup> The ALRC decided not to recommend making it an offence to remove a child from, or failure to return a child to, the custody of a parent contrary to an order granting custody to that parent, where the offender conceals the child's whereabouts, intending to deprive depriving the parent of custodial rights.

The, having traced an abducted child, should have explicit power not only to take possession of the child but also to arrest the abductor, or other persons involved, who could then be brought before the court.

Implemented? (to be checked)

### **The FLC report Access – Some Options for Reform (1987)**

The discussion of contravention in the FLC report is relatively limited. The Council said that ‘every encouragement should be given to have access disputes dealt with by mediation, conciliation or arbitration wherever that is possible, rather than by immediately proceeding in the courts’, although in cases where a child is potentially at risk or which involve violence, joint mediation or conciliation counselling were inappropriate.<sup>26</sup>

The Council noted that in practice proceedings for summary enforcement of access orders<sup>27</sup> were rarely used, and that defended hearings often resulted in long delays, during which ‘attitudes on both sides may well become very firmly entrenched’.<sup>28</sup> It proposed that more resources should be made available for supervised or assisted access either directly or through the family courts or through other appropriate agencies in the community in liaison with the family courts.<sup>29</sup> It doubted that ‘access handover centres’ would be economically possible, but suggested that the use of other community facilities should be explored.<sup>30</sup>

The Council referred to the ALRC Report and expressed general agreement with recommendations 98-103, but expressed concerns about the application of the sanctions proposed in draft section 108B of the draft bill to cases involving breach of an access order: Some of these concerns related to aspects of imprisonment, and these are of no present relevance. It wrote:

*Council is concerned to see a wider range of sanctions available, particularly in access matters. It was pointed out that sanctions available*

---

<sup>26</sup> 5.2, 5.3.

<sup>27</sup> Order 34 of the Family Law Rules.

<sup>28</sup> 5.4.

<sup>29</sup> 5.15.

<sup>30</sup> 5.16.

*under state or territorial law by way of community service and compulsory lectures are not likely to be appropriate to access violations. Judges should be educated as to the options available under such laws and advised to exercise care that the section is appropriate to the offence. It is desirable that the court maintain control and supervision of sanctions. Council proposes that compulsory conferences and education courses conducted within the court and specifically related to the needs of the children should be added to the options listed in the draft section 108H.<sup>31</sup>*

The Council also recommended that lawyers discourage their clients from precipitously taking action to punish for non-compliance with access orders' since it would be preferable that parties attend counselling before approaching the court at all.<sup>32</sup> In considering the options, the court 'should take care as far as circumstances permit to ensure the welfare of the children is not prejudiced'.<sup>33</sup>

The FLC also pointed out that breaches by the access parent might also require attention:

*When penalties for refusal of access are considered it is always on the basis of non-compliance by the custodial parent. However there are other situations where the Access parent does not fulfil his/her responsibility to take access or advise the custodial parent that he/she will, for some adequate reason, be unable to do so. The result is that the child will be ready and waiting and feel rejected when the Access parent fails to appear. The Council considers that in situations of this kind the Access parent should be regarded as having failed to comply with the access order and the court should respond accordingly.*

The Council considered, however, that the sanctions set out in the ALRC's draft bill, sections 108G and 108H should not apply in these circumstances. The majority of council took the view that where the access parent has failed to exercise access as ordered without just cause or excuse, the court should be empowered on the application of a party to order the access parent to engage in compulsory counselling and education courses; if that failed to have effect, 'the court should then consider the order for access'.

## **The legislation of 1989**

---

<sup>31</sup> Paras

<sup>32</sup> 5.17.

<sup>33</sup> 5.18.

The report of the ALRC, and to a lesser extent that of the FLC, greatly influenced what became the Family Law Amendment Act 1989 No. 182.

The EM describes the amendments relevant to contraventions by saying that the Act is:

*(a) to implement a recommendation of the Australian Law Reform Commission to unify those provisions of the Family Law Act dealing with the enforcement within Australia of orders made under the Act;*

*(b) to enable the making of arrangements with the States and Territories for the provision of facilities related to additional sentencing alternatives;*

*(c) to permit courts to order the arrest of a person who has contravened an access or custody order, and attaches a power of arrest to injunctions made for the personal safety of a child, a person with whom such a child is, or a party to a marriage;*

*(d) to provide specific power for a court to order that certain access shall occur to replace access which did not occur as a result of the contravention of an order; [...]*

The EM says:

*3. The amendments also implement an ALRC recommendation to broaden the range of penalties that a court may impose when a person has been found to have contravened a court order. The significant addition to the current range of penalties is the inclusion of community—based sentencing alternatives. Subject to agreements being made with the States and Territories, which will supply facilities and staff, courts will be empowered to make an order generally known as an additional sentencing alternative order. The range of orders includes such sanctions as community service orders, weekend detention orders or attendance centre orders. The major effect of the availability of the sanctions is that last resorts nature of imprisonment is highlighted.*

*4. Breach of orders for access to children is addressed by the amendments. Before a court imposes a sanction in relation to such a breach it must consider whether the parties should be required to attend counselling. A specialist program for counselling families in which there is a history of repeated breach of an access orders is to be established in the Family Court Counselling Service.*

The Act inserted a new Part into the Family Law Act 1975, namely Part XIII A, entitled “Sanctions for Failure to Comply with Orders and Contempt of Court”. The purpose was to implement the ALRC recommendations and unify the provisions of the Act which provide sanctions for failure to comply with a court order, and to relocate and modify the existing contempt provision in section 108. The new Part XIII A applied to all orders made under the Act, including orders made under Part VII relating to children.

The basic approach of the new contravention provisions remains today. The 1989 Act provided for sanctions for contravening an order under the Act,<sup>34</sup> and set out what counted as a ‘reasonable excuse’ for certain contraventions.<sup>35</sup> The range of possible penalties was increased by making it possible for the court to impose such penalties as a term of community service, or weekend detention, by arrangements to be made with participating states and territories. Imprisonment was carefully limited, and certain fines were specified. The court was ordinarily not to make an order unless counselling had been provided. The court could make a ‘compensatory access order’, namely “an order giving a person such access to a child (in addition to access provided for by an access order) as the court considers appropriate, having regard to any deprivation of access resulting from the contravention concerned.”<sup>36</sup> A warrant could be issued for the arrest of persons who contravened custody or access orders,<sup>37</sup> the alleged offender would be dealt with under s 112AD. In these matters the Act often adopted the draft legislation that formed part of the ALRC report. Surprisingly, as noted earlier the Act did not (and the law still does not) implement the sensible and cost-neutral recommendation that the law should list the considerations relevant to the exercise of the court’s discretion in imposing sanctions for breach of an access order.

### **Conclusions on the period 1975-1989**

---

<sup>34</sup> Defined in s 112AB. Under s 112A8(1) that a person would be taken to have contravened an order under the Act only if he or she is bound by the order and has either intended not to comply with the order or, without having that intent, has failed to make any reasonable attempt to comply with the order.

<sup>35</sup> Section 112AC.

<sup>36</sup> Section 112AD (2) (g). The child’s welfare was to be the paramount consideration when the court considered making such an order: s 112AL.

<sup>37</sup> Section 70AA

The Act now gave the court a larger and more varied armoury, but most of the weapons were of the same general character as the blunter instruments available under the traditional law of contempt.

### **1989: Part XIII A inserted by the Family Law Amendment Act 1989**

That remained the position until 1989, when until Part XIII A was added by the Act 182 of 1989.<sup>38</sup> The main basis for this insertion was a report by the Australian Law Reform Commission, *Contempt* (ALRC Report 35), espec.Chapters 13 and 14, 'Non compliance in family law'. The report included draft legislation.

The new Part XXXIA was headed 'Sanctions for failure to comply with orders and contempt of court' and did not deal separately with breaches of children's order. In his Second Reading speech, the Attorney-General Lionel Bowen also referred to the Family Law Council's report, *Access - Some Options for Reform* (1987) at pp 25-27 where, in its brief consideration of the sanctions issues, the Council (with some minor qualifications) agreed with the ALRC recommendations, including the draft legislation. Accordingly, it is not surprising that the 1989 amendment appears to have been largely based on the ALRC recommendations.

The significant changes made by the 1989 legislation, so far as they are relevant to the present discussion, may be summarised as follows:

- They enabled arrangements with the states and territories to allow for additional sentencing alternatives, particularly community service orders.
- They gave the court specific power to order that, as it was put in the explanatory memorandum, 'certain access shall occur to replace access which did not occur as a result of the contravention of an order'. In relation to this compensatory access, the child's welfare was to be the paramount consideration.
- They required the court to consider whether the parties should be required to attend counselling before imposing a sanction.<sup>39</sup>

---

<sup>38</sup> Family Law Amendment Act 1989.

<sup>39</sup> According to the EM, 'a specialist program for counselling families in which there is a history

For the purpose of Part XIII A a person would be taken to have contravened an order under the Act only if he or she is bound by the order and has either intended not to comply with the order or, without having that intent, has failed to make any reasonable attempt to comply with the order. Contravening an order included preventing a person who is bound by the order complying with an order, or aiding or abetted the contravention of an order by the person bound by the order.

The Act inserted what are essentially the existing provisions relating to reasonable excuse. As to this, the EM stated that the requirement that the person deprived of access or custody be so deprived for no longer than is necessary 'places an obligation on the person who contravenes an order to commence proceedings for variation of the custody or access orders at the earliest opportunity, where such a course is the appropriate response to a concern about the safety or health of a person'.

### **2000: Introduction of the three-stage "parenting compliance regime"**

Despite the hard work that had gone into Part XIII A, issues relating to the contravention of parenting orders continued to be raised. As the Family Law Council put it in June 1998:

*Complaints about problems with contact enforcement have been consistently voiced over a lengthy period. Members of Parliament are regularly receiving complaints about these matters and there have been a number of public inquiries in which problems were clearly made known. In Council's view the problem is real, it is persistent and it needs to be addressed.*

The Council's report, *Child Contact Orders Child Contact Orders: Enforcement and Penalties* (June 1998)<sup>40</sup> was largely the basis for the Family Law Amendment Act 2000, which created a three-stage 'parenting compliance regime'. as the Council recommended. However the legislative background included the *Report by the Joint Select Committee (JSC) on Certain Aspects of the Operation and Interpretation of the Family Law Act (1992)*, and the ALRC report *For the sake of the kids - Complex contact cases and the Family Court* (ALRC 73. 1995).

---

of repeated breach of an access orders is to be established in the Family Court Counselling Service.'

<sup>40</sup> To be read with the Council's earlier *Interim Report Penalties and Enforcement* (March 1998).

The EM to the bill of 2000 summarised the background and the main themes of the new approach as follows:

*The Bill will also address an area of very significant concern for many parents and of general public disquiet - the enforcement of parenting orders. The Joint Select Committee's concern on this aspect led it to recommend a more detailed study of enforcement cases and the causes of the discontent with such cases. That detailed study was undertaken by the Family Law Council, which reported in June 1998. This Bill will basically adopt the 3 tiered approach to the enforcement of parenting orders recommended by the Council.*

*The Bill will provide for -*

*\* stage 1 - preventative measures, to improve communication between separated parents and educating parents about their respective responsibilities in relation to their children;*

*\* stage 2 - remedial measures, to enable the parents to resolve issues of conflict about parenting; and*

*\* stage 3 - sanctions, to ensure that, as a last resort, a court takes other action in relation to a parent who deliberately disregards a court order.*

*Stage 1 of the new three tier regime aims to assist people in their responsibilities in relation to their children by the provision of information and programs so that they have a greater understanding of their changed parental responsibilities. Stage 1 makes provision for standard clauses in parenting orders setting out the obligations the order creates and the consequences of failing to observe its terms. In addition the provisions also require that parties be given information about the availability of programs which will assist them in understanding their changed parental responsibilities.*

*Stage 2 of the new compliance regime directs people to a post-separation parenting program that aims to address the real reason for non-compliance. The provisions make it clear that parties should not be referred to a post-separation parenting program where the contravention is serious, or where the contravention is a second or subsequent contravention, unless further attendance at a post-separation parenting program is warranted. Under the regime the parties are required to attend the provider of a program to enable the making of an assessment as to their suitability for the program, thereby enabling the parties to be streamed into the most appropriate program. If found suitable, the legislation requires the person to attend the program.*

*The court will have the power to order that, in addition to the person who contravened the parenting order, another party to the parenting order also attend a post separation parenting program, in circumstances where both*



*parents will benefit by addressing the real reason for the breakdown in the orders. The court will also have an option to adjourn the contravention proceedings to allow for either party to seek a further parenting order. Before the court grants such an adjournment it must consider a range of factors.*

*Stage 3 of the compliance regime provides that where there has been a serious contravention of a parenting order, the court should take action. The court will be able to take action, under Stage 3 of the parenting compliance regime, on second and subsequent contraventions where it is not appropriate to take action under Stage 2. The actions available to the court include the imposition of a community service order, a bond, a fine or, in the most serious cases, a sentence of imprisonment.*

*The Bill also makes provision to clarify the standards of proof to be met on the various elements of taking action under Stage 2 and Stage 3 of the parenting compliance regime. The Bill also makes it clear that the new regime will apply to all contraventions that occur after the Bill commences that have not been dealt with under the current provisions. [...]*

*To improve the practical operation of the new Federal Magistrates Service the Bill empowers the Family Court and the Federal Magistrates Service to vary or discharge each other's community service orders.*

Much of the substance of those provisions remains today.

Div 13A was created by the Family (operative 27 December 2000) which set out what was then a new three stage "parenting compliance regime".

### **2006: Revision to the three-stage regime in 2006**

Division 13A was revised by the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth). That revision retained the general approach of the Division, but substantially re-organised it, and made numerous changes of detail.