



Family Law Council

Improving Post-Parenting Order Processes

**A report to the Attorney-General prepared by
the Family Law Council**

October 2007

ISBN: 1 921241 21 7

© Commonwealth of Australia 2007

This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to the Commonwealth Copyright Administration, Attorney-General's Department, Robert Garran Offices, National Circuit, Barton ACT 2600 or posted at <<http://www.ag.gov.au/cca>>.

For more information about this report, or more generally about the Family Law Council's work, please contact the Council's Secretariat at:

Robert Garran Offices
National Circuit
Barton ACT 2600

Phone: 02 6234 4829
Fax: 02 6234 4811
E-mail: flc@ag.gov.au

Or visit the Council's website at <<http://www.ag.gov.au/flc>>.

TABLE OF CONTENTS

Terms of Reference	4
Recommendations	6
Executive Summary	8
1 Introduction.....	17
2 Why do we need to address post order parenting arrangements?.....	24
3 The 2006 family law reforms	28
4 Drafting better parenting orders.....	31
5 How to focus parents on the needs of their children: Information for Litigants.....	36
6 Providing support and assistance for parents.....	39
7 Compliance regime: Enforcement of orders	43
8 Mandatory requirements for a third breach of parenting orders.....	56
Bibliography	60
Appendix A: Functions of the Family Law Council.....	63
Appendix B: Members of the Improving Post-Parenting Order Processes Committee.....	64

TERMS OF REFERENCE

Terms of reference

In the light of the Every picture tells a story report¹ and the Government's proposed response² to that report outlined in the discussion paper released on November 2004 and entitled *A New Approach to the Family Law System*, the Family Law Council consider:

- (a) how family law processes can better deal with the need to vary parenting orders from time to time as family circumstances change; and
- (b) the need to distinguish variation issues from situations of serious non-compliance with court orders,

taking into consideration:

1. the proposed changes³ to the family law system in response to the Every picture tells a story report, as outlined in the discussion paper released on 10 November 2004, particularly the potential role of Family Relationship Centres in assisting families to resolve parenting order variation and compliance issues;
2. the role of court orders generally in structuring post-separation parenting arrangements and whether courts need greater flexibility in dealing with post separation parenting arrangements;
3. how court orders might be better drafted to reduce the likelihood of subsequent disputes;
4. the desirability of court orders including alternative processes, particularly primary dispute resolution processes for dealing with changes in circumstances and resolving subsequent disputes, such as a contact orders program or post separation parenting program;
5. the desirability of encouraging parties to include in their agreements primary dispute resolution processes for dealing with changes in circumstances and resolving subsequent disputes;
6. the procedural and cost barriers to bringing contravention applications in relation to serious non-compliance matters; and
7. any other matter that may be relevant.

Additional term of reference

On 28 February 2006, Council received the following additional reference:

Mandatory Penalties for a Third Breach of Parenting Orders

¹ House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story. Report on the inquiry into child custody arrangements in the event of family separation*, 2003.

² This response was given effect to by the 2006 Government reform package.

³ These changes are embodied in the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) and associated changes which came into effect on 1 July 2006.

Further examine the recommendation of the House of Representatives Standing Committee on Family and Community Affairs in the Every picture tells a story report that a court should give consideration to a parenting order in favour of the other parent, where there is a third breach within a pattern of defiance of court orders. In particular consider and make recommendations about whether it is appropriate for there to be mandatory penalties for a party that has breached a parenting order for a third time in the *Family Law Act 1975*.

This examination should consider the Government response to that report which did not support this recommendation.

RECOMMENDATIONS

Recommendation 1

That the Family Law Council in consultation with the Family Law Section of the Law Council of Australia, National Legal Aid, the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court develop a parenting orders handbook containing model parenting orders.

Recommendation 2

That the Attorney-General's Department, in consultation with the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court identify and develop information materials on conflict and children which address the following issues:

- the effects of separation on parties and on their children
- the challenges involved in post separation parenting
- the effect of continuing parental hostility on their children
- the importance of both parents being involved in the upbringing of children
- the importance of an agreed dispute resolution process, and
- the types of services available to parents to deal with post-separation issues.

Recommendation 3

That the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court amend their rules to ensure each party receives a copy of the information materials on conflict and children when a parenting order application is made.

Recommendation 4

That the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court undertake measures including educational measures to encourage judicial officers to make orders in reliance on appropriate sections of the Family Law Act to assist parents to adjust to post order parenting.

Recommendation 5

That the Government establish a child orders enforcement agency or in the alternative that the Government provide additional and specified funding to enable the State and Territory Legal Aid Commissions to assist parties to bring applications about serious contraventions of parenting orders before the family courts.

Recommendation 6

That the Attorney-General's Department, in consultation with the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court:

- explore the possibility of developing sentencing guidelines for cases involving serious disregard for parenting orders,
- develop a database to assist the judiciary in achieving consistent sentencing patterns in cases involving serious disregard for parenting orders, and
- make this information readily available to the legal profession and members of the public.

Recommendation 7

That the Attorney-General's Department, in consultation with the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court explore the feasibility of obtaining from State and Territory probation and parole services, pre-sentence reports in circumstances where a serious penalty for serious disregard of a parenting order is a possible outcome.

Recommendation 8

That the Family Law Act be amended to allow courts exercising jurisdiction under that Act to fix a non parole period and order cumulative sentences.

Recommendation 9

That the Government not introduce mandatory penalties for a third breach of a parenting order and that similarly the Government not introduce a requirement to consider a change in living arrangements where there has been a third breach of a parenting order.

EXECUTIVE SUMMARY

This executive summary will set out how each question posed in the terms of reference has been answered in the report.

How family law processes can better deal with the need to vary parenting orders from time to time as family circumstances change

The Government introduced a major package of reforms to the family law system in 2006. The reforms encourage parties to agree to their own arrangements for children after separation and to avoid litigation. By 2008, all parties who have a dispute about arrangements for their children will be required to try to resolve the dispute by using primary dispute resolution processes,⁴ unless they fall within one of the exceptions.⁵ The impact of these changes which for the most part commenced in July 2006, is not yet clear.

Nevertheless, the courts will continue to play an important role in structuring post separation parenting arrangements. That role will involve the courts making orders for those parents who are unable to agree to arrangements for their children, and varying or enforcing existing orders where a conflict arises.

The reforms put in place by the 2006 reform package will have an impact on parenting arrangements generally. Council's first recommendation is centred on improving the drafting of orders so that they are more comprehensive and importantly so that parties can provide for a mechanism other than the court for making any necessary changes. The model which Council proposes is that of the *Legal practitioner's guide: precedents for child support agreements and court orders*⁶ (the Legal Practitioner's Guide).

This is Recommendation 1 of the report.

Recommendation 1

That the Family Law Council in consultation with the Family Law Section of the Law Council of Australia, National Legal Aid, the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court develop a parenting orders handbook containing model parenting orders.

In addition Council recommends the development of materials to provide important information to parties about the impact of protracted conflict on themselves and their children. Council recommends that a publication containing this information be given to parties by the court at the commencement of the litigation so that they can take stock at that point and so that they can be motivated away from litigation back into negotiation to resolve their disputes.

⁴ *Family Law Act 1975* (Cth) s 60I.

⁵ *ibid*, s 60I(9).

⁶ Child Support Agency, *The legal practitioner's guide; precedents for child support agreements and court orders*, 2004.

Recommendation 2

That the Attorney-General's Department, in consultation with the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court identify and develop information materials on conflict and children which address the following issues:

- the effects of separation on parties and on their children
- the challenges involved in post separation parenting
- the effect of continuing parental hostility on their children
- the importance of both parents being involved in the upbringing of children
- the importance of an agreed dispute resolution process, and
- the types of services available to parents to deal with post-separation issues.

Council envisages that the materials identified or developed will be made widely available in many formats including electronic and printed publications. However, Council wishes to ensure in particular that the information be available to parents who have approached the court system so that they can be made aware of the impact of the conflict on their children and importantly of the alternative ways in which such disputes can be resolved in order to minimise the negative impact on their children.

Recommendation 3

That the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court amend their rules to ensure each party receives a copy of the information materials on conflict and children when a parenting order application is made.

The need to distinguish variation issues from situations of serious non-compliance with court orders

Council has responded to this part of the reference in three ways. First, we have looked at ways of promoting orders which are drafted in a way which may avoid variation problems arising. This aspect is addressed in Recommendations 1 and 2. The former recommends the preparation of a parenting orders handbook similar to the Child Support Agency's Legal Practitioner's Guide,⁷ and the latter recommends the identification or development of information which sets out the impact of parental conflict on children, the need to re-negotiate the terms of orders from time to time and where to seek assistance to change or update orders or to enter into a parenting agreement. These recommendations are aimed at educating parents to approach orders as tools for co-operative parenting rather than weapons to attack the other parent.

Second, Council has recommended a greater use of section 13C⁸ orders to assist parties who may get into difficulty once their parenting orders have been made. These measures are aimed at providing parties in particular need with more detailed help so that they will develop an appreciation of the difference between variation issues and non compliance issues. This is Recommendation 4.

⁷ *ibid.*

⁸ Other relevant sections of the Family Law Act are ss 65L, 65LA and 70NEB.

Recommendation 4

That the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court undertake measures including educational measures to encourage judicial officers to make orders in reliance on appropriate sections of the Family Law Act to assist parents to adjust to post order parenting.

Third, in cases where there is a serious disregard of parenting orders, Council has recommended the establishment of a child orders enforcement agency. If this option is not accepted by the Government, Council considers that an acceptable but less desirable option would be to provide specific funding to the State and Territory legal aid commissions. This funding would be used to provide generously means tested legal assistance in cases where there is deliberate contravention of a serious nature. This is Recommendation 5.

Recommendation 5

That the Government establish a child orders enforcement agency or in the alternative that the Government provide additional and specified funding to enable the State and Territory Legal Aid Commissions to assist parties to bring applications about serious contraventions of parenting orders before the family courts.

Because the proposed agency or the proposed funding will deal with cases where there is a serious disregard of parenting orders, Council considered it appropriate to look to the serious penalties which may be imposed if a breach is established. The proposed measures will ensure that when a judicial officer imposes penalties such as community service orders or imprisonment they will do so with sufficient information available to ensure that the best interests of children are not compromised by such orders. The recommendations will enhance the work of the proposed agency but do not depend on its establishment.

Recommendation 6 recommends the establishment of a database. This will enhance the consistency of judicial decision making, allow lawyers to give more specific advice to their clients and enable parties to be aware of penalties which may attach to their actions.

Recommendation 6

That the Attorney-General's Department, in consultation with the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court:

- explore the possibility of developing sentencing guidelines for cases involving serious disregard for parenting orders,
- develop a database to assist the judiciary in achieving consistent sentencing patterns in cases involving serious disregard for parenting orders, and
- make this information readily available to the legal profession and members of the public.

Recommendation 7 will ensure that where penalties such as community service orders and imprisonment are contemplated the judicial officer will have specific information about the suitability of the particular litigant for community service, the availability of community service or suitable custodial facilities.

Recommendation 7

That the Attorney-General's Department, in consultation with the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court explore the feasibility of obtaining from State and Territory probation and parole services, pre-sentence reports in circumstances where a serious penalty for serious disregard of a parenting order is a possible outcome.

Recommendation 8 will allow judicial officers imposing custodial sentences to do so under the same conditions that such sentences are imposed within the criminal jurisdiction. Parties who are convicted of an offence under the Family Law Act will not be at a disadvantage when compared to parties convicted under state or territory laws.

Recommendation 8

That the Family Law Act be amended to allow courts exercising jurisdiction under that Act to fix a non parole period and order cumulative sentences.

The remainder of the executive summary refers to the specific matters Council has been asked to consider.

The proposed changes to the family law system in response to the Every picture tells a story report, as outlined in the discussion paper released on 10 November 2004, particularly the potential role of Family Relationship Centres in assisting families to resolve parenting order variation and compliance issues

The new family law system has now been in place for over 12 months. This aspect of the terms of reference has therefore been approached by looking at the actual changes which have been made and some assessment of the impact of those changes on the issue of parenting after orders or agreements have been obtained.

The 2006 changes to the Family Law Act mandate an initial attempt at dispute resolution outside the court⁹ and by 2008, parties will not be permitted to file an application for parenting orders until they go through a dispute resolution process, unless the case falls within one of the exceptions.¹⁰

The 65 Family Relationship Centres (FRC) provided for in the 2006 family law reforms are a new gateway to an expanded range of services to assist parents after separation. The first 15 centres opened their doors in July 2006. A further 25 were opened in July 2007. The Centres have been providing assistance and referrals to parents dealing with parenting issues after they have separated. Early feedback from the Centres, private practitioners and the courts suggests that the Centres are well attended by separating couples and are providing a high standard of service.

Recommendation 1, which is for the development of a parenting orders handbook should assist the Family Relationship Centres to guide parties about the matters they will need to address when considering orders concerning their children.

⁹ Family Law Act s 60I.

¹⁰ *ibid*, s 60I(9).

The conflict and children information material provided for in Recommendation 2 should reinforce the importance of avoiding acrimonious litigation and focussing on the needs of their children.

The Family Relationship Centres will be able to work in co-operation with the proposed child orders enforcement agency provided for in Recommendation 5. The proposed agency will refer parents who do not fit its guidelines to the Family Relationship Centres and likewise the Family Relationship Centres will be able to refer appropriate cases to the proposed agency.

The role of court orders generally in structuring post-separation parenting arrangements and whether courts need greater flexibility in dealing with post separation parenting arrangements

Court orders are important in those families where parents are unable to reach independent agreement. In Recommendation 1, Council has recommended the production of a parenting orders handbook which will improve the workability of court orders, particularly those prepared without legal or judicial assistance. This will assist parties to avoid unintended ambiguities, omissions or consequences. In addition, Recommendation 2 is for the preparation of information to focus parties back on their children and on the alternatives to litigation when orders need updating. This will encourage parties away from litigation and towards self management of parenting arrangements.

Recommendation 4 provides for greater use of existing processes for the ongoing monitoring and supervision of parenting orders. The ongoing support of parenting orders proposed is to be effected by promoting more frequent use of section 13C and other like sections¹¹ which allow the court to refer litigants to a wide range of community services, courses, and programs to help them strengthen their ability to engage in post-separation parenting. These services will facilitate the implementation of the orders and provide ongoing support to family members while they learn to manage their orders.

Council's fourth recommendation envisages a greater use of orders such as section 13C orders and recommends the Family Courts take appropriate measures including education measures, to promote the use of these orders by judicial officers.

How court orders might be better drafted to reduce the likelihood of subsequent disputes

Council recommends the preparation and publication of a parenting orders handbook similar to the Child Support Agency's Legal Practitioner's Guide. The proposed parenting orders handbook would be developed in conjunction with other agencies skilled in the preparation of such resources.

The parenting orders handbook will assist anyone involved in drafting the terms of parenting orders, but will be particularly useful to the self-represented litigants who have now become a feature of family law litigation. The handbook should contain model parenting orders, information about how to approach the drafting exercise and where to obtain further assistance if it is required. The handbook should provide templates and sample terms of agreement.

Parenting orders need to be as individualised as possible to suit every family's need. The parenting orders handbook should flag considerations which may arise and which the parties may not have thought about. Some of the matters that should be included in the handbook are:

¹¹ Other relevant sections of the Family Law Act are ss 65L, 65LA and 70NEB.

- arrangements to collect and deliver the child
- how to communicate in the event of delay
- how illness of the child will impact on parenting arrangements
- how special events in the child or the parents' lives will be dealt with
- the start and end of school holidays, and
- arrangements to facilitate agreement in the event that the orders need to be changed.

The handbook containing model parenting orders should address difficulties arising from a lack of clarity in orders.

The proposed parenting orders handbook should be widely published and made available in several formats. For example, it should be available in hard copy from many outlets and available for download from Council's website.

The desirability of court orders including alternative processes, particularly primary dispute resolution processes for dealing with changes in circumstances and resolving subsequent disputes, such as a parenting orders program or post separation parenting program

Disputes can arise for many reasons. Most commonly they arise from the changing needs of children as they grow. However the particular changes in circumstances are often unforeseeable and are unavoidable given the changeable nature of families and the relatively fixed nature of court orders. Council's recommendation that a parenting orders handbook be prepared to assist with the drafting of court orders will enable parties to draft orders more easily and to give consideration to matters such as the inclusion of terms to deal with disputes which may arise. The parenting orders handbook will also assist parents to consider changes in circumstances and either address them in the initial orders or give consideration to how they might be addressed when they arise. The recommendation dealing with the parenting orders handbook is Recommendation 1.

Parenting is a challenging job at the best of times and the challenges are increased when parents separate. Council recommends that information materials on conflict and children be developed to be given to parties when they make an application to the court. The materials should contain general advice about the effects of parental conflict on children and the challenges of post separation parenting as well as information about how to approach changes in circumstances that may render an order no longer suitable.

The desirability of encouraging parties to include in their agreements primary dispute resolution processes for dealing with changes in circumstances and resolving subsequent disputes

Recommendations 1 and 2 discussed above will encourage parties to consider the issue of changing circumstances. Council expects that primary dispute resolution processes will be discussed in the publications and that as a consequence more parties will include such processes in any agreement or court orders.

In addition, the 2006 changes in the Family Law Act require parties to attend family dispute resolution. This provision will be fully operational by 2008 and will require parties to attempt to resolve their parenting dispute using primary dispute resolution processes, unless they fall within one of the specified exceptions.

Parenting plans will allow parties more flexibility in terms of the range of issues they can include and the relative simplicity involved in updating a parenting plan when circumstances change. Inclusion of a term dealing with dispute resolution in the parenting plan will give the parties a means of dealing with the problem giving rise to the dispute without having to resort to the court system. The Attorney-General's Department has developed a guide for the preparation of parenting plans. This guide will be available electronically through Family Relationships Online at <<http://www.familyrelationships.gov.au/>>.

Council's view is that these provisions should be allowed sufficient time to impact on post separation arrangements before further changes are considered. Council's Recommendations 1 and 2 are designed to complement these changes.

The procedural and cost barriers to bringing contravention applications in relation to serious non-compliance matters

The 2006 amendments to the Family Law Act introduce welcome changes to the compliance regime. The powers and obligations of the court increase with the seriousness of contraventions. In all contravention proceedings the court will be empowered to vary the terms of an order. This means the court will be able to ensure that where contraventions are the result of poorly drafted orders or a party's inability to comply with orders due to changes in circumstances the terms of the orders can be varied appropriately.

Council's major recommendation in relation to this part of the terms of reference is the establishment of a child order enforcement agency. This is Recommendation 5. The proposed agency would recognise the public interest aspect of the enforcement of parenting orders. Where cost of enforcement is a problem the agency would provide the necessary representation at no cost to the party subject to a generous means test. Cases eligible for prosecution through the agency would be those characterised as cases which demonstrate a serious disregard of parenting orders. The proposed agency should also have an obligation to attempt to resolve a matter through non litigious means such as referrals to community organisations such as Parenting Order Programs as a preliminary step.

The child orders enforcement agency would have discretion to decide whether an application should be brought in a particular case and there should be a requirement for the aggrieved parent's instructions to pass a test of reasonableness. In addition the recommendation contemplates that there will be a means test for applicants but the terms of that test will be based on the generous limits provided for in the Overseas Custody (Child Removal) Scheme which is administered by the Commonwealth Attorney-General's Department.¹²

If the proposed agency decides in a particular case that it is not an appropriate case to seek enforcement, the parties involved may, subject to the existing provisions of the Family Law Act seek enforcement on their own account in much the same way that parties can seek to enforce child support matters which the Child Support Agency (CSA) may not have the capacity to pursue. In such cases Council's view is that there should be a presumption that the unsuccessful party will bear the costs of the application.

¹² See Attorney-General's Department, *Financial Assistance*, last viewed 9 August 2007, <http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalaid_FinancialAssistance>.

Council has drafted this recommendation to provide for an alternative but less satisfactory means of achieving the proper recognition of the public interest in bringing relevant breaches of parenting orders before the courts. The alternative but not as favoured proposal envisages specific funding being made available to the State and Territory legal aid commissions to facilitate parties' prosecution of relevant cases. The mechanism for bringing appropriate cases to court would be the same under this proposal as under the proposal for an independent agency.

Referral to either the child orders enforcement agency or the Legal Aid Scheme would be through the FRC, or directly by the parties.

In order to facilitate the work of the proposed agency Council has made three recommendations which go to ensuring that the best interests of children are not compromised by the imposition of penalties such as community service orders or custodial sentences on one of their parents. Recommendation 6 aims to establish a database so that there is more uniformity in sentencing and to enhance legal advice and information available to litigants. Recommendation 7 recommends the preparation of a pre sentencing report when community service or custodial sentences are contemplated and Recommendation 8 is aimed at giving litigants convicted under the Family Law Act similar sentencing options to those available in the criminal jurisdiction.

Further examine the recommendation of the House of Representatives Standing Committee on Family and Community Affairs in the Every picture tells a story report that a court should give consideration to a parenting order in favour of the other parent, where there is a third breach within a pattern of defiance of court orders. In particular consider and make recommendations about whether it is appropriate for there to be mandatory penalties for a party that has breached a parenting order for a third time in the Family Law Act 1975.

This examination should consider the Government response to that report which did not support this recommendation.

Council has considered in some detail the extent of the changes to the enforcement regime for parenting orders that has flowed from the 2006 reforms. Mandatory sentencing options have an undesirable effect of shifting power from the judicial authority to the prosecuting authority. In the family law context where a large proportion of the litigants do not have legal representation the prosecuting authority is often the other parent.

Council does not favor a statutory requirement to 'consider' making a parenting order in favor of the other parent because of the positive connotations which that term has acquired since the introduction of the 2006 legislative reforms.¹³

Further, Council has recommended other changes which should assist in encouraging better compliance with parenting orders into the future. Council believes that these changes should be given an opportunity to work before further consideration is given to such a dramatic step as mandatory penalties or a specific requirement that a court give consideration to a parenting order in favour of the other parent where there has been a third breach of a parenting order.

¹³ *Goode and Goode* [2006] FamCA 1346 (15 December 2006).

Recommendation 9

That the Government not introduce mandatory penalties for a third breach of a parenting order and that similarly the Government not introduce a requirement to consider a change in living arrangements where there has been a third breach of a parenting order.

1 INTRODUCTION

1.1 This report suggests ways of dealing with problems encountered by parents after court orders have been made. The aim of the recommendations is to steer parents towards co-operative ways of dealing with the inevitable changes in arrangements which will be necessary as children grow and circumstances change.

1.2 A number of parliamentary enquiries have considered the complex issue of parenting children after separation in some detail. This report draws on the conclusions reached in those enquiries as well as in published research and recommends how the operation of the law in this area might be improved.

1.3 In July 2006, the Government introduced wide ranging reforms aimed at steering separating parents away from litigation and towards co-operative parenting. These reforms are discussed in detail in Chapter 3.

1.4 The reforms focus on 4 main areas:

- The establishment of Family Relationship Centres. The Government committed almost \$400 million in community services to help people with relationship difficulties. At the time of writing 40 Family Relationship Centres have been opened. It is anticipated that all 65 proposed centres will be operational by 2008.
- Amendments to the Family Law Act contained in the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Shared Parental Responsibility Act). These changes came into effect on 1 July 2006.
- Changes to the Child Support Scheme. The reforms to Stage 1 came into effect on 1 July 2006. Reforms to Stage 2 took effect in January 2007 and Stage 3 will take effect in July 2008.
- Simplification of the path into the family court system by combining the Registries of the Family Court of Australia and the Federal Magistrates Court.

1.5 This report looks at how problems, which arise after parenting orders have been made, can best be dealt with in the context of these 2006 family law reforms.

Terms of reference

1.6 The terms of reference for this report were received before the 2006 reforms. The report itself has been produced after the reforms entered into force on 1 July 2006. The history of this reference is set out below.

1.7 On 25 October 2004 Council proposed to the Attorney-General draft terms of reference for reviewing the way post-order conflicts concerning parenting issues are resolved.

1.8 On 16 November 2004 the Attorney-General approved Council's draft terms of reference and suggested that the terms be modified to ensure that Council's report took into account the then

proposed response to the Every picture tells a story¹⁴ report. The Attorney-General also suggested that consideration be given to the desirability of court orders including provisions that the parties use alternative dispute resolution processes.

1.9 The final terms of reference are as follows:

In the light of the Every picture tells a story report¹⁵ and the Government's proposed response¹⁶ to that report outlined in the discussion paper released on November 2004 and entitled *A New Approach to the Family Law System*, the Family Law Council consider:

- (a) how family law processes can better deal with the need to vary parenting orders from time to time as family circumstances change, and
- (b) the need to distinguish variation issues from situations of serious non-compliance with court orders,

taking into consideration:

1. The proposed changes to the family law system in response to the Every picture tells a story report, as outlined in the discussion paper released on 10 November 2004, particularly the potential role of Family Relationship Centres in assisting families to resolve parenting order variation and compliance issues
2. The role of court orders generally in structuring post-separation parenting arrangements and whether courts need greater flexibility in dealing with post separation parenting arrangements
3. How court orders might be better drafted to reduce the likelihood of subsequent disputes
4. The desirability of court orders including alternative processes, particularly primary dispute resolution processes for dealing with changes in circumstances and resolving subsequent disputes, such as a parenting orders program or post separation parenting program
5. The desirability of encouraging parties to include in their agreements primary dispute resolution processes for dealing with changes in circumstances and resolving subsequent disputes
6. The procedural and cost barriers to bringing contravention applications in relation to serious non-compliance matters, and
7. Any other matter that may be relevant.

1.10 Since it received this reference, Council has made a submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Committee) about the then Exposure Draft of the Shared Parental Responsibility Bill 2006. In addition, on 25 July 2005,

¹⁴ House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story. Report on the inquiry into child custody arrangements in the event of family separation*, 2003.

¹⁵ House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story. Report on the inquiry into child custody arrangements in the event of family separation*, 2003.

¹⁶ *A new family law system*, Government response to 'Every picture tells a story'. Response to the report of the House of Representatives Standing Committee on Family and Community Affairs inquiry into child custody arrangements in the event of family separation, June 2005.

Council member Ms Nicola Davies appeared on behalf of Council at a hearing of the Committee to answer questions about Council's submission. On 18 August 2005, the Committee reported on the Exposure Draft of the Committee's report. On 8 December 2005, the Government tabled its response to that report and the Family Law Amendment (Shared Parental Responsibility) Bill 2005 was introduced into the House of Representatives. The Bill passed all stages in the Parliament on 10 May 2006. The *Family Law Amendment (Shared Parental Responsibility) Act 2006* (the Shared Parental Responsibility Act) came into force on 1 July 2006.

1.11 Schedule 2 of the Shared Parental Responsibility Act contains a range of amendments to strengthen the existing enforcement regime in the Family Law Act. The amendments provide the courts with a greater range of options to enforce parenting orders, including make up time and financial compensation. The general amendments are outlined in greater detail in Chapter 3. The enforcement regime is discussed in Chapter 7.

1.12 On 28 February 2006 Council received the following additional reference:

Further examine the recommendation of the House of Representatives Standing Committee on Family and Community Affairs in the Every picture tells a story report that a court should give consideration to a parenting order in favour of the other parent, where there is a third breach within a pattern of defiance of court orders. In particular consider and make recommendations about whether it is appropriate for there to be mandatory penalties for a party that has breached a parenting order for a third time in the *Family Law Act 1975*.

This examination should consider the Government response to that report which did not support this recommendation.¹⁷

Background

Previous enquiries by the Family Law Council (1987 to 1998)

1.13 In its report, *Access: some options for reform* (1987), the Family Law Council first examined the difficulties experienced by separated parents in maintaining their relationship with their children. In that report Council acknowledged the need to focus on ways of achieving greater co-operation between parents in the ongoing care of their children after separation.

1.14 Council had occasion to consider these issues again in reporting on *Patterns of parenting after separation* (April 1992) and in *The Operation of the (UK) Children Act 1989* (March 1994). Pursuant to its enquiries, Council made a number of recommendations which were largely implemented in the *Family Law Reform Act 1995*. The 1995 reforms replaced the custody/access model with a system based on parental responsibility and placed legislative emphasis on the importance of children spending time with both parents after separation. The main focus became how separating parents could be assisted to make decisions about the care of their children without the need for court intervention.

1.15 In March 1998, in an interim report entitled *Penalties and Enforcement*, Council recognised that a minority of cases would continue to be plagued by ongoing difficulties for which court intervention was inevitable. Council also formed the view that systemic problems could be addressed and improved by approaching them differently. The proposed system aimed to achieve:

¹⁷ *ibid.*

- a flexible approach in the individual cases
- a focus on children by taking into account the children's wishes and changing needs, and
- educating parents to have regard for children's best interests, both in the short and long term.¹⁸

1.16 In its final report *Child contact orders: enforcement and penalties* (June 1998), Council noted that ongoing contact problems were real, persistent and needed to be addressed. Council formed the view that no single simple solution could be identified and it recommended:

- expanded community education programs
- clarifying legislation to make it clear that wilful and repeated breaches of court orders should be dealt with adequately and appropriately
- primary dispute resolution (PDR) alternatives before court action
- post order counselling as a preventative and educative measure
- unsatisfactory court processes should be improved
- monitoring matters by independent counsel and counsellors, and
- better drafted orders to avoid unclear, vague and unenforceable provisions.

1.17 Many of the issues highlighted by Council's previous reports have been addressed in the 2006 reform package. For example, the certification process required by section 60I of the Family Law Act effectively mandates PDR prior to commencing child-related proceedings unless the exceptions set out in section 60I(9) apply. Community education programs have been expanded and the Family Law Act provisions relating to breaches of court orders have been re-organised and clarified in Division 13A.

1.18 This report makes recommendations that will be adjuncts to the 2006 reform package and will complement those reforms. This report will focus on recommendations to assist separating parents to draft better orders, focus on the impact of conflict on their children and in appropriate cases, assisting them after they have obtained orders about their parenting arrangements by monitoring those arrangements or by facilitating the enforcement of orders through the courts in cases which demonstrate serious disregard for parenting orders.

1.19 The focus of Council's terms of reference is on processes rather than legislation although one legislative change is recommended.¹⁹ Council's view is that Schedule 2 of the Shared Parental Responsibility Act implements large scale reforms that ought to be allowed to operate. The changes to the law on compliance are detailed in Chapter 7.

¹⁸ Family Law Council, *Interim Report, Penalties and Enforcement*, 1998, paragraph 5.08, p 43.

¹⁹ Recommendation 8. That the Family Law Act be amended to allow courts exercising jurisdiction under that Act to fix a non parole period and order cumulative sentences.

Social Science Research

1.20 Research in Australia²⁰ and elsewhere²¹ confirms:

- a general dissatisfaction with court process as a slow, expensive and adversarial means of resolving disputes and enforcing parenting arrangements
- the importance of separating parents obtaining information about the effects of separation and conflict on their children as soon as possible
- the serious harm caused to children by ongoing parental acrimony and entrenched conflict, and
- the significant advantages to children's wellbeing of maintaining a relationship with the parent with whom they are not living, provided the child is not endangered by such a relationship.

1.21 The paramountcy principle²² generally guides judicial decision making in child related proceedings under the Family Law Act. Unsurprisingly however, disputes about parenting arrangements are not always laid to rest when the court makes a parenting order.

1.22 Research indicates that every aspect of family life has undergone substantial change over the past twenty five years.²³ For example, the rate of family mobility interstate and overseas, relationship patterns, gender roles, work and family interface all tend to suggest a period of dramatic social change is occurring. The list of choices and decisions about relationships and the resultant size, form and composition of families is also changing. Most relationships involve marriage and, while estimates of divorce rates vary depending on the method of estimation employed, the data indicate that between 32% and 46% of marriages end in divorce.²⁴ Of those divorces granted in 2005, 49.8% (26,289) involved children.²⁵ The total number of children involved in 2005 was 49,358.²⁶

1.23 Further, as the problems relating to parenting orders are diverse, there can be no single solution. No single parenting arrangement has been found which is in the best interests of all children.²⁷ Even when orders that suit all parties are made, the dynamic nature of families and the context of broader social change means that the orders have to be flexible to serve the needs of growing children and their parents.

²⁰ For example see, J McIntosh, *Australian children in post separation dispute: impacts of conflict and pathways of intervention*, *Safe Transitions Presentation*, 2005; P Parkinson and B Smyth, 'Research: satisfaction and dissatisfaction with father-child contact arrangements in Australia' (2004) 16 *Child and Family Law Quarterly* 289.

²¹ For example see Advisory Board on Family Law: Children Act Sub- Committee, *Making Contact Work*, 2002, viewed 12 July 2007, <<http://www.dca.gov.uk/family/abfla/mcwrep.pdf>>; J R Johnston, 'High conflict divorce' (1994) 4 *Children and Divorce* 165.

²² Sections 60CA and 60CC of the Family Law Act set out the paramountcy principle and the primary and additional considerations in determining what is in the child's best interest.

²³ Australian Institute of Family Studies, *Diversity & changes in Australian families*, 2005, page v.

²⁴ *ibid*, p 282.

²⁵ Australian Bureau of Statistics, 3307.0.55.001 — *Divorces, Australia*, 2005, released 2 November 2006.

²⁶ Family Law Council, *Statistical Snapshot of Family Law 2003–2005*, 2007, p 15.

²⁷ Australian Institute of Family Studies, *Parent-child contact and post-separation parenting arrangements*, Research Report No 9, 2004, p 129.

1.24 The regulation of post-separation parenting is a highly emotive, sensitive, frequently painful and unsatisfactory area of law which continues to occupy policy makers. The nature of these problems is discussed in Chapter 2 of this Report.

The 2006 Family Law Reforms

1.25 In December 2003, the House of Representatives Standing Committee on Family and Community Affairs tabled its report on the inquiry into child custody arrangements in the event of family separation. The *Every picture tells a story* report²⁸ was produced following extensive community consultation. The report recommends the courts develop a system which is less-legalistic, more child-focussed and designed to encourage and facilitate positive shared parenting after separation.

1.26 The *Every picture tells a story* report identified the need for major change and recommended a range of reforms to family law legislation and the family law system. In its 2005 response, *A new family law system: Government Response to Every picture tells a story* the Government agreed a cultural shift was required.

1.27 The 2006 reform package has addressed the issue of inflexibility of court orders in section 64D of the Family Law Act, introduced by the Shared Parental Responsibility Act. Section 64D renders orders unenforceable, to the extent of any inconsistency, if parents have subsequently made a properly executed parenting plan. However, Council's view is that more can be done to ensure that parenting orders and parenting plans work smoothly to enhance separating parties' capacity to continue to successfully parent their children.

1.28 The details of the 2006 reforms to the family law system are discussed at Chapter 3. These reforms are predicated on the position that disputes relating to children are fundamentally about relationships and that, except in limited cases, an application to the court for an order should be the remedy of last resort. The Government's reform package is guided by recognition of how important it is for children to have a relationship with both parents. The reforms encourage and support parents to work together to resolve their disputes outside the court system.

1.29 Notwithstanding the focus away from the court which informs the 2006 reforms, the courts' ongoing role in intractable, difficult and intransigent cases will continue to be of major importance. Accordingly, the courts' contravention focus must necessarily continue. Details of the post 1 July 2006 compliance regime are discussed in Chapter 7.

Structure of this report

1.30 This report is structured to reflect the processes which a family in conflict over parenting arrangements could use to approach and resolve difficulties. Families may face problems making orders work at various stages in the life of a parenting order. Over a course of time, an order will need to be changed to keep pace with changes in the family it serves. As the title of this report suggests, this report is focussed on the progressive course of actions available to resolve difficulties.

1.31 Chapter 2 begins by describing the problems that confront families after they have obtained their court orders and also looks at the negative impact of parental conflict on children.

²⁸ House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story*, 2003.

1.32 Chapter 3 describes the relevant changes which have been made to the family law system by the 2006 family law reforms.

1.33 Many contravention applications are filed because of poorly drafted orders, many of which have been drafted by the parties themselves and are made by consent. Such orders have given rise to disputes between parents. While it is clear that each family's circumstances are unique, Chapter 4 considers practical assistance to promote drafting clearer orders.

1.34 Families are highly dynamic entities. When the circumstances of any of the parents change and as children grow up, the terms of the order can become unworkable. A parent unable to comply in such circumstances may be the respondent to a contravention application. Chapter 5 looks at focussing the parents on the negative effect of ongoing conflict on their children and the benefits of availing themselves of alternative processes to resolve disputes.

1.35 Some parents require more support than others to learn to manage their orders. Chapter 6 considers processes that will provide families with ongoing support in managing their parenting orders while they work toward independent management. Such processes are particularly useful to families with multiple problems such as substance abuse or mental health problems and also to families experiencing financial stress. Such orders would also assist high conflict families where parenting time arrangements between parent and child have broken down.

1.36 Chapter 7 looks at the public interest considerations of enforcement of parenting orders where there has been serious disregard of the orders. The chapter suggests that the Government consider establishing a publicly funded agency, whose primary task would be to bring those matters requiring enforcement to the appropriate court. Establishment of such a public agency would demonstrate the seriousness of breaching parenting orders. The agency could relieve the wronged parent of the financial burden of pursuing enforcement in cases where breaches of orders manifest serious disregard for the orders. If such an option is not accepted then a lesser option is that legal aid commissions could be specifically funded to bring before the courts those matters which show serious disregard of parenting orders. Council notes that the alternative proposal is less satisfactory because it does not sufficiently reflect or entrench the importance of ensuring that children obtain the benefit of orders which are made in their best interests.

1.37 Finally, the imposition of mandatory penalties for a third breach of parenting orders is discussed in Chapter 8 of this report to address the additional terms of reference received on 28 February 2006.

2 WHY DO WE NEED TO ADDRESS POST ORDER PARENTING ARRANGEMENTS?

2.1 A number of Australian studies have highlighted the negative impact of parental conflict on children.²⁹

2.2 Some conflict and emotional distress is a normal part of the experience of separation for children but extended and pervasive conflict can undermine how the parents interact with the children, is commonly associated with negative consequences for the children and may also be a factor in the alienations of children from one or other of their parents.³⁰

2.3 The 2002 report of the United Kingdom's Advisory Board on Family Law: Children Act Sub-Committee (the UK Report) commented that disputes over orders about the time children spend with each of their parents remain 'a highly emotive, difficult and sensitive subject to which there is no one straightforward answer'.³¹ The themes which emerged from that report mirror those of the reports into post separation parenting in Australia. Those themes include:

- the general sense of dissatisfaction with court processes as a mechanism for resolving and enforcing contact disputes
- the need at an early stage to provide information to separating parents and their children about the likely effects of the separation, the difficulties they are likely to encounter, and the means whereby those difficulties can be addressed
- the need to address problems by a wide range of different mechanisms which are not based on court proceedings, and
- the need to ensure that mechanisms alternative to court proceedings are in place and are accessible to those who need them.³²

2.4 The UK Report identified the following information as being of critical importance to separating parents:

- the serious harm caused to children by continuing parental acrimony
- the significance to most children's wellbeing of maintaining contact wherever possible with the parent with whom they are not living
- the very substantial challenges involved in successful post-separation parenting for both parents, and
- the services which are available to assist in the resolution of difficulties over contact.³³

²⁹ J McIntosh, *Entrenched conflict in parental separation: Pathways of impact on child development: A synopsis of recent research*, 2002. J McIntosh and C Long, 'Outer conflict, inner discord: Australian children in post separation disputes' (2005) 84 *Health Issues* at pp 22–25. J McIntosh, C Long, and L Moloney, 'Child-focussed and child-inclusive mediation: A comparative study of outcomes' (2004) 10 *Journal of Family Studies* 87.

³⁰ J McIntosh and L Moloney, *Child focused dialogues*, 2006, p17.

³¹ The Advisory Board on Family Law: Children Act Sub-Committee, *Making contact work*, 2002, paragraph 1.2, p 10.

³² *ibid.*

³³ *ibid.*, paragraph 1.3, p 11.

Council's 1998 report: Child Contact Orders: Enforcement and Penalties

2.5 In its 1998 report, Council considered the 943 published submissions made to the 1992 Joint Select Committee on the Operation and Interpretation of the Family Law Act and consulted with a large number of organisations and individuals on those issues. At the end of this process Council produced an interim report entitled *Penalties and Enforcement* (March 1998). The final report entitled *Child Contact Orders: Enforcement and Penalties* was published in June 1998.

2.6 In the June 1998 report, Council outlined the problems confronting parents and made a range of recommendations for legislative and non-legislative changes. Council's legislative recommendations were that a three-tiered approach for dealing with the contravention of contact orders be included in the Family Law Act. This recommendation was adopted by the Government in the *Family Law Amendment Act 2000*. The non-legislative recommendation centred on a community education campaign and various counselling initiatives.

2.7 As in the UK, ongoing disputes in Australia between separated parents over the time children spend with each of their parents are characterised by high levels of anger, entrenched attitudes, violence and abuse. The presence and degree of inter-parental conflict negatively impacts on the adjustment of children following separation and divorce.³⁴ Chapter 2 of Council's 1998 report focussed on the need to change community attitudes to child orders about the time children spend with each of their parents, through a campaign of community information and education.

2.8 Complaints about problems with maintaining an ongoing relationship with children after separation have been consistently voiced over a lengthy period. The 1998 report noted that while complaints might be seen as 'statistically insignificant' they continue to use a high volume of resources in both human and financial terms.³⁵

Issues identified by parents

2.9 The main issues identified in the 1998 report from the available consultative and research material, in so far as they relate to the topic of post-order parenting problems, are summarised below. In this discussion we have retained the terminology of residence and contact which was in force at the time. The residence parent is the parent with whom the child lives and the contact parent is the parent with whom the child spends time. Both residence and contact parents reported problems.

2.10 Contact parents complained residence parents were denying them contact by various methods, such as:

- openly refusing to comply with an order
- moving residence to make contact difficult or impossible
- being absent when the contact parent calls for the child
- making false allegations of physical or sexual abuse of a child
- making false allegations of domestic violence
- making false claims that a child is ill, and

³⁴ Family Law Council, *Child contact orders: enforcement and penalties*, 1998, paragraph 3.04, p 18.

³⁵ *ibid*, paragraph 12.01, p 67.

- disputing interpretations of the contact order.³⁶

2.11 Further, contact parents said their capacity to enforce a contact order was limited because of a range of factors such as the costs of litigation, the perceived inability of the court to enforce its own orders and the lack of a speedy and effective means of having their difficulties dealt with.³⁷

2.12 Residence parents also reported problems, including:

- failure of the other parent to collect or return the child on time
- failure to attend for contact visits
- the condition of the child on return
- concerns about the safety and/or neglect of the child
- a child (particularly of more mature years) refusing to have contact with the other parent
- illness of the child
- changes in the child's behaviour before and after contact visits
- the other parent using contact to harass, intimidate and abuse the residence parent
- fear of the other parent
- threats and controlling actions of the other parent, and
- problems caused by a lack of clarity in contact orders.³⁸

2.13 Council's 1998 report concluded that discontent with the family law system for resolving child contact disputes stemmed from a range of issues.³⁹ The relevant points from the report are summarised as follows:

The process for determining applications for enforcement

- The legislative basis of the system is mainly aimed at punishing offenders and does not offer parents the practical help they want in maintaining regular contact with their children.
- Parties considered the court process largely failed to enforce its own orders.
- The range of penalties available to the court did not reflect the unique issue of contact enforcement, for which remedial measures were required.
- There was no legislative basis for preventative action such as warnings about the seriousness of breaching a court order or the provision of advice about orders at the time orders are made.
- Litigation is expensive and prevents some parents from taking action to enforce contact orders.

³⁶ *ibid*, paragraph 3.17, p 20.

³⁷ *ibid*.

³⁸ *ibid*, paragraph 3.17, p 21.

³⁹ *ibid*, paragraph 3.17 pp 20–24

- Other complaints related to problems with legal assistance; the calibre of advice, delays, frustrations caused by the system, health problems allegedly caused by family law experiences and perceptions about the Family Court's attitudes, beliefs and assumptions.

Counselling and mediation

2.14 Intervention through counselling and mediation was suggested as a way of addressing contact problems such as:

- where a child refuses to attend contact with the parent, and
- where unresolved issues between parents fuelled conflict and anger and prevented cooperation between them.

The drafting of contact orders

- The wording of contact orders contributed to problems that could be addressed by promoting greater clarity, reducing ambiguity and avoiding omissions.
- In its interim report, Council suggested that it may assist persons responsible for drafting orders to have a range of model orders or standard wording options available which would assist in better outlining the conditions and requirements set out in contact orders.

2.15 Although reforms were made in 2000⁴⁰ the continuing existence of complaints was evident in the Every picture tells a story report which referred to the family law system's disjointedness, cost and delays and recommended broad systemic change.⁴¹

2.16 The Shared Parental Responsibility Act implements a significant number of the recommendations made in the Every picture tells a story report. The substance of these initiatives is discussed in Chapter 3.

2.17 Council's legislative recommendations outlined above and adopted in the *Family Law Amendment Act 2000*, have not resolved the issues leading to the ongoing complaints highlighted most recently in the Every picture tells a story report. At least in part this is because the non-legislative recommendations made by the Council relating to community education and additional counselling and mediation services were not implemented in 2000. However, the Government's response to Every picture tells a story report has very significantly expanded the counselling and mediation services available to separating parents. Similarly, the community education campaign designed to highlight those services means that there are now major non-legislative reforms of the type that Council had in mind in its 1998 report. It is against this stimulating backdrop that Council presently considers the improvement of post-parenting order processes.

⁴⁰ *Family Law Amendment Act 2000* (Cth).

⁴¹ House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story*, 2003.

3 THE 2006 FAMILY LAW REFORMS

3.1 The Government's Family Law Reform package, which commenced its implementation phase on 1 July 2006, includes fundamental non-legislative and legislative reform and aims at a generational change in family law. The major changes to services for families include the establishment of 65 Family Relationship Centres (FRC) around Australia and the expansion of existing services. In particular, the Parenting Orders Program will be rolled out across Australia and there will be an additional 30 children's contact services around the country. The Shared Parental Responsibility Act introduces initiatives that seek to promote co-operative parenting solutions and to discourage litigation.⁴²

3.2 The key components of the 2006 reforms are:

- new and expanded services for families
- amendments to the Family Law Act
- changes to child support, and
- changes to court processes.

3.3 Under the 'new family law system' an application to the court for an order should be the remedy of last resort. The package is guided by recognition of how important it is for children to have a relationship with both their parents where it is safe for them to do so. The package encourages and supports parents to work together to resolve their disputes outside the court system. Accordingly certain provisions will bear directly on the topic at hand, including those on parenting plans, the role of the FRCs and the impact of compulsory alternative dispute resolution on the law relating to contraventions.

Changes to Process

Parenting Plans

3.4 A number of provisions in the Shared Parental Responsibility Act actively encourage parents to reach agreements, particularly those provisions relating to the use of parenting plans. The Shared Parental Responsibility Act contains new provisions about what might be included in a parenting plan⁴³ and imposes obligations on advisers assisting people making parenting plans.⁴⁴

3.5 Parenting plans are elevated by virtue of section 64D, such that they may render existing court orders unenforceable to the extent of any inconsistency. The explanatory memorandum to the Family Law Amendment (Shared Parental Responsibility) Bill 2005 states that:

the default provision has the effect that those parenting orders will be subject to any subsequent parenting plan. This will only be the case where the parenting plan is agreed to in writing by any [sic] other person to whom the parenting order applies. There is discretion

⁴² Family Law Section of the Law Council of Australia, *The new family law parenting system handbook*, 2006, p 5.

⁴³ Section 63C(2).

⁴⁴ Section 63DA.

for the court not to include the default provision in the parenting order in 'exceptional circumstances'.⁴⁵

3.6 It is unclear whether elevating the status of parenting plans will result in parents being more likely to make use of parenting plans. However, parenting plans offer a flexible alternative to seeking a variation of the orders in court and accommodate the need to update orders as circumstances change. They will also prevent parents seeking to enforce orders which have been subsequently changed by agreement.

3.7 The new Subdivision E of Division 1 of Part VII of the Family Law Act also fosters agreement between parents. Section 60I provides for compulsory attendance at family dispute resolution in a range of circumstances, prior to lodging an application for parenting orders with the court. The explanatory memorandum notes that 'this is a key change to encourage a culture of agreement making and avoidance of an adversarial court system.'⁴⁶

Compulsory dispute resolution

3.8 Compulsory dispute resolution is being phased in, to allow time for the establishment of FRCs and expansion of other services. Section 60I explains the phases, which are:

Phase 1: From 1 July 2006 – 30 June 2007, parties will need to comply with the Family Court's pre-action procedures, which include attempting to resolve the dispute using alternative dispute resolution methods.

Phase 2: For applications made on or after 1 July 2007, and before the date fixed by Proclamation, new applicants for orders relating to children will have to show that they have attempted family dispute resolution before filing an application in court.

Phase 3: The third phase will commence by Proclamation and from then on all applicants seeking orders relating to children will have to show they have attempted family dispute resolution before filing an application in court.

3.9 Phase 3 is expected to come into effect in mid 2008 and from that time onwards, subsection 60I(7) will apply to all matters. Subsection 60I(7) provides that a court cannot hear an application unless the applicant also files a certificate from a family dispute resolution practitioner to say that the applicant attended dispute resolution, unless they fall within one of the exceptions.

3.10 The certificate must state one of the following (subsection 60I(8)):

- the parties attended family dispute resolution and made a genuine effort to resolve the dispute, or
- the person applying to the court did not attend family dispute resolution due to the refusal or failure of the other party or parties to attend, or
- the family dispute resolution practitioner considers that it would not be appropriate to conduct the family dispute resolution, or

⁴⁵ Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005, paragraphs 173–4, p 36.

⁴⁶ *ibid*, p 20.

- the parties attended family dispute resolution but one or more of them did not make a genuine effort to resolve the dispute.

3.11 The introduction of competency-based accreditation standards for Family Counsellors, Family Dispute Resolution Practitioners and workers in Children's Contact Services (as provided for in Schedule 4 to the Shared Parental Responsibility Act) underpins the introduction of attendance at a compulsory dispute resolution process. The Community Services and Health Industry Skills Council (CSHISC) currently has the standards under development.⁴⁷ Accreditation will ensure consistency of the standards that apply to all professionals, particularly those issuing certificates.

Court process

3.12 The new combined registry of the Family Court of Australia and the Federal Magistrates Court is the gateway to the court system. Most matters will initially be streamed to the Federal Magistrates Court. Simplified and consolidated forms, fees and files for all new family law matters will simplify navigating the court process. Post order disputes usually present to the courts as contravention applications. Contravention applications will also be managed under this new court process. This arrangement is still evolving, however streaming has been introduced into the Adelaide registry and there is no doubt that the new arrangements will simplify the process of getting to a hearing in the courts.

⁴⁷ See <<http://www.cshisc.com.au>>.

4 DRAFTING BETTER PARENTING ORDERS

4.1 Council's report *Child contact orders: enforcement and penalties*, released in June 1998, concluded that the 'wording of contact orders' was a source of disputes between parents about the enforcement of contact orders. In assessing the nature of these disputes, Council noted that residence and contact parents⁴⁸ alike complained of problems in this regard. The 1998 report noted that:

- contact parents experienced problems arising from the 'disputed interpretation of the contact order', and
- residence parents experienced 'problems caused by a lack of clarity in contact orders'.

4.2 Council considered that such problems:

could possibly be eradicated, or significantly reduced, if more attention is given to drafting of these [contact] orders. The main problems appear to relate to lack of clarity, ambiguity and particularly to omissions.⁴⁹

4.3 Council concluded that there are circumstances in which model orders would assist a significant number of parents, especially those representing themselves.⁵⁰ The development of a parenting orders handbook containing model orders is consistent with Recommendation 9 of Council's 1998 Report.⁵¹

4.4 Dr Bruce Smyth opened the International forum on family relationships in transition panel on practical resources for separating families with the observation that:

Practical resources – such as contemporary models for parenting plans, graphic tools, to help parents reflect on more lateral arrangements for the care of their children, information brochures, telephone and web based information tailored to Australian families, and so forth – can resonate with the broad thrust of the reform package by helping to reduce conflict, and by offering practical ideas for sharing the care of children.⁵²

4.5 To reduce conflict and foster the involvement of both parents, Dr Smyth emphasised:

Practical resources can help parents to consider a broad range of options, and help them to explore possibilities that might best fit their own and their children's particular needs and circumstances... Binary ways of thinking create fertile ground for parents to get stuck, and to become entrenched. Worse still, all-or-nothing binaries can escalate conflict – 'They live with you or they live with me', 'fifty-fifty or nothing', and so forth.

4.6 A number of publications have been developed to address aspects of the family law system. The Commonwealth Attorney-General's Department has produced a short brochure and a guide

⁴⁸ These terms are no longer current but have been retained for ease of reference to the 1998 report. The residence parent refers to the parent with whom the child lives for the majority of time and the contact parent is the parent with whom the child spends time with but does not ordinarily live.

⁴⁹ Family Law Council, *Child contact orders: enforcement and penalties*, 1998, page x.

⁵⁰ *ibid*, paragraph 6.02, p 40.

⁵¹ *ibid*, paragraph 6.11, p 41.

⁵² Bruce Smyth, Nicholas Richardson and Grace Soriano, eds., *Proceedings of the International Forum on Family Relationships in Transition: Legislative, practical and policy responses*. 2006, viewed 23/5/2007, <<http://www.aifs.gov.au/institute/pubs/frtforum/proceedings.html>>.

aimed at assisting parents with the preparation of parenting plans. The Child Support Agency has produced a guide for child support agreements and orders. Both of these publications have something to offer as models for the parenting orders handbook proposed in this chapter.

The Attorney-General's Department's parenting plan brochure and guide

4.7 The 2006 family law package emphasises the use of parenting plans to make arrangements for children after separation and section 65DAB of the Family Law Act requires courts to have regard to parenting plans when making orders. The expectation is that parenting plans will become the usual method of making arrangements for children and orders will only be sought in a minority of cases.

4.8 The Attorney-General recently approved a short brochure that sets out information for parents to consider when they are making a parenting plan.⁵³ Advisers (including legal practitioners, family counsellors, family dispute resolution practitioners and family consultants) will be able to provide a copy of this brochure to their clients. This will assist advisers to meet their obligations to provide certain information under section 63DA of the Family Law Act. It is intended that the brochure will be widely used by advisers, including by those working in Family Relationship Centres, the Family Relationship Advice Line, and in other services funded under the Family Relationship Services Program (FRSP).

4.9 The Attorney-General's Department has also prepared a more detailed parenting plan guide, aimed at assisting parents who are formulating a parenting plan.⁵⁴ This parenting plan guide includes a checklist of issues that should be considered or included when making a parenting plan.

4.10 The parenting plan guide includes:

- an overall framework for the development of parenting plans
- information on the legal, child support and income support implications of entering into parenting arrangements
- emphasis on the importance of making a parenting plan with the best interests of the children in mind
- a list of the kind of issues parents should consider when developing a parenting plan, and
- general information on enforcement, compliance, variations, referral to services that can provide assistance

4.11 The parenting plan brochure and guide are available to the public via Family Relationships Online.⁵⁵ Printed copies of the brochure are being provided to FRCs and other services funded under the FRSP. The brochure will also be translated into 15 key languages.

⁵³ Attorney-General's Department, *Parenting Plans – Information for parents to consider when making a parenting plan*, 2007.

⁵⁴ Attorney-General's Department, *Parenting Plans – What is a parenting plan*, 2007.

⁵⁵

[http://www.familyrelationships.gov.au/www/agd/rwpattach.nsf/VAP/\(4BEFD7EAAA9FF2239114806153C8403E\)~Parenting+Plan+Fact+Sheet.html/\\$file/Parenting+Plan+Fact+Sheet.html](http://www.familyrelationships.gov.au/www/agd/rwpattach.nsf/VAP/(4BEFD7EAAA9FF2239114806153C8403E)~Parenting+Plan+Fact+Sheet.html/$file/Parenting+Plan+Fact+Sheet.html)

The Child Support Agency's Legal Practitioner's Guide

4.12 The Child Support Agency's *Legal practitioner's guide: precedents for child support agreements and court orders* (Legal Practitioner's Guide) was first produced in 2004 as a joint project of the Family Law Council, the Family Law Section of the Law Council of Australia and the Child Support Agency. It was developed in direct response to a particular problem. The Child Support Agency was receiving agreements and court orders in relation to child support which it was unable to implement. The Legal Practitioner's Guide sought to remedy this by the provision of specific information to assist drafting. The booklet contains precedent terms for court orders and agreements that can be readily administered by the CSA. It deals with a range of situations, both common and unusual. In addition, it alerts practitioners to common problems and pitfalls, and assists them to draft terms that appropriately balance certainty and flexibility for their clients and their clients' children.

4.13 The Legal Practitioner's Guide has been well used and is well regarded by legal practitioners, the courts and the public.

Council's proposed parenting orders handbook

4.14 A publication similar to the Child Support Agency's Legal Practitioner's Guide would complement the parenting plan brochure and guide published by the Attorney-General's Department and assist in avoiding conflicts caused by ambiguous orders. Like the CSA Legal Practitioner's Guide and the parenting plan guide, the proposed parenting orders handbook should be aimed at a wide audience including staff in FRCs, community organisations, legal practitioners and parties entering into consent orders. It is Council's view that such a publication is timely and is in keeping with the spirit of current reforms which are intended to encourage parties to resolve disputes outside the court system.

4.15 The choice of content and layout of the proposed parenting orders handbook could to some degree follow the highly regarded CSA Legal Practitioner's Guide. Accordingly, the handbook proposed by this recommendation would contain general information about how to approach the drafting exercise. It would provide suggested terms, including terms to provide for future dispute resolution, which could be used to reflect the terms of an agreement in court orders, as well as information about how to obtain further assistance if necessary. It should be drafted in similar style to the Attorney-General's Department parenting plan guide.

4.16 Because the proposed parenting orders handbook will have a broad application it should be developed by Council in conjunction with the Family Law Section of the Law Council of Australia (FLS), National Legal Aid and the courts. FLS is the representative body for family law practitioners and is in a position to facilitate input from lawyers throughout Australia. National Legal Aid is the peak body of the State and Territory legal aid commissions and has a particular clientele. The courts will bring expertise derived from their experience in developing model orders for judicial use and of course their insight into enforcement. These bodies in conjunction with Council representatives will be in an excellent position to develop a comprehensive and appropriate resource.

4.17 Once complete, the parenting orders handbook would be made widely available to FRCs, community organisations and legal practitioners in both electronic and hard copy format. Indeed, it could also be made available as a downloadable video or DVD. If this recommendation is accepted, Council proposes to commence work on the parenting orders handbook as the next phase of work

on the improved post-parenting order processes reference. This recommendation addresses paragraph 3 of terms of reference which focuses on better drafted orders to reduce the likelihood of disputes.

Considerations for development of the parenting orders handbook

4.18 While Council recommends development of model orders to govern time spent with children, it recognises the difficulties inherent in such a project. As Dr Smyth observed, ‘develop[ing] creative, child-responsive parenting arrangements in the often emotionally charged context of relationship breakdown is no easy task’.⁵⁶ The UK Advisory Board on Family Law referred to two major difficulties faced when making orders. First, it recognised ‘the infinite variety of family circumstances and the difficulty of trying to encompass them within the narrow framework of a court order’.⁵⁷ Second, it noted that there is an inherent ‘tension between the need for flexibility in the arrangements to meet the needs of the children on the one hand and the fact that if an order is required, the capacity to achieve that flexibility is often lacking in the adults’.⁵⁸

4.19 The UK Advisory Board considered it highly desirable to include a clause for dispute resolution in orders. This will allow parents (and older children) to renegotiate arrangements, enabling parties to agree to further time spent with a parent or to vary the time from that ordered.⁵⁹

4.20 Not a great deal is known about the factors that facilitate or frustrate parenting relationships, particularly between fathers and their children. Research about whether some patterns of care are better for children and parents than others is being conducted.⁶⁰ Perhaps the most that can be said is that no single post separation arrangement has been found to be in the best interest of all children.⁶¹

4.21 Research suggests that ‘every-other-weekend models may operate for practical reasons, as a vestige of the past, or by default’.⁶² Furthermore, the ‘standard package’ parenting arrangement may also occur because parents and legal professionals may not consider different ways of approaching more individualised arrangements. The data analysed by Dr Smyth ‘suggest[s] that many separated parents are indeed looking for more creative way [sic] of sharing the care of children after separation’.⁶³

4.22 The US materials provided to separating parents by the Arizona Supreme Court include ‘Model Parenting Time Plans for Parent/Child/Access’. This booklet is designed to help parents reach agreements about parenting time (access) with their children. The *Things You Should Know About Custody and Parenting Time* booklet provides general information about custody, parenting after separation, what parties can expect when the court is involved in the process.⁶⁴ This resource will provide a useful model when drafting the parenting orders handbook.

⁵⁶ B Smyth, ‘Parent-child contact schedules after divorce’ (2004) 69 *Family Matters* 32, p 43.

⁵⁷ The Advisory Board on Family Law: Children Act Sub-Committee *Making contact work*, 2002, paragraph 13.20, p 23.

⁵⁸ *ibid.*

⁵⁹ *ibid.*, paragraph 13.21, p 23.

⁶⁰ Australian Institute of Family Studies, *Parent-child contact and post-separation parenting arrangements*, Research Report No 9, 2004, page v.

⁶¹ *ibid.*, p 129.

⁶² B Smyth, ‘Parent-child contact schedules after divorce’ (2004) 69 *Family Matters* 32, p 43.

⁶³ *ibid.*, pp 42–3.

⁶⁴ Arizona Supreme Court, <<http://www.supreme.state.az.us/nav2/divorce.htm>>.

4.23 Professionals such as judges, registrars, mediators, lawyers and counsellors working in the community settings or privately and divorce support people more generally are well placed to help parents to develop more individualised arrangements for children. This means that more refined and comprehensive supporting material should be developed for use by professionals. Council's recommended parenting orders handbook would be such a resource.

4.24 Council recommends:

Recommendation 1

That the Family Law Council in consultation with the Family Law Section of the Law Council of Australia, National Legal Aid, the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court develop a parenting orders handbook containing model parenting orders.

5 HOW TO FOCUS PARENTS ON THE NEEDS OF THEIR CHILDREN: INFORMATION FOR LITIGANTS

5.1 This chapter addresses paragraphs 4 and 5 of the terms of reference. The issue of whether it is desirable to include a primary dispute resolution process in court orders or agreements has been discussed in relation to the handbook proposed in Recommendation 1. This chapter will look at how to provide pertinent information to parents. The type of information proposed is information about the impact of conflict on children; the community services available to assist parents experiencing difficulties with their post-separation parenting arrangements, the likelihood of change affecting parenting orders, the importance of compliance with parenting orders, and about the best ways to cope with changing parenting requirements using primary dispute resolution.

5.2 The UK Report⁶⁵ describes the provision of information to separating parents as a ‘crucial element’ in making contact work.⁶⁶ It recommends the inclusion of information about ‘the effects of their separation on themselves and on their children; about the difficulties involved in post separation parenting; and about the effect of continuing parental hostility on their children’.⁶⁷ The UK Report goes on to note the importance of such information being provided at an early stage in the breakdown of the relationship. It also stresses the need to ‘promote understanding of the importance of the involvement of both parents in the upbringing of children’ and the need to ‘focus more specifically on the issue of contact and difficulties likely to be encountered’.⁶⁸

5.3 Since 2000, section 65DA of the Family Law Act has required courts exercising jurisdiction under the Family Law Act to provide information about the obligations that a parenting order creates and the consequences of breaching that order. The Family Law Act also requires the courts to provide information to unrepresented parties about services that can assist parties to better understand their responsibilities under the order. Where orders have been breached, information on the availability and use of location orders and recovery orders must also be provided. The courts have created a Fact Sheet that sets out this information.⁶⁹

5.4 The requirements of section 65DA do not deal with all of the issues raised in the UK Report discussed above. In particular, it is important to discuss the effect of separation on the parents and their children and the effect of continuing parental hostility. The Court’s Fact Sheet also does not deal with the importance of the involvement of both parents in the upbringing of children.

5.5 Council believes that the production of more extensive informational materials on conflict and children is consistent with Recommendation 6 of Council’s 2000 report entitled *Litigants in Person*. That recommendation provides that:

The Family Court, legal assistance service providers and the Commonwealth Government should consider providing education following final orders, to include an explanation of what orders mean, how to make the best of the outcome and compliance. Co-ordination of

⁶⁵ The Advisory Board on Family Law: Children Act Sub-Committee, *Making contact work*, 2002.

⁶⁶ See Chapter 3 generally concerning information and help for parents: *ibid*.

⁶⁷ *ibid*, at paragraph 3.9, p 22.

⁶⁸ *ibid*, at paragraph 3.10, p 22.

⁶⁹ See the fact sheet, Family Court of Australia and Federal Magistrates Court of Australia, *Parenting orders — obligations and who can help*, 2007, viewed 12 July 2007, <http://www.familylawcourts.gov.au/wps/wcm/resources/file/ebf37a0ecc1532e/Parenting_orders_obligations_consequences210207.pdf>.

support and assistance for unrepresented litigants who have finished litigation should also be considered.

5.6 The proposed information on conflict and children, which should be given to parents at the commencement of litigation, should provide information about the range of community resources available to assist parents in resolving the difficulties which will arise from time. These community resources should include information about how to locate the nearest Family Relationship Centre and other community service providers such as contact change-over centres and organisations which provide counselling and mediation.

5.7 The information on conflict and children should make clear that the need to change orders is something which parents can expect to happen and that there is a clear and non litigious path to resolving these issues. It should set out the process for varying orders when the parties or the children's circumstances change. The interaction between court orders and subsequent parenting plans should also be explained.

5.8 The information on conflict and children should also discuss the inclusion of a term in any orders or agreements of a process for resolving disputes to avoid the expense and stress of court proceedings. It should emphasise to the parents the need to continue cooperative parenting after separation and the benefits for themselves and their children when they adopt this approach.

5.9 The proposed information on conflict and children should contain general advice about the parties' compliance responsibilities as well as information about how to approach changes in circumstances that may render an order no longer suitable. The latter information should aid parties to distinguish contraventions of the parenting orders from situations in which a variation of order is appropriate. The proposed informational materials should be widely available but should be given to parties when litigation is commenced.

5.10 Council recommends that the Attorney-General's Department, in consultation with the Family Court, the Family Court of Western Australia and the Federal Magistrates Court, identify and develop such information on conflict and children, in multiple formats, such as paper documents, web pages, and audio-visual presentations. These materials could be supplied to parties by community organisations, practitioners and FRCs. In particular Council recommends that this information be made available to parties when they file for parenting orders.

Recommendation 2

That the Attorney-General's Department, in consultation with the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court identify and develop information materials on conflict and children which address the following issues:

- the effects of separation on parties and on their children
- the challenges involved in post separation parenting
- the effect of continuing parental hostility on their children
- the importance of both parents being involved in the upbringing of children
- the importance of an agreed dispute resolution process, and
- the types of services available to parents to deal with post-separation issues.

The material developed should be widely available in many forms including electronic and printed media. It should also be available from a wide variety of sources including public libraries and baby health centres. In particular the material should be provided to each party when an application

for a parenting order is made. At this time parties are in a good position to receive advice about the impact of the conflict on themselves and their children.

Recommendation 3

<p>That the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court amend their rules to ensure each party receives a copy of the information materials on conflict and children when a parenting order application is made.</p>

6 PROVIDING SUPPORT AND ASSISTANCE FOR PARENTS

6.1 The UK report, discussed in Chapter 1 of this report, indicated high levels of dissatisfaction with the legal process in the area of child contact in the UK and strong support for alternative mechanisms for enforcing contact orders.

6.2 The UK Sub-Committee said responses to the consultation of an extremely high quality and surprising unanimity recommended that there should be a more expanded role for Children and Family Court Advisory Support Service (CAFCASS) in private law disputes.⁷⁰ CAFCASS is a national Non-Departmental Public Body for England and Wales which is responsible for supporting vulnerable children in family proceedings. The main role of CAFCASS is to advise the courts so that the decisions they make are in the best interest of children. CAFCASS officers write reports for the court explaining the enquiries they have made and make recommendations.

6.3 The UK report proposed that CAFCASS officers play a much more proactive role in the facilitation of contact so CAFCASS officers are able to work with the children concerned rather than simply write reports about them and an individual officer could also bring the matter swiftly back to court if things are not going well. The UK report also recommended that an in-court conciliation system be operated by CAFCASS at the first appointment in every contact case. Many of these recommendations were included in the *Children and Adoption Act 2006* which was assented to on 21 June 2006.

6.4 Effective processes for the ongoing support of parenting orders hold implications for improving compliance with parenting orders and offer a similar approach to that suggested in the UK report.

6.5 The Family Court of Australia investigated a number of measures including:

- the Child Responsive Model developed by Ms Dianne Gibson⁷¹
- the hybrid model piloted at the Melbourne Registry of the Family Court September 2005.⁷² This model incorporates features of both the Children's Cases Program (CCP) and the Child Responsive Model, and
- the Children's Cases Program piloted at the Sydney and Parramatta Registries of the Family Court from 2004.⁷³

⁷⁰ The Advisory Board on Family Law: Children Act Sub-Committee, *Making contact work*, 2002.

⁷¹ Dianne Gibson, 'New approach to child dispute services in the Family Court of Australia', 1 *Family Relationships Quarterly* 2006, pp 7–8.

⁷² See the Family Court of Australia, *Practice Direction No. 2 of 2005 – practice direction for the Melbourne implementation of the children's cases program incorporating the child responsive pilot*, 2005, viewed 12 July 2007, <http://www.familycourt.gov.au/presence/connect/www/home/directions/practice_directions/2005+practice+directions/practice_direction_no_2_of_2005>.

⁷³ Family Court of Australia, *Client Service in the Family Court of Australia and the Federal Magistrates Court*, Progress Report Submitted by the Family Court of Australia to the Joint Standing Committee on Public Accounts and Audit, May 2006.

6.6 The Chief Justice of the Family Court has described the Child Responsive Program as follows:

A new model for the provision of family dispute services is being trialled through the Child Responsive Model in Melbourne and in some rural and regional areas. It is a significant departure from the Court's previous practice model.

Under the Child Responsive Model, all interventions are reportable. Where appropriate, the Family Consultant speaks directly to the children whose parents are in dispute and feeds back their views, feelings and wishes to the parents in a separate session. There is also continuity of service in the sense that the same Family Consultant will work with the family in the resolution phase of the dispute and where the matters require judicial determination, the Family Consultant will give evidence in the proceedings with the benefit of having interviewed the parents and children.

The evaluation of the Melbourne pilot identified considerable potential in the Child Responsive Model to enrich and support the LAT process, as well as positively influence parents' perception and approach to resolving their dispute.⁷⁴

6.7 Based on an examination of these trials, Division 12A, Part VII of the Family Law Act imports the less adversarial trial (LAT) process in the Family Court and similar processes in the Federal Magistrates Court, which now apply in all children's cases.

6.8 Further measures likely to improve arrangements after parenting orders have been obtained are the greater use of referrals to the Parenting Orders Program and other forms of assistance such as counselling, family dispute resolution, or some other course, program, or service as appropriate.⁷⁵ There are a number of provisions in the Family Law Act which already enable such orders to be made. These include section 13C, section 65L, section 65LA, and section 70NEB. There is also scope for a combination of these elements to be utilised together to achieve a similar role to that recommended for CAFCASS in the UK system.

Section 13C of the Family Law Act

6.9 Section 13C provides that the court may make a number of orders to help families develop the skills necessary to meet the challenges of post-separation parenting. The text of that section is set out below.

13C Court may refer parties to family counselling, family dispute resolution and other family services

- (1) A court exercising jurisdiction in proceedings under this Act may, at any stage in the proceedings, make one or more of the following orders:
 - (a) that one or more of the parties to the proceedings attend family counselling;
 - (b) that the parties to the proceedings attend family dispute resolution;
 - (c) that one or more of the parties to the proceedings participate in an appropriate course, program or other service.

⁷⁴ *State of the nation*, speech by Chief Justice Diana Bryant, Family Court of Australia. 12th National Family Law Conference, 23 October 2006, Perth.

⁷⁵ Attorney-General's Department, *The Contact Orders Program*, 2003, viewed 7 September 2006, <http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/Publications_Publications_2003_The_Contact_Orders_Program>.

Note 1: Before making an order under this section, the court must consider seeking the advice of a family consultant about the services appropriate to the parties' needs (see section 11E).

Note 2: The court can also order parties to attend appointments with a family consultant (see section 11F).

- (2) The court may suggest a particular purpose for the attendance or participation.
- (3) The order may require the party or parties to encourage the participation of specified other persons who are likely to be affected by the proceedings.

Note: For example, the participation of children, grandparents or other relatives may be encouraged.
- (4) The court may make any other orders it considers reasonably necessary or appropriate in relation to the order.
- (5) The court may make orders under this section:
 - (a) on its own initiative; or
 - (b) on the application of:
 - (i) a party to the proceedings; or
 - (ii) a lawyer independently representing a child's interests under an order made under section 68L.

6.10 Such orders are made relatively infrequently by Australian courts and they are usually only made in complex cases involving an independent children's lawyer. The simplified procedures introduced by Children's Cases Program (CCP) which have developed into the less adversarial trial mandated by the Shared Parental Responsibility Act may have an impact on the use of orders such as section 13C orders, however, there is a need for judicial officers to be encouraged to make use of the excellent opportunity these orders provide to assist particular parties to settle into parenting orders once they have been made by the courts.

6.11 Council's view is that these orders allow the courts to provide what can best be described as 'after sales service',⁷⁶ where this is necessary. The greater use of orders such as section 13C in appropriate cases will help to avoid problems arising from orders not being appropriately tailored to the parties' circumstances and will deal with minor issues as they arise. The parties will gain a more realistic idea of the problems which may arise and more importantly have some assistance in learning to deal with eventual problems. The Family Consultant would be well placed to advise the court on this issue and on which programs, services or courses would be most advantageous for a particular litigant.

6.12 These orders will be particularly useful to parents whose circumstances make it difficult for them to manage court orders immediately. Parents facing multiple problems such as financial stress, substance abuse or mental illness.

6.13 Council recommends that the Family Court, the Family Court of Western Australia and the Federal Magistrates Court cooperate to develop educational material and arrange any necessary judicial training to encourage the use of orders such as section 13C by judicial officers.

⁷⁶ Deputy Chief Justice Faulks, personal communication to Council, 22 February 2006.

Recommendation 4

That the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court undertake measures including educational measures to encourage judicial officers to make orders in reliance on appropriate sections of the Family Law Act to assist parents to adjust to post order parenting.

6.14 Council recognises that this recommendation has resource implications, both for the courts and services such as the Parenting Orders Program. The Council acknowledges that as part of its 2006 family law reform package the Australian Government has allocated increased funding to expand the Parenting Orders Program. This recommendation will dovetail well with this greater availability of services and any additional costs must be weighed against the current costs of parties going back to court about contravention of court orders.

7 COMPLIANCE REGIME: ENFORCEMENT OF ORDERS

Background to current enforcement provisions

7.1 The compliance regime introduced as a result of Council's recommendations in its 1998 report, *Child Contact Orders: Enforcement and Penalties* involved a three tiered approach. The first tier recognised the need for preventative measures. This involved communication between separated parents and educating parents about their respective responsibilities in relation to their children at the time the order is made. The second tier called for remedial measures. The third tier called for punitive action. Council's view as expressed in that report was that punishment should only be used in the event of deliberate disregard for a court order or as a last resort. That view is supported by the findings of the UK Advisory Board on Family Law.⁷⁷ Council's view in this respect has not changed.

7.2 The reforms to the enforcement regime in the Family Law Act which were enacted in 2000 in response to Council's 1998 report, emphasised that mandatory referral to post separation parenting courses should precede any application of punitive measures when breaches of parenting orders occur. This approach was also adopted by the Every picture tells a story report of 2005. The Every picture tells a story report noted that the 2000 reforms had not been effective at least in part because there were insufficient appropriate programs. Recommendation 21 of the Every picture tells a story report provides:

The committee recommends the immediate implementation of the following additions to contact enforcement options:

- a cumulative list of consequences for breaches
- reasonable but minimal financial penalties for first and subsequent breaches
- on a third breach within a pattern of deliberate defiance of court orders, consideration to a parenting order in favour of the other parent, and
- retaining the ultimate sanction of imprisonment.

7.3 The UK report in contrast said that certain penalties (such as fines and committal of residential parents to a term of imprisonment for breach of a contact order) are necessary, but it held such measures to be an ineffective means of addressing problems.

Whatever the intellectual force of the argument that it is in a child's best interest to enforce contact, the simple fact remains that it is very difficult to see how it can ever be to the benefit of children for their primary carer to be sent to prison.⁷⁸

7.4 In *A new family law system: Government Response to Every picture tells a story* report, the Australian Government agreed to the majority of the measures recommended by the Every picture tells a story report.⁷⁹ The 2006 legislative amendments to the Family Law Act impact on the issue of compliance in a number of ways. For example, FRCs will play a key role in providing

⁷⁷ Advisory Board on Family Law: Children Act Sub- Committee, *Making Contact Work*, 2002, paragraph 1.13.

⁷⁸ *ibid*, paragraph 1.13, p 13.

⁷⁹ *A new family law system: Government Response to Every picture tells a story*, 2005, p 16.

information and addressing disputes at an early stage and outside the court system. The emphasis given to parenting plans should allow parenting arrangements to be more individualised.

7.5 The expansion of the Parenting Orders Program will assist where entrenched conflict has led to a breakdown in the relationship affecting the efficacy of parenting orders. In a small number of intractable cases, the court will still need to have the power to take firm and decisive action in the face of serious disregard of orders. The Government accordingly decided to strengthen the enforcement provisions in the Family Law Act. In addition to the financial penalties and cumulative list of consequences already present in the Family Law Act, the new provisions introduced by the 2006 amendments are set out below.

Schedule 2 of the Shared Parental Responsibility Act

7.6 The Government's amendments to the law on enforcement are contained in Schedule 2 of the Shared Parental Responsibility Act. The Explanatory Memorandum provides that the amendments repeal and replace Division 13A of Part VII. References to a three-stage parenting compliance regime are removed. The Government's view is that the stages were poorly understood and unwieldy. Confusion had resulted from having stage 1 of the regime in Division 6 of Part VII, while stages 2 and 3 were located at Division 13A. The new division is clearer and contains more accessible provisions that make the whole Division easier to understand.

7.7 The exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2006 was examined by the House of Representatives Standing Committee on Legal and Constitutional Affairs, who reported in August 2005. Recommendations 39 and 40 of their report⁸⁰ concerned the compliance regime and were substantially accepted by the Government.⁸¹ As a result of these recommendations, further amendments were made to the Bill in an attempt to reduce the complexity of Division 13A, in particular for self-represented litigants.

7.8 The new Division 13A compliance regime contains all the contraventions procedure. The regime is divided into four subdivisions each of which is based on one of the four possible outcomes of contravention proceedings. The court's range of powers is greater for contraventions which demonstrate a serious disregard for the orders.

7.9 If the court finds that a contravention which demonstrates a serious disregard for the orders has occurred then it can impose a community service order or imprisonment. If on the other hand the court finds that no breach has occurred or that the breach is trivial, the court can dismiss the application and order costs against the applicant.

7.10 Importantly, the court has power to change the orders even if a reasonable excuse for a contravention is established or no contravention is proved. Section 70NBA empowers a court dealing with any contravention to vary the terms of the existing order, including a variation which takes into account a parenting plan. This general power may be exercised regardless of the outcome of the contravention application.

⁸⁰ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005*, 18 August 2005, chapter 5.

⁸¹ *Government's response to the House of Representatives Standing Committee on Legal and Constitutional Affairs, report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005*, tabled 8 December 2005, pp 18–19.

7.11 Where the court dismisses a contravention allegation or finds that no action is required, it must consider ordering costs against the applicant if the applicant has previously taken unsuccessful contravention proceedings. When the court finds that a contravention which demonstrates a serious disregard for the orders has occurred then it must order costs against the respondent except where that would not be in the best interests of the child.⁸² Although the precise meaning of ‘all of the costs’ referred to in s 70NFB(2)(g) and ‘some of the costs’ referred to in s 70NFB(2)(h) is yet to be judicially determined, this is an important provision which will assist in dealing with parties who use contravention proceedings as a tool to harass the other parent.

7.12 The court must consider make up time (such as another weekend) where parenting time has been missed through a breach of the orders regardless of whether or not the breach was intentional. Further the court can award compensation for reasonable expenses incurred and that are wasted due to a breach of an order. This might include airfares or other tickets purchased but not used or travel expenses incurred to collect a child where the child was not handed over and potentially could include expenses of the parent with whom the child lives which were predicated on the child being with the other parent. For example if the parent with whom the child lives books a weekend away and is then not able to take up the travel and accommodation because the child is not collected by the other parent. There is also discretion to impose a bond for all breaches of orders. Imprisonment is retained as the ultimate sanction.

The public law aspects of breach of orders pertaining to children

7.13 The 2006 changes have rationalised and simplified the enforcement processes under the Family Law Act. The changes have not however addressed an issue which has been raised in a number of forums including the consultation which gave rise to the Every picture tells a story report. That issue is the public law aspects of breach of the contravention of orders which demonstrates a serious disregard for orders pertaining to children.

7.14 The Child Support Scheme recognises that maintaining children after marriage or relationship breakdown is a matter which affects the whole of Australian society. Section 30 of the *Child Support (Registration and Collection) Act 1988* (the Registration Act) converts a debt which had in the past been a matter between two individuals to a debt due to the Commonwealth. Indeed so clear is the public good aspect of the legislation that parties are not permitted to pursue debts as individuals except in the circumstances set out in section 113A. These provisions require notice to be given to the Child Support Registrar and provide for significant penalties if a payee does not comply with the section.

Child Support (Registration and Collection) Act 1988, Section 30

Effect of registration

(1) If a registrable maintenance liability is registered under this Act, amounts payable under the child support assessment, court order or maintenance agreement under which the liability arises are debts due to the Commonwealth by the payer in accordance with the particulars of the liability entered in the Child Support Register.

⁸² Family Law Act, s 70NFB(2)(g).

(2) In particular, the amounts are payable by the payer at the payment rate entered in the Register under paragraph 26(2) (d) in respect of the periods entered in the Register under paragraphs 26(2) (a) and (b).

Note: Section 28B requires the Registrar to convert the periodic amount payable in respect of a registrable maintenance liability to a rate of payment depending upon the payment period determined in respect of the liability.

(3) If a registrable maintenance liability is registered under this Act, the payee of the liability is not entitled to, and may not enforce payment of, amounts payable under the liability other than by instituting a proceeding under section 113A to recover a debt due in relation to the liability.

7.15 Clearly this and other⁸³ provisions of the Child Support Acts demonstrate that parties continuing to financially maintain their children after separation is an important public policy issue. Similarly where there is a contravention which demonstrates a serious disregard for parenting orders, Council's view is that there should be some public law intervention to recognise the importance of children's well being to society as a whole. In addition such an intervention would also serve to maintain the integrity of the court and the family law system in general by ensuring that the court's orders are not wilfully ignored.

7.16 Contraventions occur for many reasons and much more frequently than is reflected by numbers of applications to the courts.⁸⁴ As in most situations concerning their children, most parents deal with such issues between themselves either putting up with missed time or negotiating additional or different times directly with the other parent. From time to time parents will seek the assistance of counselling or mediation organisations. This is the ideal towards which any intervention should be aimed.

7.17 In order to achieve that aim it may be useful to look at the types of contraventions which are typically seen by the courts to consider how each type may best be dealt with to push it back into the majority category where parents deal with it between themselves.

Contravention caused by lack of clarity of the orders

7.18 In many cases one or both parties do not fully understand what the orders require them to do or simply do not treat the orders seriously, complying only when it is convenient for them to do so. This usually results in a pattern of sporadic compliance with parenting orders with growing frustration on the part of the parents and the children. Usually only the cases where the parent with whom the child lives contravenes the orders are seen by the courts. Situations in which the parent with whom the children are scheduled to spend time, does not turn up or is regularly late, are generally suffered in silence. However, both types have negative consequences for the children.

7.19 Council's recommendations have sought to address this type of contravention in 2 ways. First, Council has recommended the preparation of a parenting orders handbook to assist in the drafting of parenting orders so that they are more transparent and easier to understand. Second,

⁸³ *Child Support (Assessment) Act 1989*, ss 3, 4(1) and 117(5), and *Child Support (Registration and Collection) Act 1988*, ss 3(1)(a) and (b).

⁸⁴ In 2003–2004, 2,639 contravention applications were filed in the Family Court of Australia and the Federal Magistrates Court and in 2004–2005, 2,400 contravention applications were filed in these courts: Family Law Council, *Statistical Snapshot of Family Law 2003–2005*, 2007, p 23.

Council has recommended the preparation of information material on children and conflict which is aimed at drawing parents' attention to the impact of conflict on their children. These recommendations are discussed in Chapters 4 and 5. The changes to the Family Law Act which came into effect on 1 July 2006 requiring parents to obtain a certificate under section 60I will also ensure that these parents are either directed to appropriate services such as Parenting Order Programs (POPs) or are assisted to understand their obligations directly by the Family Relationship Centres when they attend to obtain a certificate.

Contravention caused by changed circumstances

7.20 In this type of case there is a period where the arrangements for the children to spend time with each parent work reasonably well and then something changes in the parents' or children's lives which makes the orders unworkable. The most common example is the way in which arrangements inevitably need to change as children get older. Often changes are associated with some changed circumstance in one parent's post separation life of which the other parent is resentful. For example dad can't pick up the kids after school on Friday any more because he has taken on extra work to support his new family or mum can't drop the children off at 9.00 am because her new baby is having a nap at that time. The impact of the change may be large or small, but it is the resentment which prevents the parents making appropriate compensatory arrangements between themselves. In these cases the parents need to be assisted to refocus on the needs of their children. In most cases such assistance will be provided by the FRCs which will refer them to community counselling and mediation organisations or to assist parents to refocus on their children. This assistance will allow parents to alter the orders which no longer suit the families through the preparation of a parenting plan which will update the existing orders or arrangements.

Contravention caused by other factors

7.21 This type of contravention usually involves parents who cannot comply with parenting orders because of forces beyond their capacity to control. Typical cases are where both parties are impecunious and the arrangement involves either complicated rail or bus journeys or unreliable motor vehicles. Parties may be psychologically disorganised either by reason of mental illness, substance abuse or other intellectual impairment. In these cases compliance is sporadic and applications to the court frequent.

7.22 These cases need support and monitoring for some time after the orders are made so that an accommodation between the children's needs and the parents' limitations is found. Council has recommended greater use of orders such as section 13C orders to provide this support for vulnerable parents so that the treadmill of repeated applications usually publicly funded may be avoided. This recommendation is discussed in Chapter 6.

Contravention demonstrating a serious disregard for the orders

7.23 Generally this will occur in cases when one or other of the parties does not accept the decision of the court which made the original order.

7.24 In some cases the contravention involves the parent with whom the child is living refusing to facilitate the child spending time with the other parent. It is often the case that the parent with whom the child is living has a fixed belief that the child is at risk in the care of the other parent. These cases are typically preceded by a long and bitterly contested hearing often resulting in orders

for very limited time to be spent with the other parent and often for supervision of that parenting time. For this parent any relationship with the other parent presents a danger to the child and they will risk any sanction, even the possibility that the court will place the child in the care of the other parent.

7.25 In other cases in this category the contravention involves repeated retention of the child by the parent with whom the child does not live, that parent typically does not accept that the children have been ordered to live with the other parent. This parent will not accept that a court has the power to determine their rights as a parent. These cases often become involved in extensive litigation.

A child orders enforcement agency

7.26 Council's view is that in contravention cases demonstrating serious disregard for parenting orders there is a public interest element to enforcement. The most important public interest at stake is the best interests of the child. If a court has determined that a particular arrangement for a child is in the best interests of the child, then a deliberate breach of that order prevents this beneficial arrangement for the child from taking place. A breach of an order is thus a prima facie derogation from the best interests of that child. In addition to the loss of the relationship with a parent there is the negative impact on the child of the often extended and acrimonious litigation.

7.27 The public interest in upholding the best interests of the child is also supported by other considerations. The disrespect of the court order has a negative effect on wider compliance with court orders and generally has a negative effect on the administration of justice extending to bringing the court into disrepute. In addition these cases take up a great deal of the courts' time and often involve self represented litigants. The frustration experienced in the litigation process particularly by self represented litigants will further derogate from the parties' capacity to parent their children. To address the need presented by these cases where there has been a serious disregard of obligations under a parenting order Council recommends the establishment of a child orders enforcement agency.

7.28 Such an agency would not deal with minor contraventions such as those caused by lack of clarity of the orders or changed circumstances. These cases are addressed by Recommendations 1 and 2 of this report as well as by the package of changes introduced by the Shared Parental Responsibility Act. Nor would the proposed agency deal with those cases where parents require a little more assistance to learn to manage orders. Those cases are dealt with by Recommendation 4 of this report. The cases which would be dealt with by the proposed agency would be those which demonstrate a serious disregard for parenting orders.

In many cases this will be orders to which s 60I(9)(c)⁸⁵ applies where there is no requirement to obtain a certificate prior to making an application to the court.

⁸⁵ Family Law Act, s 60I(9)(c).

(9) Subsection (7) does not apply to an application for a Part VII order in relation to a child if:

(c) 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;

7.29 In these difficult cases an individual litigant is often left to run the gauntlet of repeated applications. Experience has been that many litigants will drop out which results in the particular children losing the benefit of the original orders and the recalcitrant party winning out in a war of attrition.

7.30 Council's proposal is for the establishment of a small independent public agency with offices in each capital city. The purpose of the proposed agency will be to take up the enforcement of orders which have a public interest aspect because they involve a serious disregard of parenting orders. This recommendation will address the costs and procedural barriers to the enforcement of parenting orders. Council anticipates that referrals to the child orders enforcement agency would come either from the FRCs or directly from parents.

The test of serious disregard of orders

7.31 The threshold test for determining whether a case will be taken up by the proposed agency should be whether, prima facie, the breaching party has displayed a serious disregard for his or her obligations under the order.

7.32 The concept of 'serious disregard' is used in the Family Law Act in a number of places as a test of the seriousness of a breach. Sub-section 60I(9)(c)(iv) provides an exception to the requirement for a certificate from a family dispute resolution practitioner for filing of new matters under certain circumstances where a party has shown a serious disregard for his or her obligations under an order. Sub-section 70NFA(2) provides that Subdivision F (which deals with more serious contraventions) applies, amongst other requirements, if a party has demonstrated "a serious disregard of his or her obligations under the primary order".

7.33 The predecessor provision, section 70NJ(1), was considered in *NP & AP (No. 2)*.⁸⁶ In that case, Mullane J held that serious disregard was established by two major factors. Firstly, the mother was found to have 'no intention of supporting the orders' and was 'intent on finding an excuse not to implement them... all of the contraventions were intentional'.⁸⁷ Secondly, the effect of the mother's conduct in contravening the orders was 'seriously prejudicial' of the child's well-being.⁸⁸ The various techniques the mother had used to frustrate the orders had impacted on the

⁸⁶ *NP & AP (No. 2)* [2006] FamCA 869 per Mullane J.

⁸⁷ At paragraph 11.

⁸⁸ At paragraph 12.

child's welfare, and were 'abusive of the child. That, to my mind, establishes a very high level of culpability.'⁸⁹

7.34 The cases which have considered the term 'serious disregard' have been reviewed by the Full Court of the Family Court of Australia after the implementation of the 2006 amendments to the Family Law Act. The case in which the issue arose is *Elspeth & Peter; Mark & Peter; and John & Peter* [2007] FamCA 655 (5 July 2007). Their honours Faulks DCJ, Kay and Penny JJ examined the authorities and extracted the meaning of the phrase at paragraph 66 of the judgement.

What seems to be the common thread is that the more serious sanctions should only be invoked if there is a persistent disregard of an obligation or a clearly wilful and deliberate attempt to resist carrying out an order.

It is these cases which Council seeks to address with the recommendation made in this chapter.

How the proposed agency would work

7.35 Once a matter has been referred to the proposed child orders enforcement agency it will be reviewed by agency staff and additional information obtained from the applicant so that a decision can be made as to whether this is a matter which prima facie shows a serious disregard of the orders and thus has the requisite public interest aspect to justify the application of public funding.

7.36 It is anticipated that the proposed agency would quickly develop protocols for assessing applications, so that there is no delay and an applicant who is refused may pursue other options which will be more appropriate. The agency will have a role in diverting these applications to more appropriate services.

7.37 If the proposed child orders enforcement agency decides that the matter does prima facie demonstrate a serious disregard for the orders, the agency will be required to give consideration to alternatives to litigation including referral to parenting orders programs or other community resources. This approach is not intended to delay the matter but to reflect the importance of trying to resolve disputes by means other than litigation if at all possible. For suitable matters this will avoid the delay of making an application and then being referred to the community alternatives.

7.38 If the matter is not suitable for such community intervention or such intervention has already been attempted and failed, the agency will commence litigation to ensure compliance with the orders. It is anticipated that the proposed agency would develop protocols for mutual referrals to and from the Family Relationship Centres and other primary dispute resolution providers.

7.39 Any litigation instituted by the agency will be conducted in the name of the aggrieved parent who will instruct a lawyer provided by the agency. In keeping with the public interest aspect of the litigation, the aggrieved parent's instructions must meet a test of reasonableness so that public money is not expended on trivial or oppressive litigation.

7.40 Council proposes that this service be widely available and that any qualifying means test be based on the test applied for *Overseas Custody (Child Removal) Scheme*⁹⁰ which is administered by the Commonwealth Attorney-General's Department.

⁸⁹ At paragraph 15.

7.41 In keeping with the public interest aspect of this agency Council proposes that the agency should enjoy protection against costs orders provided that it acts within the limits of its mandate. This protection is available to the Central Authority under the Hague Convention on the Civil Aspects of International Child Abduction when it acts in child abduction matters under the Family Law (Child Abduction Convention) Regulations 1986. It is appropriate that the same protection be extended to the proposed agency which will similarly have a public interest role.

An alternative to an independent agency

7.42 The view of the Council is that an independent agency would best meet the needs of children and parents where there is a serious breach of a parenting order. Such an agency would have a clear and focused role in the same way as the Child Support Agency currently enjoys. However Council recognises that such an agency would require significant establishment costs and it is for this reason that Council has proposed an alternative and arguably less expensive way of ensuring that children enjoy the benefit of orders which are made in their best interests. Council remains of the view that the child orders enforcement agency is the preferred option.

7.43 The alternative proposal is to provide additional targetted funding to legal aid commissions. The legal aid commissions would be required to use the money provided to fund enforcement matters. The eligibility requirements and the management of cases would be handled in the same manner as proposed for the child orders enforcement agency. This proposal would use existing structures to achieve some of the role envisaged for the proposed child orders enforcement agency. The disadvantage of this approach is that it does not sufficiently highlight or the importance of enforcing orders which have been made in the best interests of the child.

7.44 It would be appropriate for reasons of equity that the function envisaged for the alternative to the child orders enforcement agency be located in an organisation which is sufficiently spread throughout the community as to be conveniently available to potential users of the services. Council has considered two possible organisations. They are the Child Support Agency (CSA) and the State and Territory Legal Aid Commissions.

7.45 The Child Support Agency is an attractive option in that the CSA have a well understood and clear role. However to place the parenting enforcement function in the CSA would inevitably link the payment of child support to spending time with a child. It would be undesirable for the welfare of the children of separated parents to suggest that the two issues may be linked by co-locating the child orders enforcement functions in the CSA.

7.46 The role proposed for the alternative to the child orders enforcement agency will require a close working relationship with the complainant parent in order to obtain sufficient information to properly proceed to an application to the courts on an appropriate breach. The State and Territory Legal Aid Commissions are well placed to take on this role. They have a history of acting for parties in enforcement applications and have an excellent regional network which is widely accessible to parents. They have also in the past had a similar role in the enforcement of international maintenance liabilities under the United Nations Convention on the Recovery Abroad of Maintenance (UNCRAM).

⁹⁰ See Attorney-General's Department, *Financial Assistance*, last viewed 9 August 2007, <http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalaid_FinancialAssistance>.

7.47 Council suggests the arrangements be modelled on the UNCRAM enforcement structures. For example, a designated fund could be made available to the legal aid commissions for the enforcement of orders where the applicant is able to establish prima facie that there has been a serious disregard of parenting orders.

7.48 The other features of the scheme would be similar to those proposed for the independent agency. Any means test applied to accessing the scheme should be based on the *Overseas Custody (Child Removal) Scheme*. Similarly, a test of reasonableness should be applied to the instructions given by the applicant parent in order to prevent the scheme becoming oppressive for respondents. Immunity from costs should also apply where an application is made within the parameters of the scheme.

Recommendation 5

That the Government establish a child orders enforcement agency or in the alternative that the Government provide additional and specified funding to enable the State and Territory Legal Aid Commissions to assist parties to bring applications about serious contraventions of parenting orders before the family courts.

Sentencing guidelines and database

7.49 The current legislation provides little guidance for the court or litigants as to when a fine as opposed to a bond is a likely, or appropriate, outcome. There is also little guidance as to when someone might expect a serious risk of being imprisoned.

7.50 The lack of certainty under the legislation is compounded by the number of judicial officers with varying levels of experience who may deal with contraventions. Currently there are 38 Family Court Judges and Judicial Registrars as well as 42 Federal Magistrates each of whom will from time to time hear a case involving a serious breach of parenting orders. In addition, some contraventions are heard by State Magistrates. Judicial officers' experience in the practice of family law varies between individuals in both state and federal courts. This means that uniformity in sentencing for breach of a parenting order is difficult to achieve.

7.51 This issue is addressed in jurisdictions outside family law by the provision of sentencing guidelines and databases of sentencing patterns. These are used most often when serious penalties such as fines, bonds, community service orders and imprisonment are contemplated.

7.52 Without limiting the wide discretion of the sentencing court, the Family Law Council suggests that guidelines and a database be readily available to judicial officers, lawyers and the public. This would be a positive enhancement to the current discretionary provision under s112AD of the Family Law Act, encourage more uniformity in sentencing and alert potential litigants to the type of sentence which may be imposed if a breach is found.

7.53 Some State Courts have well developed sentencing profiles. These systems may provide some insight into how the following recommendation could be implemented. For example, the Judicial Commission of New South Wales has developed the Judicial Information Research System (JIRS) for NSW,⁹¹ and the National Judicial College of Australia has developed a Guide to

⁹¹ Judicial Commission of New South Wales, website, viewed 23 August 2007, <<http://www.judcom.nsw.gov.au>>.

Commonwealth Sentencing Principles and Practice, for Commonwealth matters. JIRS contains case law, legislation, principles of sentencing, sentencing statistics, a bench book, and other information used by judicial officers, the courts, the legal profession and government agencies. Sentencing statistics are provided in the form of graphs and tables on the range and frequency of penalties imposed in the Supreme Court, District Court, Local Courts and Children's Court. In addition, JIRS provides copies of sentencing decisions and case summaries setting out the brief facts and sentencing outcomes of individual cases. The Commonwealth database also provides a range of sentencing options, and information addressing particular issues in sentencing such as continuing offences.

7.54 A joint database for the Family Court, the Family Court of Western Australia and Federal Magistrate's Court could provide copies of guideline judgements, sentencing decisions, and brief narrative summaries of each sentence showing the original order, how the order was breached, factors contributing to the sentence determination and the final sentence. This would be an invaluable resource for judicial officers, practitioners, and the public. The case summaries on JIRS are completed by the Judicial Commission rather than court staff or Judges' associates. A similar system would assist the family courts to maintain a consistent database. There may not be a sufficient number of sentences in family law matters for a quantitative database to provide an accurate perspective.

Recommendation 6

That the Attorney-General's Department, in consultation with the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court:

- explore the possibility of developing sentencing guidelines for cases involving serious disregard for parenting orders,
- develop a database to assist the judiciary in achieving consistent sentencing patterns in cases involving serious disregard for parenting orders, and
- make this information readily available to the legal profession and members of the public.

Pre-sentence reports

7.55 Imposing a community service order or custodial sentence for a breach of a parenting order is a very serious penalty. Arrangements under s 112AN of the Family Law Act between the Commonwealth and some States have never been finalised, so that community service and weekend detention are not available options in some States. The Family Law Council believes such arrangements should be made with all States and Territories. Judicial officers determining sentences in family law cases could dovetail into existing State pre-sentencing structures. For example, Queensland Corrective Services will provide a written pre-sentence report about a convicted offender once presented with a request by a Judge or Magistrate using the approved form. The report may address the background and personal circumstances of the offender, and provide suitable sentencing options. Similarly, the Tasmanian Department of Justice Community Corrections Service will provide a pre-sentence report on the offender's background, circumstances and sentencing options, including an assessment of suitability for community service.

7.56 In jurisdictions other than family law when a guilty finding is made and a serious penalty is contemplated, the usual procedure is for sentencing to be deferred. The purpose of the deferral is in part to allow the court to obtain a pre-sentence report from the relevant probation and parole services of each State.

7.57 The pre-sentence report will provide the judicial officer with an independent assessment of issues such as whether the person is prone to mental illness, substance abuse or other impairment which may impact on the suitability of a sentence. It is also an opportunity to explore issues such as whether the children will be able to visit the parent and the proposed arrangements for other children in the care of the parent whom the court proposes to incarcerate. If the proposed penalty is a community service order, the pre-sentence report will advise on the suitability of the person and the availability of suitable programs. The ‘Sentencing Facilities’ component of the JIRS contains information on drug and alcohol counselling, periodic detention and community service options cross referenced by geographic location and type.

7.58 In the family law jurisdiction there is currently no practice or facility to obtain pre-sentence reports, when serious penalties such as a community service order or an order for imprisonment is contemplated. There is usually no deferral in sentencing once a court has found a contravention of a parenting order, with serious disregard by the offender. The judicial officer usually hears and determines the matter at the one court event.

7.59 The decision about whether to order a custodial sentence or make a community service order is usually made without the benefit of relevant information such as:

- whether community service is a viable option
- whether the parent is considered by those providing community service to be an appropriate candidate for that sentence
- whether weekend detention is an option
- whether the parent is considered by those providing weekend detention to be an appropriate candidate for that sentence
- whether a suitable level of security and support is available for the parent, and
- whether the children will be able to visit their parent in prison, should the court consider that appropriate.

Recommendation 7

That the Attorney-General’s Department, in consultation with the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court explore the feasibility of obtaining from State and Territory probation and parole services, pre-sentence reports in circumstances where a serious penalty for serious disregard of a parenting order is a possible outcome.

Other legislative improvements

7.60 The current legislation does not provide a provision to fix a non parole period. Nor does the current legislation make clear that there can be cumulative sentencing on different counts.⁹² The provision of these sentencing options would provide certainty and promote greater uniformity in sentencing following a finding that a breach showing a serious disregard for the orders has occurred.

⁹² *Abduamoski and Aburamoska* (2005) FLC 93-215.

Recommendation 8

That the Family Law Act be amended to allow courts exercising jurisdiction under that Act to fix a non parole period and order cumulative sentences.

8 MANDATORY REQUIREMENTS FOR A THIRD BREACH OF PARENTING ORDERS

8.1 The additional reference received by the Family Law Council on 28 February 2006 requires Council to:

Further examine the recommendation of the House of Representatives Standing Committee on Family and Community Affairs in the Every picture tells a story report that a court should give consideration to a parenting order in favour of the other parent, where there is a third breach within a pattern of defiance of court orders. In particular consider and make recommendations about whether it is appropriate for there to be mandatory penalties for a party that has breached a parenting order for a third time in the *Family Law Act 1975*.

This examination should consider the Government response to that report which did not support this recommendation.

8.2 Mandatory requirements have attractiveness as tools to resolve problems because they have the advantage of certainty of outcome and they underline the seriousness with which a problem is viewed by refusing to admit any exculpatory material.

8.3 The disadvantages are more subtle. The discretion about what should happen in a particular case is transferred from the judicial officer to the person bringing the application.⁹³ In the context of enforcement applications where parties are already at loggerheads this is not a productive change. In addition such requirements undermine the authority of the judicial officer and remove that person's capacity to tailor a solution to the particular circumstances of the case.

8.4 There is of course no impediment to a judicial officer considering a change of living arrangements for a child when any application for enforcement is before the court.

Section 70NBA

Variation of parenting order

- (1) A court having jurisdiction under this Act may make an order varying a primary order if:
 - (a) proceedings in relation to the primary order are brought before a court having jurisdiction under this Act; and
 - (b) it is alleged in those proceedings that a person committed a contravention of the primary order and either:
 - (i) the court does not find that the person committed a contravention of the primary order; or
 - (ii) the court finds that the person committed a contravention of the primary order.

⁹³ C McCoy and T Krone, 'Mandatory Sentencing: Lessons from the United States', (2002) 35 *Indigenous Law Bulletin*.

- (2) If Subdivision F applies to the contravention, when making an order under subsection (1) varying a primary order, the court, in addition to regarding, under section 60CA, the best interests of the child as the paramount consideration, must, if any of the following considerations is relevant, take that consideration into account:
- (a) the person who contravened the primary order did so after having attended, after having refused or failed to attend, or after having been found to be unsuitable to take any further part in, a post separation parenting program or a part of such a program;
 - (b) there was no post separation parenting program that the person who contravened the primary order could attend;
 - (c) because of the behaviour of the person who contravened the primary order, it was not appropriate, in the court's opinion, for the person to attend a post separation parenting program, or a part of such a program;
 - (d) the primary order was a compensatory parenting order made under paragraph 70NEB(1)(b) or 70NFB(2)(c) after the person had contravened a previous order under this Act affecting children.
- (3) This section does not limit the circumstances in which a court having jurisdiction under this Act may vary a primary order.

8.5 Is there any advantage in requiring the court to 'give consideration to a parenting order in favour of the other parent where there is a third breach within a pattern of defiance of court orders'? The term 'consider' is used in s 60CC(1) of the Family Law Act. The meaning of the term has been judicially considered in *Goode and Goode*.⁹⁴ In their judgment Chief Justice Bryant and Justices Finn and Boland held at paragraph 64 that

...the juxtaposition of ss 65DAA(1)(a), 65DAA(1)(b) and 65DAA(1)(c) suggests a consideration tending to a result, or the need to consider positively the making of an order, if the conditions in s 65DAA(1)(a), being the best interests of the child, and s 65DAA(1)(b), reasonable practicability, are met.

8.6 There is now a positive aura to the term 'consider', so that while it does not go so far as to import a presumption, the requirement to 'consider' under the Family Law Act has moved some way towards a presumption in favour of that which is to be considered. In the context of the more serious contravention cases a requirement to consider which it would seem imports an implication that the consideration must be positive, is particularly inappropriate because the court is in a sense the last bastion for the child, the parents having shown themselves unable to act in the child's best interests by their continuing failure to agree and co-operate in promoting that interest.

8.7 It may be that in some cases it will be appropriate to consider a change in the living arrangements of a particular child and in some cases it will be appropriate to change those arrangements. However, to import a quasi presumption in favour of such a change will simply enhance the shift of power from an impartial judiciary to a highly partial party. This is not a desirable change.

8.8 Council's 1998 report, at Recommendation 2, stated that the court should ensure that breaches of contact orders are appropriately and adequately dealt with and wilful or repeated breaches are

⁹⁴ *Goode and Goode* [2006] FamCA 1346 (15 December 2006).

punished.⁹⁵ In this report Council has recommended the establishment of a child orders enforcement agency. The establishment of such an agency would sufficiently demonstrate the seriousness with which breaches of parenting orders are viewed without imposing a one size fits all solution.

8.9 The Every picture tells a story report recommended reasonable but minimum financial penalties should be imposed for first and subsequent breaches. The report also made clear that penalties should follow breaches irrespective of which parent breaches the order:

The consequences of a deliberate breach of an order should be as serious for the parent who fails to make themselves available in accordance with an order as it is for a parent who wilfully refuses to make children available without reasonable excuse.⁹⁶

8.10 The Every picture tells a story report recommended strengthening the enforcement provisions. Part of Recommendation 21 of the Every picture tells a story report is that on a third breach within a pattern of deliberate defiance of court orders, the court should consider making a parenting order in favour of the other parent. In the discussion of this proposal, the Committee explained that a great deal of evidence had been provided to the Committee to show that there was a perception of imbalance between the enforceability of child support and child orders.⁹⁷ Accordingly, the Committee considered that a 'third breach, if found to demonstrate a pattern of deliberate defiance of court orders, should require the court to give serious consideration to making a new parenting order in favour of the other parent (unless this is contrary to the best interests of the child).'⁹⁸

8.11 In its response the Australian Government agreed with the House of Representatives Standing Committee on Family and Community Affairs' concern that the parenting order enforcement options in the Family Law Act needed to be strengthened. In addition to the financial penalties and cumulative list of consequences, the Government introduced a range of new measures (these measures are discussed in more detail in the previous chapter of this report).

8.12 The broad changes brought about by the reforms are described as having:

the potential to make a real difference to families experiencing the difficult life transition of parental separation. The proposed Family Relationship Centres are in many ways the fruit of decades of work in the provision of services to families in the community.⁹⁹

Conclusion

8.13 Council's view is that there should be few further legislative changes, so that Schedule 2 of the 2006 amendments is given effect and the opportunity to work. The majority of provisions commenced on 1 July 2006. Council's recommendation for the establishment of a child orders enforcement agency discussed in Chapter 7 would remove the financial burden of repeated litigation and would demonstrate the seriousness with which society views serious disregard of such orders.

⁹⁵ Family Law Council, *Child Contact Orders: Enforcement and Penalties*, 1998, p xiii.

⁹⁶ House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story: report on the inquiry into child custody arrangements in the event of family separation*, (2003), paragraph 4.142, pp 99–100.

⁹⁷ *ibid*, p 98.

⁹⁸ *ibid*, p 100.

⁹⁹ C Caruana, 'Shared parenting and family law reform: the next instalment' (2004/2005) 69 *Family Matters* 63.

8.14 On this basis Council does not believe that such a radical proposal as mandatory penalties should be adopted at this stage. Council does, however, recognise the continuing concerns about breaches of parenting orders. The Government may wish to consider whether this issue should be reviewed when the 2006 reforms are evaluated.

Recommendation 9

<p>That the Government not introduce mandatory penalties for a third breach of a parenting order and that similarly the Government not introduce a requirement to consider a change in living arrangements where there has been a third breach of a parenting order.</p>
--

BIBLIOGRAPHY

Legislation cited

Child Support (Assessment) Act 1989 (Cth).

Child Support (Registration and Collection) Act 1988 (Cth).

The Children and Adoption Act 2006 (UK).

Children (Contact) and Adoption Bill 2005 (UK).

Family Law Act 1975 (Cth).

Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).

Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth).

Family Law Amendment (Shared Parental Responsibility) Bill 2006 (Cth).

Family Law Amendment Act 2000 (Cth).

Family Law Reform Act 1995 (Cth).

Cases cited

NP & AP (No. 2) [2006] FamCA 869.

Goode and Goode [2006] FamCA 1346 (15 December 2006).

Abduamanoski and Aburamanoska (2005) FLC 93-215.

Articles cited

Advisory Board on Family Law: Children Act Sub- Committee, *Making Contact Work*, 2002, viewed 12 July 2007, <<http://www.dca.gov.uk/family/abfla/mcwrep.pdf>>.

Arizona Superior Court in Pima County, *Parent information sheet regarding the use of special masters*, viewed 7 September 2006, <<http://www.sc.co.pima.az.us/domestic/SpecialMaster/ParentInfo.htm>>.

Arizona Supreme Court, *AJB: Custody/Divorce*, viewed 21 June 2007, <<http://www.supreme.state.az.us/nav2/divorce.htm>>.

Attorney-General's Department, *Financial Assistance*, last viewed 9 August 2007, <http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalaid_FinancialAssistance>.

—, *Parenting Plans – Information for parents to consider when making a parenting plan*, 2007.

—, *Parenting Plans – What is a parenting plan*, 2007.

—, *The Contact Orders Program*, (2003), viewed 7 September 2006,
<http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/Publications_Publications_2003_The_Contact_Orders_Program>.

Australian Bureau of Statistics, 3307.0.55.001 — *Divorces, Australia*, 2005, released 2/11/2006.

Australian Government, *A new family law system*, Government response to ‘Every picture tells a story’. Response to the report of the House of Representatives Standing Committee on Family and Community Affairs inquiry into child custody arrangements in the event of family separation, June 2005.

Australian Institute of Family Studies, *Diversity & changes in Australian families*, 2005.

—, *Parent-child contact and post-separation parenting arrangements*, Research Report No 9, 2004.

Bryant CJ, Diana, *State of the nation*, Speech to the 12th National Family Law Conference, 23 October 2006, Perth.

Caruana, C, ‘Shared parenting and family law reform: the next instalment’ (2004/2005) 69 *Family Matters* 63.

Child Support Agency, *The legal practitioner’s guide; precedents for child support agreements and court orders*, 2004.

Family Court of Australia, Practice Direction No. 2 of 2005 – *Practice Direction for the Melbourne Implementation of the Children’s Cases Program Incorporating the Child Responsive Pilot*, viewed 21 June 2007,

<http://www.familycourt.gov.au/presence/connect/www/home/directions/practice_directions/2005+practice+directions/practice_direction_no_2_of_2005>.

—, *Client Service in the Family Court of Australia and the Federal Magistrates Court*, Progress Report Submitted by the Family Court of Australia to the Joint Standing Committee on Public Accounts and Audit, May 2006.

Family Court of Australia and Federal Magistrates Court of Australia, *Parenting orders — obligations and who can help*, 2007, viewed 12 July 2007,

<http://www.familylawcourts.gov.au/wps/wcm/resources/file/ebf37a0ecc1532e/Parenting_orders_obligations_consequences210207.pdf>.

Family Law Council, *Child contact orders: enforcement and penalties*, 1998.

—, *Interim Report, Penalties and Enforcement*, 1998.

—, *Statistical Snapshot of Family Law 2003–2005*, 2007.

Family Law Section of the Law Council of Australia, *The new family law parenting System handbook*, 2006.

Gibson, Dianne, 'New approach to child dispute services in the Family Court of Australia', (2006) 1 *Family Relationships Quarterly* 7.

Goodman, K, *The master system*, viewed 7 September 2006, <<http://www.divorcenet.com/states/maryland/mdart-02>>.

House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005*, 18 August 2005.

House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story. Report on the inquiry into child custody arrangements in the event of family separation*, 2003.

Johnston, J R, 'High conflict divorce' (1994) 4 *Children and Divorce* 165.

Judicial Commission of New South Wales, website, viewed 23 August 2007, <<http://www.judcom.nsw.gov.au>>.

McCoy, C and Krone, T, 'Mandatory Sentencing: Lessons from the United States', [2002] 35 *Indigenous Law Bulletin*.

McIntosh, J, *Australian children in post separation dispute: impacts of conflict and pathways of intervention, Safe Transitions Presentation*, 2005.

—, C Long, and L Moloney, 'Child-focussed and child-inclusive mediation: A comparative study of outcomes' (2004) 10 *Journal of Family Studies* 87.

— and L Moloney, *Child focused dialogues*, 2006.

—, *Entrenched conflict in parental separation: Pathways of impact on child development: A synopsis of recent research*, 2002.

— and C Long, 'Outer conflict, inner discord: Australian children in post separation disputes' (2005) 84 *Health Issues*.

Parkinson, P and Smyth, B, 'Research: satisfaction and dissatisfaction with father-child contact arrangements in Australia' (2004) 16(3) *Child and Family Law Quarterly* 289.

Smyth, Bruce, 'Parent-child contact schedules after divorce' (2004) 69 *Family Matters* 32.

—, Richardson, Nicholas, and Soriano, Grace, eds., *Proceedings of the International Forum on Family Relationships in Transition: Legislative, practical and policy responses*, 2006.

APPENDIX A: FUNCTIONS OF THE FAMILY LAW COUNCIL

Functions of the Family Law Council

The Family Law Council is a statutory authority which was established by section 115 of the *Family Law Act 1975*. The functions of the Council are set out in subsection 115(3) of the Act as follows:

It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning:

- (a) the working of this Act and other legislation relating to family law;
- (b) the working of legal aid in relation to family law; and
- (c) any other matters relating to family law.

The Council may provide advice and recommendations either on its own motion or at the request of the Attorney-General.

Membership of the Family Law Council (as at 1 July 2007)

Professor Patrick Parkinson, *Chair*
Ms Nicola Davies
Mr Kym Duggan PSM
Deputy Chief Justice John Faulks
Federal Magistrate Norah Hartnett
Mr Clive Price
Ms Susan Purdon
Federal Magistrate Robyn Sexton
Justice Garry Watts

The following seven agencies have observer status. The representatives of the agencies as at July 2007 are listed.

Australian Institute of Family Studies
Australian Law Reform Commission
Child Support Agency
Family Court of Australia

Family Court of Western Australia
Federal Magistrates Court of Australia
Family Law Section of the Law Council of Australia

Ms Ruth Weston
Ms Lani Blackman
Ms Yvonne Marsh
Principal Registrar Angela Filippello and
Ms Dianne Gibson
Principal Registrar David Monaghan
Mr John Mathieson
Ms Maurine Pyke

APPENDIX B: MEMBERS OF THE IMPROVING POST-PARENTING ORDER PROCESSES COMMITTEE

The members of the committee who prepared this report are:

- Mr Kym Duggan (convenor)
- Ms Nicola Davies
- Deputy Chief Justice John Faulks
- Mr Clive Price
- Federal Magistrate Norah Hartnett
- Principal Registrar Angela Filippello
- Ms Dianne Gibson
- Ms Yvonne Marsh
- Federal Magistrate Mead
- Dr Bruce Smyth
- Mr Murray Green
- Ms Pamela Hemphill

Members of the Secretariat who have assisted in the preparation of the report are:

- Ms Anita Mackay / Ms Rosa Saladino (Director of Research)
- Ms Carole Caple
- Mr James Mueller
- Ms Jennifer Wilcock
- Ms Jacqueline Menyhart
- Mr Stephen Still