

## Compliance regime

### 5.1 The FCAC report recommended that:

...the immediate implementation of the following additions to contact enforcement options:

- a cumulative list of consequences for breaches;
- reasonable but minimum 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.<sup>1</sup>

### 5.2 In its response to the FCAC report, the government stated that it:

...agrees with the committee's concern that the contact enforcement options in the Act need to be strengthened. In addition to the financial penalties and cumulative list of consequences already in the Act, the government will introduce the following new measures:

- a requirement that the courts consider 'make-up' contact if contact has been missed through a breach of an order. Unlike most enforcement provisions, it will not be necessary to prove that the breach was intentional. This will make it easier to obtain make-up contact and help those parents who are missing out on seeing their children;
- a power to award compensation for reasonable expenses incurred by a person but which were wasted due to a breach of an order. This might include airfares or other

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<sup>1</sup> FCAC report, pp.xxvi, 106-07 (recommendation 21).

tickets purchased but not used or travel expenses incurred by the person to collect a child but the child was not handed over;

- in cases involving a series of breaches or a serious disregard of court orders, a presumption that legal costs will be awarded against the party that has breached the order, unless it is not in the best interests of the child; and
- a discretion to impose a bond for all breaches of orders.

As recommended by the committee, imprisonment will be retained as an ultimate sanction.<sup>2</sup>

- 5.3 The Committee notes that the individual measures specified in the government response differ somewhat from those proposed in recommendation 21 of the FCAC report.
- 5.4 This Chapter will focus on these legislative measures as included in the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005.
- 5.5 The terms of reference for the inquiry require the Committee to consider whether the provisions of the proposed Bill are drafted to implement the measures set out in the Government's response to the FCAC report.

## Provisions in the draft Bill

- 5.6 Schedule 2 of the draft Bill contains most of the provisions relating to the compliance regime; some new provisions are also located in Schedules 4 and 5 of the draft Bill. The Explanatory Statement for the draft Bill states that:

Schedule 2 implements a range of amendments to strengthen the existing enforcement regime relating to Part VII orders in the Act. The amendments ensure that enforcement applications can be dealt with appropriately by the court, particularly given the object that children have a meaningful relationship with both parents.<sup>3</sup>

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<sup>2</sup> Government response to the FCAC report, p.16.

<sup>3</sup> Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.11.

- 5.7 In terms of the structure of the Commonwealth *Family Law Act 1975*, the draft Bill makes changes to the current compliance regime in Division 13A of Part VII of the Act.<sup>4</sup> The major changes to the Act introduced by the new compliance provisions are set out below.

## Standard of proof

- 5.8 Under the new section 70NEA, the standard of proof to be applied in determining matters in proceedings under Division 13A will be proof on the balance of probabilities. This standard of proof will also apply to the determination of whether a person who contravened an order under the *Family Law Act 1975* affecting children had a reasonable excuse for the contravention.<sup>5</sup>
- 5.9 Under the new section 70NEA also the court will only be able to make orders for certain criminal penalties in response to contraventions of orders if it is satisfied beyond reasonable doubt that the grounds for making the order exist.<sup>6</sup>
- 5.10 The Explanatory Statement for the draft Bill states that the new section 70NEA:

...provides clarification of the standard of proof to be applied by the court in considering enforcement applications. The current test provided by section 140 of the *Evidence Act 1995* (the Evidence Act) is the civil standard of proof, the balance of probabilities, but for the court to take account of the gravity of matters. In practice, the court applies a stricter standard of proof, much closer to the standard of beyond reasonable doubt because of the possibility of criminal sanctions being applied.

To ensure that expectations about the standard of proof are clear and realistic, the Bill specifies that a civil standard of proof applies to all matters where there are no criminal consequences and that a stricter standard of proof beyond reasonable doubt should apply to those matters in stage 3 of

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4 Part VII deals with post-separation court proceedings concerning children. The compliance regime in Division 13A deals with consequences of failure to comply with orders, and other obligations, that affect children.

5 Subsections 70NEA(1) and (2).

6 Subsection 70NEA(3). The orders are those in paragraphs 70NJ(3)(a),(d),(e) and 70NN(8)(a) (orders for community service, fines, and imprisonment) and are currently available to the court.

the parenting compliance regime in circumstances where the court is considering applying a criminal penalty.<sup>7</sup>

## Changes to stage 1 of the compliance regime

- 5.11 Currently, stage 1 of the compliance regime in the *Family Law Act 1975* applies when a court is making a parenting order and provides that the court must include in the order particulars of the obligations created and the consequences that may follow contravention.<sup>8</sup>
- 5.12 The new sections 70NEAA and 70NEAB, which comprise a new Subdivision AAA in Division 13A, will apply where there has been a contravention of a parenting order but there is a reasonable excuse for the contravention. These new sections will constitute, in effect, a new intermediate stage that will be applicable after stage 1 but prior to stage 2.
- 5.13 The new section 70NEAA provides that Subdivision AAA will apply if:
- A primary parenting order has been made in relation to a child; and
  - The court is satisfied that a person has committed a contravention of the order; and
  - The contravention resulted in a person not spending time with the child or the child not living with a person for a particular period; and
  - The person who committed the contravention proves that he or she had a reasonable excuse for the contravention.<sup>9</sup>
- 5.14 Under the new section 70NEAB, the court may make a further parenting order compensating for lost time the person who, as a result of the contravention of the parenting order, did not spend time with the child or did not have the child living with them. The court must consider making such an order.<sup>10</sup>

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7 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.11.

8 Among other requirements – see current section 65DA in Division 6 of Part VII of the Act.

9 Paragraphs 70NEAA(a)-(e).

10 Subsection 70NEAB(1).

- 5.15 Under section 70NEAB also, however, the court must not make the compensatory order if it would not be in the best interests of the child.<sup>11</sup>
- 5.16 For section 70NEAA, the existence of a reasonable excuse will be determined under the new sections 70NE(2) and (3) as follows:
- (2) A person (the *respondent*) is taken to have had a reasonable excuse for contravening a parenting order to the extent to which it deals with whom a child is to live with in a way that resulted in the child not living with a person in whose favour the order was made if:
    - (a) the respondent believed on reasonable grounds that the actions constituting the contravention were necessary to protect the health or safety of a person (including the respondent or the child); and
    - (b) the period during which, because of the contravention, the child did not live with the person in whose favour the order was made was not longer than was necessary to protect the health or safety of the person referred to in paragraph (a).
  - (3) A person (the *respondent*) is taken to have had a reasonable excuse for contravening a parenting order to the extent to which it deals with whom a child is to spend time with in a way that resulted in a person and a child not spending time together as provided for in the order if:
    - (a) the respondent believed on reasonable grounds that not allowing the child and the person to spend time together was necessary to protect the health or safety of a person (including the respondent or the child); and
    - (b) the period during which, because of the contravention, the child and the person did not spend time together was not longer than was necessary to protect the health or safety of the person referred to in paragraph (a).<sup>12</sup>
- 5.17 A further new section 70NEC sets out the court's duties where section 70NEB applies and where, after a parenting order has been made, the parents make a parenting plan that deals with a matter dealt with in the order and is in force when the contravention of the order allegedly

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11 Subsection 70NEAB(2).

12 New subsections 70NE(2) and (3) are in Schedule 5 of the draft Bill.

occurs. In such a case the court must have regard to the terms of the parenting plan and consider making an order under section 70NEB varying the parenting order to include some or all of the provisions of the parenting plan.<sup>13</sup>

## Changes to stage 2 of the compliance regime

- 5.18 Currently, stage 2 of the compliance regime in the *Family Law Act 1975* is applicable where there is a contravention of a primary order with no proven reasonable excuse, and where there have been no previous contraventions or where there have been previous contraventions and the court considers it appropriate to apply this stage. The court is able to select an appropriate course(s) of action (such as making an order) from a list in section 70NG.<sup>14</sup>
- 5.19 The Explanatory Statement for the draft Bill states that:
- To strengthen the existing enforcement regime, the court will be given a wider menu of options that it must consider at both stages 2 and 3 of the parenting compliance regime.<sup>15</sup>
- 5.20 Under the new paragraph 70NG(1)(a), the court may make an order directing the person who committed the contravention (or that person and another specified person) to attend a post-separation parenting program. Before making such an order, the court must consider seeking the advice of a family and child specialist about the services appropriate to the person's needs.<sup>16</sup>
- 5.21 If the court makes an order under the new paragraph 70NG(1)(a), the new subsection 70NG(3) will require the principal executive officer of the court to ensure that the provider of the program concerned is notified of the making of the order.<sup>17</sup>
- 5.22 Under the new paragraph 70NG(1)(b), the court may make a further parenting order compensating for lost time the person who, as a

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13 The court has the power to vary parenting orders under section 70NEB, which has been inserted into the Act by the separate *Family Law Amendment Act 2005*.

14 Stage 2 provisions are in the current Subdivision B. Primary orders can include child maintenance orders.

15 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.11.

16 New paragraph 70NG(1)(a) is in Schedule 4 of the draft Bill.

17 New subsection 70NG(3) is in Schedule 4 of the draft Bill.

result of the contravention, did not spend time with the child or did not have the child living with them.

- 5.23 Under the new paragraph 70NG(1)(d), the court may, if the contravention is not of a minor or technical nature, make an order requiring the person who committed the contravention to enter into a bond in accordance with the new section 70NGA.
- 5.24 The new section 70NGA provides for bonds that the court may require a person to enter into under the new paragraph 70NG(1)(d). A bond must be for a specified period of up to 2 years; may be with or without surety and security; and may contain conditions requiring attendance at an appointment(s) with a family and child specialist, or attendance at family counselling, or attendance at family dispute resolution, or good behaviour.<sup>18</sup> If the court proposes to require a person to enter into a bond, it must explain the purpose and effect of the requirement and the consequences that may follow if the person fails to enter into the bond or fails to act in accordance with the bond.<sup>19</sup>
- 5.25 The Explanatory Statement for the Bill indicates that this new bond provision will give the court:
- ...power to impose a bond at stage 2 where the consequences of failure to comply with the bond would be limited to civil penalties. This would distinguish it from the current bond provisions at stage 3 where there are clear criminal consequences.<sup>20</sup>
- 5.26 In its submission the Attorney-General's Department indicated that:
- A bond with 'surety' is given where a person promises to take responsibility for a party's performance of an undertaking.  
...A bond with 'security' requires a party to provide the court with some form of wealth in advance.<sup>21</sup>
- 5.27 Under the new paragraph 70NG(1)(e), if:
- The contravention is a contravention of a parenting order in relation to a child; and

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18 Subsections 70NGA(1)-(4).

19 Subsection 70NGA(5).

20 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.11.

21 Attorney-General's Department, *Submission 46.1*, p.25.

- The contravention resulted in a person not spending time with the child or the child not living with a person for a particular period; and
- The person who lost time with the child reasonably incurs expenses as a result of the contravention; and
- The contravention is not of a minor or technical nature;

the court may make an order requiring the person who committed the contravention to compensate the person who lost time and incurred expenses for some or all of those expenses.

5.28 In relation to this new provision, the Explanatory Statement for the Bill indicates that:

...at both stage 2 and stage 3 the court must consider awarding compensation for reasonable expenses incurred by a party (such as airfares wasted, other tickets or accommodation purchased but not used).<sup>22</sup>

5.29 Under the new paragraph 70NG(1)(f), if the contravention is not of a minor or technical nature, the court may make an order that the person who committed the contravention pay some or all of the costs of another party or parties to the proceedings.

5.30 Under the new subsection 70NG(1AA), if:

- The contravention is a contravention of a parenting order in relation to a child; and
- The contravention resulted in a person not spending time with the child or the child not living with a person for a particular period;
- The court must consider making an order under the new paragraph 70NG(1)(b) to compensate the person for the time the person did not spend with the child (or the time the child did not live with the person) as a result of the contravention.

5.31 Under the new subsection 70NG(1AB), however, the court must not make a compensatory order under paragraph 70NG(1)(b) if it would not be in the best interests of the child.

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<sup>22</sup> Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.11.



- 5.32 A further new section 70NGB sets out the court's duties where proceedings are brought in relation to a contravention of a parenting order and where, after the parenting order was made, the parents made a parenting plan dealing with a matter dealt with in the order and in force when the contravention occurred. In such a case the court must have regard to the terms of the parenting plan and consider making an order under paragraph 70NG(1)(ba) varying the parenting order to include some or all of the provisions of the parenting plan.<sup>23</sup>

### Changes to stage 3 of the compliance regime

- 5.33 Currently, stage 3 of the compliance regime in the *Family Law Act 1975* is applicable where there is a contravention of a primary order with no proven reasonable excuse, and where there have been no previous contraventions but there has been a serious disregard for the primary order, or where there have been previous contraventions of primary orders. The court is able to make an appropriate order(s) from a list at section 70NJ(3) which includes community service orders, fines, and imprisonment.<sup>24</sup>

- 5.34 The Explanatory Statement for the draft Bill states that:

To strengthen the existing enforcement regime, the court will be given a wider menu of options that it must consider at both stages 2 and 3 of the parenting compliance regime.<sup>25</sup>

- 5.35 The new subsection 70NJ(2A) provides that, in relation to a person who committed the contravention, the court must:

- Make an order under the new paragraph 70NJ(3)(g) unless the court is satisfied that it would not be in the best interests of the child concerned to make the order; and
- Consider, if the court makes an order under paragraph 70NJ(3)(g), making another order (or other orders) under subsection 70NJ(3) that the court considers to be the most appropriate of the orders under that subsection in the circumstances; and
- If the court does not make an order under paragraph 70NJ(3)(g), make at least one order under subsection 70NJ(3), being the

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23 Paragraph 70NG(1)(ba) is current in the Act.

24 Stage 3 provisions are in the current subdivision C.

25 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.11.

order/orders that the court considers to be the most appropriate of the orders under subsection 70NJ(3) in the circumstances.<sup>26</sup>

5.36 In relation to this new provision, the Explanatory Statement for the draft Bill states that there is:

...a presumption that the court will order costs for legal expenses against the party who has breached the order, unless it is not in the best interests of the child. Where it is not in the best interests of the child to order costs at stage 3, the court must make one of the other orders available to it.<sup>27</sup>

5.37 Under the new paragraph 70NJ(3)(ca), the court may make a further parenting order compensating for lost time the person who, as a result of the contravention, did not spend time with the child or did not have the child living with them, unless it would not be in the best interests of the child concerned for the order to be made.

5.38 The new paragraph 70NJ(3)(f) provides that if:

- The contravention is a contravention of a parenting order in relation to a child; and
- The contravention resulted in a person not spending time with the child or the child not living with a person for a particular period; and
- The person who lost time with the child reasonably incurs expenses as a result of the contravention;

the court may make an order requiring the person who committed the contravention to compensate the person who lost time and incurred expenses for some or all of those expenses.

5.39 Under the new paragraph 70NJ(3)(g), the court may make an order that the person who committed the contravention pay all of the costs of another party or parties to the proceedings.

5.40 The new paragraph 70NJ(3)(h) provides that the court may make an order that the person who committed the contravention pay some of the costs of another party or parties to the proceedings.

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26 The new paragraph 70NJ(3)(g) relates to orders to pay legal costs and is covered below.

27 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.12.

- 5.41 The new subsection 70NM(4) provides that a bond that the court may require a person to enter into under paragraph 70NJ(3)(b) may contain conditions requiring attendance at an appointment(s) with a family and child specialist, or attendance at family counselling, or attendance at family dispute resolution, or good behaviour.<sup>28</sup>
- 5.42 A further new section 70NJA sets out the court's duties where proceedings are brought in relation to a contravention of a parenting order and where, after the parenting order was made, the parents made a parenting plan dealing with a matter dealt with in the order and in force when the contravention occurred. In such a case the court must have regard to the terms of the parenting plan and consider making an order under paragraph 70NJ(3)(c) varying the parenting order to include some or all of the provisions of the parenting plan.<sup>29</sup>

## Matters arising from the evidence

### Support for the compliance provisions

- 5.43 Some support for the new compliance provisions in the draft Bill was expressed in evidence received by the Committee. The Family Law Council submitted that 'the provisions in schedule 2 should be given a reasonable opportunity to work' and that:

The provisions in schedule 2 should be viewed in the context of the other measures. For example, parties will have to attend family dispute resolution prior to filing an enforcement application, unless one of the exceptions applies.<sup>30</sup>

- 5.44 One submission stated that the changes in Schedule 2 of the draft Bill 'help to clarify this part of the FLA',<sup>31</sup> while the Lone Fathers

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28 New subsection 70NM(4) is in Schedule 4 of the draft Bill.

29 Paragraph 70NJ(3)(c) is current in the Act.

30 Family Law Council, *Submission 33*, p.6. The Council did note however that 'there may be cause for concern about the effect of these provisions on the more difficult cases, eg. those involving family violence' (p.6). The Council suggested that safeguards to stop parties coercing other parties into agreeing to parenting plans that override orders may need to be considered (p.6).

31 Ms Ballantyne, *Submission 32*, p.1.

Association of Australia (LFAA) stated that the 'proposed new enforcement mechanisms are potentially useful'.<sup>32</sup>

## Issues raised in relation to the compliance provisions

5.45 The main issues raised by the evidence in relation to the new compliance provisions in the draft Bill are detailed below.

### Standard of proof

5.46 The Family Court of Australia was critical of the new section 70NEA in its submission:

...the Court thinks there will be confusion about how the standard of proof applies and that the application of this will make it more confusing for applicants, many of whom are self-represented, to bring an application for contravention.<sup>33</sup>

5.47 The Court indicated its preference for the *Briginshaw* standard, which is the civil standard of the balance of probabilities but which also requires the court to take into account other factors such as the seriousness of the allegation and the gravity of the consequences of a particular finding. The Court stated that:

The *Briginshaw* standard in fact allows the Court to apply the *appropriate* standard, namely where the allegations are more serious and in all likelihood would lead to a criminal sanction, to apply a higher standard, but where that is obviously not the case, to apply a lower standard.<sup>34</sup>

5.48 The Court further indicated that:

...the existing standard works well and provides the flexibility necessary to determine contravention applications which are by their nature already complex proceedings... it is **not** the Court's experience that it is the standard of proof that creates difficulty for litigants. In the Court's view the flexibility of the existing standard enables the Court to apply

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32 LFAA, *Submission 48*, pp.3-4. The LFAA also stated however that the 'reasonable excuse' specification should be altered to read 'reasonable and convincing' (p.4). The Association further submitted that the Family Court is 'either unable and/or unwilling to enforce its own orders on contact' (p.3).

33 Family Court of Australia, *Submission 53*, p.37.

34 Family Court of Australia, *Submission 53*, p.36.

the appropriate penalties whereas the present proposals would inhibit that occurring in many cases, and potentially limit what penalties a court could impose.<sup>35</sup>

5.49 The Court recommended that the new section 70NEA be withdrawn from the draft Bill and that no changes be made to the existing standard of proof.<sup>36</sup>

5.50 In its submission, the Attorney-General's Department stated that:

...courts require a very high standard of proof of a breach because of the possibility of criminal sanctions. ...This provision [new section 70NEA] is intended to assist practitioners and in particular self-represented litigants as it clarifies the evidentiary standard that must be met. This will assist in case preparation.<sup>37</sup>

5.51 The Department submitted that the new provision will also improve matters due to the fact that the application of the *Briginshaw* standard is not necessarily suitable in all cases:

The lower standard of 'balance of probabilities' will apply for cases where non-criminal sanctions are sought. This will make it easier to demonstrate contraventions than under the current system where a higher standard, which is something between the balance of probabilities and beyond reasonable doubt [the *Briginshaw* standard], may be applied to all contravention applications.<sup>38</sup>

5.52 The Men's Rights Agency submitted that the standard of proof should be the criminal standard of proof (i.e. beyond reasonable doubt) in all cases.<sup>39</sup>

5.53 While the Committee recognises that the *Briginshaw* standard may afford flexibility to the Family Court, it also considers that the new section 70NEA will be a useful and necessary clarification of the standards of proof which should be applied in proceedings under Division 13A.<sup>40</sup> For applicants seeking to prove a contravention, it will

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35 Family Court of Australia, *Submission 53*, p.38.

36 Family Court of Australia, *Submission 53*, p.38.

37 Attorney-General's Department, *Submission 46.1*, p.23.

38 Attorney-General's Department, *Submission 46.1*, p.23.

39 Men's Rights Agency, *Submission 74*, p.13.

40 The LFAA stated that 'Provisions in the legislation on the standard of proof required in dealing with contraventions need to be clear': *Submission 48*, p.4.

be clear that if they are only able to satisfy a contravention to the civil standard of proof (balance of probabilities), the court will move to consider a civil penalty. If however an applicant is able to establish the contravention to the criminal standard of proof (beyond reasonable doubt), they will be in a position to seek that the court consider applying criminal penalties as well as civil penalties.

- 5.54 For the court, the practical effect of the new section 70NEA will be that if the contravention has only been proved on the balance of probabilities, then only civil penalties will be available. If however the court is satisfied of a contravention to a standard beyond reasonable doubt, then both civil and criminal penalties will be available.

## Complexity

- 5.55 The Family Law Section of the Law Council of Australia (FLS) expressed its concern that the new compliance provisions in the draft Bill:

...will produce a legislative scheme which is too complex. FLS is also concerned that the complexity and some specific provisions of the scheme will tend to undermine the two key messages if compliance is to be successfully promoted: that orders must be strictly complied with; and that if the orders are no longer suitable or workable then an application to vary should be made without delay.<sup>41</sup>

- 5.56 The FLS recommended that:

...the contravention process be simplified. These provisions will often be used by self-represented litigants as well as qualified lawyers and they need to be clear and simple. Apart from making the legislation accessible, simplification is likely to reduce cost and delay and promote the message that parenting orders must be obeyed; and if they are seen to be impractical or unsuitable then an application must immediately be made to vary them.<sup>42</sup>

- 5.57 The FLS suggested that the new provisions, as well as the existing Subdivisions B and C of the Act, could be redrafted along the following lines:

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41 FLS, *Submission 47*, p.19.

42 FLS, *Submission 47*, p.20.

- That when any contravention application is before it a court may vary the relevant parenting orders.
- That a party may make a simple application for compensatory contact and costs along the lines suggested by FLS.<sup>43</sup>
- That there be a single contravention process in which the court has the power to impose higher penalties for serious or repeat contraventions.<sup>44</sup>

5.58 The Committee recognises that complexity is a live issue regarding the new compliance provisions in the draft Bill, but is also aware that the intention of the government to have the draft Bill passed by the Parliament as soon as possible effectively precludes a complete redraft of the compliance provisions at this stage. The Committee notes its recommendation in Chapter 6 that resources be allocated for a redrafting of the *Family Law Act 1975* as soon as possible and considers that a redraft of the compliance regime would need to be a priority focus for that process.<sup>45</sup> The Committee makes two suggestions in this Chapter to lessen the complexity of the new compliance provisions and the compliance process.<sup>46</sup>

### Strength of enforcement

5.59 It was suggested in evidence to the Committee that the new compliance provisions are not severe enough in respect of deliberate breaches and continual breaches.<sup>47</sup>

5.60 The Attorney-General's Department stated in its submission that:

The government considers the changes to the enforcement provisions provide the court with significantly more options to enforce orders, while allowing the court sufficient discretion to ensure that the most appropriate orders are made in the best interests of the children.

The amendments contained in the Bill to strengthen the existing enforcement regime are about providing the court with a greater range of options to appropriately deal with contraventions. ...the provisions do place greater obligations

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43 Refer FLS position paper at *Attachment A* to FLS submission.

44 FLS, *Submission 47*, p.20.

45 See paragraphs 6.65 – 6.66 in Chapter 6.

46 See paragraphs 5.74 – 5.75 and 5.79 – 5.81 below.

47 Mr Bennet, *Submission 5*, p.3; *Dads in Distress, Submission 41*, p.2.

on the court to make orders compensating the party who has not had contact as a result of the breach.<sup>48</sup>

### Conclusion

5.61 The Committee recognises that the balance between sufficiently strong enforcement and necessary discretion for the court, especially in the context of the best interests of the child, is difficult to strike. The Committee considers that the new compliance provisions in the draft Bill do significantly increase the enforcement options for the court (particularly the compensation for lost time/expenses and costs provisions) while still maintaining the necessary judicial discretion.

### Withholding contact, burden of proof, and penalties for harassment applications

5.62 More than one submission criticised the new provisions for not recognising the legitimacy of a parent withholding contact where there are safety concerns for a child due to violence and abuse.<sup>49</sup> It was submitted that the provisions should recognise the withholding of contact for child safety reasons, that the burden of proof for establishing that contact was not provided should be placed on the party bringing the application for the contravention, and that penalties should be available to the court when applications are found to be without substance and for harassment purposes.<sup>50</sup>

### Conclusion

5.63 The Committee acknowledges these concerns, but considers that the criticism is unjustified. The new subsections 70NE(2) and (3) will provide that a person (the respondent to a contravention application) will be taken to have had a reasonable excuse for contravening a parenting order where that person believed on reasonable grounds that the action of withholding contact was necessary to protect the

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48 Attorney-General's Department, *Submission 46.1*, p.10.

49 SPARK Resource Centre Inc, *Submission 16*, p.8; National Council of Single Mothers and their Children, *Submission 20*, p.10.

50 SPARK Resource Centre Inc, *Submission 16*, pp.8-9; National Council of Single Mothers and their Children, *Submission 20*, p.10; New South Wales Women's Refuge Resource Centre, *Submission 22*, p.14; National Abuse Free Contact Campaign, *Submission 8*, p.10. The Sole Parents' Union recommended that that the new provisions should take account of a child's rights to refuse contact: *Submission 38*, p.3.



health and safety of a person (including the respondent or the child).<sup>51</sup> It is also important to bear in mind that contravention applications only occur subsequent to the making of parenting orders by the court, and parenting orders must be made with the best interests of the child as the paramount consideration. Protection of the child from family violence and physical and psychological harm will have been taken into account as part of this process.

- 5.64 In terms of the burden of proof, while the applicant will need to establish that the contravention occurred, the Committee considers it only appropriate in such circumstances that the onus for establishing a reasonable excuse for contravention should be on the party relying on that excuse. The Committee also notes that, where applications are found to be without substance and motivated by harassment, the court is able, under the current Act, to deal with such cases using either the provisions relating to frivolous and vexatious litigants (section 118), cost penalties (section 117(2)), or the contempt provisions (section 35).

## Bonds

- 5.65 In regard to the new subsections 70NGA(4) and 70NM(4) regarding bonds, the FLS recommended that an additional condition regarding court order compliance be inserted into these provisions:

FLS recommends that the conditions that may be imposed on a person by a bond in subsection 70NGA(4) be extended to include a condition that a party comply with a court order.  
...FLS recommends that section 70NM (Bonds under stage 3 of the parenting compliance regime) be amended in a similar fashion...<sup>52</sup>

## Conclusion

- 5.66 The Committee does not agree with this recommendation. The insertion of an extra condition for court order compliance in the new subsections 70NGA(4) and 70NM(4) is not necessary given that the court already has the power to make orders under section 70NG.

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51 See paragraph 5.16 above.

52 FLS, *Submission 47*, p.26.

## The costs provision – section 70NJ(2A)

5.67 A number of submissions expressed concerns regarding the new subsection 70NJ(2A). The FLS indicated its opposition to this section:

FLS strongly opposes the proposed subsection 70NJ(2A) of the FLA regarding automatic costs sanctions in contravention applications. It is highly inappropriate to impose automatic costs sanctions in children's cases, even on a *prima facie* basis. The court already has sufficient discretion to order costs in appropriate circumstances.<sup>53</sup>

5.68 National Legal Aid stated that:

NLA expresses some concern about the lack of discretion in this provision and suggests that the wording be amended to provide that "the court must consider" making such an order.<sup>54</sup>

5.69 The New South Wales Law Society suggested in relation to the new subsection 70NJ(2A) that the 'court should have a discretion in relation to costs.'<sup>55</sup>

## Conclusion

5.70 In the Committee's view, the new subsection 70NJ(2A) is not inappropriate. The provision is not automatic as it gives the court discretion to not make an order for costs under paragraph 70NJ(3)(g) if this would not be in the best interests of the child. Further, the Committee considers that subsection 70NJ(2A) is a suitable provision to include in the final stage of the Act's compliance regime where cases involving repeated contraventions of orders or serious disregard for orders will come before the Court. The new subsection is also suitable given the context of other penalties available to the court under section 70NJ. The Committee agrees with the comments of the Family Court regarding the new subsection 70NJ(2A):

I think we thought that all that was being provided for in the legislation was that, where there was a serious disregard for an order on a contravention, there should be a presumption of costs unless it was in the best interests of the child not to

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53 FLS, *Submission 47*, p.iv.

54 National Legal Aid, *Submission 24*, p.4.

55 New South Wales Law Society, *Submission 81*, p.7.

order them. We thought that there were relatively few cases and that, if that was what the parliament wanted to do – if it wanted the message to be loud and clear that you should not contravene orders in those cases – that was a good message and, provided that there was sufficient to allow you to depart from that in a case where it really required it, that was all right. So we did not think that there was any real difficulty with that limited provision.<sup>56</sup>

## Effect of parenting plans

- 5.71 In its submission, the FLS recommended that provisions akin to the new sections 70NEC, 70NGB and 70NJA be inserted elsewhere in the Act for completeness:

FLS notes that Subdivision A and AAA do not contain provisions about the effect of parenting plans. Similar provisions are proposed in Subdivision AA (s.70NEC), Subdivision B (s.70NGB) and Subdivision C (s.70NJA). FLS recommends that Subdivision A and AAA also include a provision about the effect of parenting plans.<sup>57</sup>

- 5.72 Conversely, the Family Court suggested that the new sections 70NEC, 70NGB and 70NJA are unnecessary<sup>58</sup> and suggested that the three new sections could be replaced with a single provision:

...consideration might perhaps be given to replacing all these provisions with a simple provision that made it clear than [*sic*] in dealing with compliance matters, the court could take into account, in determining whether there was a breach of an order, and whether there was a reasonable excuse for any breach, whether to vary the parenting order, and what other order to impose under s 70NG and 70NJ, the terms of any parenting plan, and any arrangements agreed to or acted upon by the parties since the parenting order was made.<sup>59</sup>

## Conclusion

- 5.73 The Committee understands the Court's view that the three new sections are unnecessary, but considers that, in the interests of clarity,

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56 Chief Justice Bryant, *Proof transcript of evidence*, 26 July 2005, pp.33-34.

57 FLS, *Submission 47*, p.32.

58 Family Court, *Submission 53*, pp.27-28.

59 Family Court, *Submission 53*, p.28.

some comprehensive provision needs to be in place to state the requirement that, in the relevant circumstances, the court must have regard to parenting plans and consider making an order varying the parenting order to include some or all of the provisions of the parenting plan. This is also necessary to explicate the potential legal effect of parenting plans for litigants.

5.74 This said, the Committee is also conscious that three separate but essentially identical provisions in separate areas of the Act may be something of an overcomplication. The Committee believes therefore that a single provision:

- Inserted at an appropriate point at the beginning of Division 13A;
- Embodying the requirements of each of the proposed sections 70NEC, 70NGB and 70NJA; and
- Applying to all subdivisions in Division 13A (including Subdivision A and the new Subdivision AAA);

would go some way towards meeting the recommendations of both the FLS and the Family Court. The new sections 70NEC, 70NGB and 70NJA could then be removed.

### **Recommendation 39**

5.75 **The Committee recommends that the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 be amended so as to insert a single provision at the appropriate point at the beginning of Division 13A of the *Family Law Act 1975* which applies to all Subdivisions in Division 13A and which contains the following elements:**

- **The section applies if:**
  - ⇒ **a parenting order has been made in relation to a child (whether before or after the commencement of Division 13A); and**
  - ⇒ **after the parenting order was made, the parents of the child made a parenting plan that dealt with a matter dealt with in the parenting order; and**
  - ⇒ **proceedings are brought under this Division in relation to a parenting order; and**
  - ⇒ **the parenting plan was in force when the contravention or**

alleged contravention of the parenting order occurred.

- In exercising its powers under this Division, the court must:
  - ⇒ have regard to the terms of the parenting plan; and
  - ⇒ consider whether to exercise its powers under this Division to make an order varying the parenting order to include (with or without modification) some or all of the provisions of the parenting plan.

The existing note in the proposed sections 70NEC, 70NGB and 70NJA should be retained in the single section.

Consequentially, the proposed sections 70NEC, 70NGB and 70NJA of the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 should be deleted from the draft Bill.

5.76 As discussed in Chapter 3, the new section 64D in Schedule 1 of the draft Bill has the effect of making parenting orders subject to subsequent parenting plans. In its submission the Family Court also considered that section 64D is either unnecessary or that its intent could also be addressed by a single provision within the compliance regime.<sup>60</sup> The Committee is of the view however that the new section 64D is a useful provision as it makes it clear, on the face of the parenting order, exactly what will be the effect of subsequent parenting plans. The provisions in the compliance regime will only be relevant for those parenting orders which are not affected by section 64D (for example parenting orders made prior to the commencement of these provisions).

### Other recommendations for amendments

5.77 The FLS opposed the inclusion of the phrase 'minor or technical nature' in the new paragraphs 70NG(1)(d), 70NG(1)(f), and subparagraph 70NG(1)(e)(iv):

FLS believes that the addition of the phrase '*minor or technical nature*' will lead to unnecessary applications and arguments about the interpretation of that phrase. The use of this phrase adds an unnecessary layer of complexity in situations where the court already has the discretion to take such matters into account.<sup>61</sup>

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60 Family Court, *Submission 53*, pp.27-28.

61 FLS, *Submission 47*, p.23.

- 5.78 The FLS recommended that ‘further consideration be given to the introduction of the phrase’.<sup>62</sup>
- 5.79 The Committee agrees with the concerns of the FLS on this issue. The phrase ‘minor or technical nature’ has the potential to unduly complicate the process and could lead to increased litigation regarding its meaning. The phrase is also unnecessary given that the court already has a discretion under section 70NG(1) regarding the making of orders and is therefore able to take such matters into account. The Committee is of the view that the phrase should be removed from the provisions in the draft Bill.
- 5.80 At the same time, the Committee is aware that there is potential for one party in proceedings to make repeated applications for technical or minor contraventions with a view to harassing or inconveniencing the other party. The Committee considers that the court should be able to order costs against the applicant party in such circumstances.

#### **Recommendation 40**

- 5.81 **The Committee recommends that, as the phrase ‘if the current contravention is not of a minor or technical nature-’ in the proposed subsection 70NG(1) is unnecessary and has the potential to unduly complicate court process and increase litigation:**

- (a) the phrase be deleted from the proposed paragraphs 70NG(1)(d) and 70NG(1)(f) of the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005; and**
- (b) the proposed subparagraph 70NG(1)(e)(iv) of the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 be deleted.**

**The Committee also recommends that a provision be inserted into Division 13A of the *Family Law Act 1975* enabling the court to make a costs order against a party to proceedings where:**

- (a) the court is satisfied that the party has made more than one contravention application for minor or technical contraventions of a primary order(s); and**

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62 FLS, *Submission 47*, p.23.

**(b) relief for those applications has not been granted.**

- 5.82 The FLS also made two drafting suggestions concerning renumbering the new Subdivision AAA and renaming the new Subdivision AA:

FLS recommends that Subdivision AAA be re-numbered. The *FLA (SPR) Bill 2005* proposes that Subdivision AAA be inserted into the Family Law Act to follow the existing Subdivision A. FLS submits that this numbering sequence which starts with Subdivision A, followed by Subdivision AAA and then followed by Subdivision AA is unnecessarily confusing.<sup>63</sup>

FLS recommends that Subdivision AA be renamed "*Subdivision AA- Court's powers where contravention or contravention without reasonable excuse not established*". This is on the basis that paragraph 70NEB(1)(b) provides that the court may vary a parenting order if the court is not satisfied that the respondent has committed a contravention (subparagraph 70NEB(1)(b)(i)) or that a contravention has been committed but the respondent proves reasonable [*sic*] excuse (subparagraph 70NEB(1)(b)(ii)).<sup>64</sup>

- 5.83 The Committee agrees with these drafting suggestions and recommends accordingly in Chapter 7.<sup>65</sup>

### Compliance outside the court

- 5.84 The Committee notes that the courts are not the only venues envisaged as having a role in compliance. In its submission the Attorney-General's Department stated that:

Enforcement cases are often cases that involve the most entrenched and bitter conflict between couples. ... The Government believes that that the courts are not necessarily the best place to settle such disputes. The significant increase in both the contact orders program and children's contact centres help provide alternative to court based options.<sup>66</sup>

- 5.85 While the Committee is supportive of the intention to utilise legitimate non-court alternatives such as the Contact Orders Program,

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63 FLS, *Submission 47*, p.21.

64 FLS, *Submission 47*, p.22.

65 See paragraphs 7.9 – 7.12 in Chapter 7.

66 Attorney-General's Department, *Submission 46*, p.5.

children's contact centres and the Family Relationship Centres to address compliance issues, it has concerns regarding the evaluation and monitoring of the Family Relationship Centres and strong concerns regarding the accreditation of contact services. These issues are dealt with more fully in Chapter 8.<sup>67</sup>

## Conclusion

- 5.86 The Committee concludes that the new compliance provisions in Schedule 2 of the draft Bill have been drafted to implement the measures in the government response to the FCAC report. The Committee notes that the statement in the government response that there will be 'a discretion to impose a bond for all breaches of orders' has not been implemented in respect of contraventions under the new Subdivision AAA, but the Committee is aware that this would not be appropriate given that the new Subdivision AAA deals with contraventions involving a reasonable excuse.

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<sup>67</sup> See paragraphs 8.33 – 8.54 in Chapter 8.