# Contravention of orders affecting children

A contravention is a breach of an order of the court. Just about any order is capable of being contravened, but the most commonly contravened orders that are actioned are parenting orders. These types of contraventions are dealt with in Division 13A of Part VII of the Act, ‘Consequences of failure to comply with orders, and other obligations, that affect children’.

Contraventions of orders that are not parenting orders are dealt with in Part XIIA-’Sanctions for failure to comply with orders, and other obligations, that do not affect children’ commencing with section 112AA and following. Contraventions which involve a ‘flagrant challenge to the authority of the court’ are dealt with under Part XXIIB, Contempt of court.

All courts of superior jurisdiction have the inherent power to enforce their orders. In addition, courts exercising Family Law jurisdiction have the statutory regime provided with in the legislation. (NB the Common law position arising from inherent jurisdiction will continue to exist unless specifically removed or contained by statute (see *Johnson v Director General of social Welfare (Victoria) [1976] 135 CLR 92 judgment of Barwick CJ with whom Stephen J and Mason J agreed at 97).*

## Division 13A – compliance regime

This regime was developed to deal specifically with orders affecting children (i.e. not just parenting orders) in a staged approach beginning with preventative measures, then remedial measures and finally punitive measures. The regime was also designed to enable the court to tailor the response to the contravention to meet the specific needs and circumstances of the case.

This regime was implemented in 2006 as part of a suite of changes in relation to parenting and parenting orders.

From the practitioner’s point of view, the starting point will always be to ensure that your client has orders that are enforceable. Commencement dates, mechanisms for determining who gets what weekend when school recommences each year; and unambiguous terminology are all necessary to make sure your client has orders that can, if necessary, be enforced.

## Preventative measures

The compliance regime commences at the time the parenting orders are made. The requirement to make ‘the usual order pursuant to sections 65DA and 62B’ is the first step in the process of making parents and others who are subject to the orders aware of their obligations to comply with the orders.

The provisions of s. 62B and s. 65DA are set out in the materials book accompanying this paper; as are the document entitled ‘Parenting orders-obligations, consequences and who can help’, which is attached to each set of court orders by the court so as to fulfil its obligation under s.62B to inform the parties of the services available to assist them in adjusting to consequences of the court order.

Be aware you as a legal practitioner may be requested by the court to explain the obligations created by any parenting order and the consequences of non compliance together with providing advice as to the services available to assist the parties in adjusting to the orders (s. 65DA ss. 5 and 6). It is suggested that you should do this as a matter of course in any event.

If you have never read the pamphlet that is annexed to all parenting orders you should take the time to do so. You should also advise your clients to read the pamphlet when the orders are sealed and returned to them. It is astounding how many times the orders are breached within the first few weeks of operation.

Early breaches that are not actioned or identified can become the beginning of an unenforceable order. The Order of the court is little more than a piece of paper unless you educate your client on how to make the order work for them.

## Remedial measures

These are found within Division 13A.

I have reproduced the whole of Division 13A in your materials. Reading it is essential if you are to understand the compliance regime.

Subdivision A deals with the meaning of ‘contravened an order’, ‘reasonable excuse’ and the standard of proof required under the Division. Subdivision B goes on to consider the court’s powers to vary a parenting order.

Subdivision C deals with the circumstances in which a contravention is alleged but not established (including the issue of costs), while Subdivision D considers the circumstances of where the contravention is proved but there is a reasonable excuse (including the issue of costs) and Subdivision E deals with the circumstances where a contravention is proved and there is no reasonable excuse but the contravention is considered to be a ‘less serious contravention’ while subdivision F deals with the circumstances of a more serious contravention.

## Meaning of ‘contravention’

The definition in s.70NAC deals only with orders affecting children and is an exclusive definition (i.e. ‘if and only if’).

The definition sets out the circumstances in relation to where a ‘person is bound by the order’ and those when the person, who is alleged to have contravened, intentionally prevented compliance, or aided or abetted non compliance.

A person bound by the order is taken to have contravened the order if he or she has:

* intentionally failed to comply with the order; or
* made no reasonable attempt to comply.

The quasi criminal nature of contravention is clear from the definition. A degree of intent or knowledge is required.

The obligations created by the differing types of parenting orders are imported into the order for the purpose of the division by s.70NAD.

Therefore:

### Live with orders

A live with order also includes those matters set out in s. 65M; that is a person must not contrary to the order;-

* 1. Remove the child form the care of the person with the live with order; or
  2. Refuse or fail to deliver or return the child to the person with the live with order; or
  3. Interfere with any of the performance of the powers, duties or responsibilities that the person with the live with order has.

### Spend time with orders

A spend time with order pursuant to s. 65N includes that a person must not:

* 1. Hinder or prevent the child form spending time as per the order; or
  2. Interfere with the person spending time as per the order.

The same types of provisions are found in s. 65NA in relation to an order about the child ‘communicating’ with a person .While s. 65P(2) provides that in relation to a person with an order for parental responsibility *‘*A person must not hinder the carer in or prevent the carer from discharging that responsibility’.

Notably s. 65Q gives the power to the court to issue a warrant if:

* 1. there are reasonable grounds for believing that a person has contravened the provisions of s.65N, s. 65NA, or s. 65P in relation to an order, and
  2. there is an application before the court for that person to be dealt with under Division13A for the alleged contravention; and
  3. the court is satisfied the warrant is necessary to ensure the alleged offender comes to court to answer the allegations.

(emphasis added).

## Meaning of ‘reasonable excuse’

**Section 70NAE** defines reasonable excuse for the purposes of the Division. The definition is not exclusive (that is, it includes but is not limited to those matters set out in the sub-sections).

### I didn’t understand!

Subsection 2 provides for circumstances where the person alleged to have contravened the order did not understand the obligations created by the order **and** the court is satisfied that respondent ought to be excused for the contravention. If there is a finding under this provision, then the court has an obligation to ensure that the person understands both the order and the obligations created by them (s.709NAE (3)).

### Contravention necessary to protect the health or safety of a person

This includes the respondent or child

Subsections (4), (5),(6)& (7) deal with this excuse in respect of live with orders, time with orders, communication orders and parental responsibility orders. The elements to this defence are:

* 1. Belief held on reasonable grounds by the respondent;
  2. The contravention of the order was necessary for the protection of health or safety;
  3. The period of the contravention was for no longer than was necessary for the protection of that health and safety.

How the ‘reasonable excuse’ defence plays out is often quite different to how offending clients believe that it will. The defence has several objective elements which means that although the individual circumstances of the case dictate the outcome, the measure of what is reasonable and what is a necessary period of contravention is determined on an objective basis.

For example, in Kamano & Kamano [2011] FamCAFC 189 Coleman J sitting as the Full Court of the Family Court hearing an appeal from the decision of a Federal Magistrate (as he then was) considered the circumstances where a mother had withheld a child from spending time and communicating with the father on four occasions. The mother asserted that what she did was for the child’s protection and safety and that she had acted on the basis of what the child’s psychologist had said. The Federal Magistrate had found that the mother had not relied upon what she had been told but rather had relied upon what she believed she had been told.(In this case the mother also sought to rely upon a report of November to deal with contraventions that commenced in the July ).

## Standard of proof

The standard of proof for contraventions is ‘on the balance of probabilities’ unless the court is making an order under:

* s. 70NEB(1)(da)-fining a party 10 penalty points where they have failed to enter into a bond under s.70NEB(1)(d);
* s. 70NECA(3)(a)-continue a bond and fine 10 penalty units;
* s. 70NFB(2)(a), (d), (e) –to require a person to enter into a community service order; to fine not more than 60 penalty points or impose a sentence of imprisonment
* s. 70FF(3)(a);-to impose a fine of up to 10 penalty units as well as have the person enter into a bond or community service order.

In which case the court must adopt the standard of beyond reasonable doubt.

## Power to vary Part VII orders

Sometimes orders are doomed to failure and this provision in s. 70NAB can be used to assist in the rectification of the primary orders. By filing an application in relation to the primary orders at the same time as the contravention or in response, the court is alerted to the potential of changing the orders to make them workable.

This provision can also be used in extreme circumstances to change living arrangements in cases where one party continues to frustrate the orders.

## Remedial aspects of the regime

The regime provides for various remedial measures to try and assist and encourage parties to get back on track.

Costs provisions are found throughout the Division and deals with the circumstances of ‘frequent flyers’ as well as the usual type costs provisions.

In circumstances where the contravention is proved, however the respondent establishes a reasonable excuse (s. 70NB), then the court has the power to order make up time.

In circumstances where the court has found that a party has contravened the orders and there is no reasonable excuse and the contravention is a less serious contravention (subdivision E) - that is where the court has not previously ordered, or the court has adjourned the proceedings to permit one of the parties to make application for further parenting orders; **or** the court has previously ordered a sanction and has adjourned proceedings to allow a party to make application

for parenting orders and is satisfied that it would be more appropriate to deal with the contravention under this subdivision, then the court may do any, or all of the following:

* 1. Require attendance at a post separation parenting program;
  2. Make an order for ‘make up time’;
  3. Adjourn the matter to allow an application to be made to vary, discharge or suspend the existing parenting orders;
  4. Require a party to enter into a bond;
  5. If the court has ordered a party to enter into a bond and they fail to so do then the court may fine that party 10 penalty units;
  6. Order the contravening party to pay compensation for the expense of the other party not having time with the child;
  7. Make an order that the contravening party pay some or all of the other party’s costs;
  8. If the court finds a contravention but makes no orders then the applicant can be ordered to pay some or all of the respondent’s cost.

Section 70NEB(4) is a mandatory requirement for the court to consider making an order for make up time but not if such order would not be in the best interests of the child.

The considerations for the court in determining whether to grant an adjournment are set out in s. 70NEB(6) and the considerations for the court in making a costs order against the applicant where a contravention is proved are found in s. 70NEB(7).

The conditions a court may impose when requiring a party to enter into a bond are found in s. 70NEC and they include surety, security, attending counselling and to be of good behaviour. Bonds may continue for a period of up to 2 years.

Section 70NEF deals with things that a person may say during a post –separation parenting program . The Section provides that evidence of anything said during such program ( including admissions made) is inadmissible in both State and Federal courts unless of course it discloses abuse or risk of abuse.

## The court’s powers in relation to a ‘more serious contravention’

Subdivision F deals with these types of contraventions and the subsection is structured in the same way as subdivision E in that it deals with circumstances where there have been no previous sanctions imposed and where there have been previous sanctions imposed but the proceedings have been adjourned to allow an application under part VII to be dealt with. The court also has the option to deal with the contravener under subdivision E.

In the circumstances of a more serious contravention the court is able to make community service orders, require a person to enter into a bond, make an order for make up time; fine the person up to 60 penalty units impose a prison sentence, make an compensatory orders for expenses and make an orders for costs.

Special considerations are made when the primary order contravened was a child maintenance or child support order.

The court has the power to make consequential orders to ensure compliance with the order that was contravened.

There are limitations on the duration of prison sentences. They are up to one month or for a period ending when the person complies with the order contravened (s. 70NFG). Further, the court ‘must not sentence a person to imprisonment’ unless in the circumstances of the case ‘it would not be appropriate to deal with the contravention under any other of the paragraphs of subsection 70NFB(2). It is noteworthy that if the sentence of imprisonment is for the non payment of child maintenance the liability is not affected by the term of imprisonment.

## Preparing and running a contravention

There is nothing in the Act that takes Division 13A proceedings in Part VII out of the reach of Divisions 12A of Part VII of the Act. The impact of Division 12A relates to procedure and evidence specifically. Once upon a time a respondent to a contravention did not have to file any document unless and until the applicant had proved their prima facie case. Contravention proceedings are often referred to as quasi criminal in nature ( given the penalties that can be imposed and the standard of proof was previously required). A respondent had the right to silence therefore the respondent’s affidavit in reply would not be filed or served until the prima facie case had been established ( although often the affidavits were in court and handed up at the relevant time).

Division 12A means that the judicial officer now controls the manner in which the contraventions are run. Generally it is my experience that because of the nature of the allegation and the possible consequences, judicial officers will still adopt the old approach of not expecting any material to be filed by the respondent until after the finding of a contravention.

As Division 13A is a division under Part VII and Division 12A of the Act applies to all divisions in the Part, then the provision in relation to the ousting of certain provisions of the Evidence Act also apply. It is worth considering making an application to the court that s. 69ZT(3) to have the Evidence Act apply if you think you are able to argue the ‘special circumstances of the case’ require it. Otherwise you will need to ensure, if you are acting for a respondent, that you make appropriate addresses under s. 69ZT(2) as to the weight evidence, that is admitted because the Evidence Act does not apply, ought to be given.

## Drafting the application

These applications are very technical and must be drafted very carefully. The application must be checked and re checked as typographical errors, wrong or inconsistent dates or references to paragraphs in orders may be fatal. You cannot amend errors on the application as you go. The application form is the basis upon which the respondent will be ‘charged’ in court and will be required to enter into a ‘plea’.

The Family Law Courts [Contravention Application Form](http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Forms/Family+Court+of+Australia+forms/FCOA_form_App_Contravention) is designed for the self represented litigant as many contraventions are brought by persons who cannot afford representation. The form is therefore self explanatory.

When completing the form, remember that you must rely upon the wording of the orders . If orders are non specific as to time and place for time with or other activity it makes them very difficult to enforce as you must then rely upon some other evidence ( oral or written) to substantiate the allegation.

Orders which require parties to do things ‘as agreed’ are always problematic from an enforcement point of view. I always prefer orders that require parties to agree in writing which you can define to include email and SMS text message. This will give you a source from which evidence to support the alleged terms of an agreement to be sourced.

## The affidavit in support

Notwithstanding the provisions of Division 12A, the affidavit in support should comply with the *Evidence Act 1995* (Cth).

The Affidavit should set out the making of the orders and thereafter any history of conduct that varies or defines those orders. For example, where the orders are silent about how alternate weekends recommence after the school holiday period, but the parties have for the last 3 years worked on the basis that, whoever has the children for the last weekend of the holiday does not have the fist weekend of the new school term.

The affidavit must set out how the deponent complied with the order alleged to have been contravened. For example if the orders were to provide for the parents to meet at X at 9.30am for changeover then the deponent must state*;*

‘On the Friday 7 December 2012 I travelled to X arriving at 9.15am. I waited at X until 9.45am and the Respondent did not arrive with child nor did any other person arrive with the child. I made a note of this in my diary’

It is no good if a deponent alleges that he or she received a phone call the night before from the other parent who said I am not coming tomorrow and therefore the deponent did not go to the changeover point and the nominated time.

These affidavits should be clinical and only directed to the contraventions alleged.

### In response

As stated, it is my preference not to file any evidence until such time as the contravention has been established on a prima facie basis. Sometime you do not have any option in this regard, particularly when the contravention is stood over to be dealt with as part of a final hearing.

The options are that:

* 1. the Applicant got it wrong (that is, in interpreting the orders);or
  2. the order was contravened but I had a reasonable excuse.

If your client is going to admit the contravention and rely on the reasonable excuse defence, then it is better that this is done sooner rather than later. Some judicial officers will then give you time to file your material and set the matter down to run the defence.

Again evidence must be clear and admissible if it is to be given appropriate weight. If your client is going to rely upon evidence from others particularly experts, that evidence must be filed in the appropriate way (not annexed to you client’s affidavit) and those witnesses must be available for cross examination.

You will probably want to road test your witnesses to ascertain their state of knowledge prior to trial. Checking what information your client has given her witnesses particularly any expert witnesses is important to ensure that there has been no ‘setting up ‘ of the evidence.

## In court

Prepare your client for court. If you are acting for an applicant advise your client that they will be required to get into the witness box, give evidence and be cross examined.

If you are acting for a respondent be mindful of the fact that your client will be ‘charged’ with each count of the alleged contravention. You client will need to be told they will be asked how they plead, whether they admit or deny the contravention, and if admitted; whether they allege a reasonable excuse.

Prepare your client for cross examination by testing the evidence yourself. This way both you and client can assess the process.

Finally if you are acting for a respondent ensure that you have advised them of the possible consequences of the contravention being proved both in terms of penalty and possible changes to the primary orders.

You should go and read some cases. It is the best way of learning how a court deals with a contravention application.

**Good luck**

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