Throw your enforcement orders on the barbie: Lessons on domestic enforcement of private law children orders in Australia

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Families around the world are now seven months into the most devastating pandemic for a century. The disruption experienced has been significant and no more so than for children with separated parents. Family law practitioners have found themselves at the forefront in supporting families address these unique circumstances. On the one hand, they have advised understandably anxious parents on the operation of their orders during the pandemic to ensure their children's best interests are promoted. On the other hand, they have supported parents in those small number of very high conflict disputes who assert that the pandemic has been used as a pretext to undermine their relationships with their children. This article examines the legal remedies available to parents who have found those relationships disrupted, compares the legal positions in England and Australia and explores potential reforms to the law in England.

The Legislation

Readers will of course know that orders settling division of children's time in England are known as child arrangements orders.[1] The language of those orders changed from 'contact' and 'residence' to 'spend time with' and 'live with' with the introduction of the Children and Families Act 2014. Fewer readers may know that this language was imported from Australia.[2] To that extent, there is already in England a tradition of adopting an Australasian approach to family justice.

Unlike the United Kingdom, Australia has a federal system of government. In many federal systems of government different family law legal systems operate in each federal jurisdiction. With the exception of the state of Western Australia, however, Australia operates a single national system of private children law in the *Family Law Act 1975* (Cth). Under that Act orders regulating arrangements for children are known as *parenting orders*.[3]

The English Law Position

A parent ('AA') who believes the other parent ('BB') has failed to comply with a child arrangements order can apply for an enforcement order.[4] There is only one remedy under an

[1] Children Act 1989, s 8 (Children Act).
[2] See the writer's critical analysis of these changes published in *Shared Parenting: keeping welfare paramount by learning from mistakes* [2013] Fam Law 448.
[3] *Family Law Act 1975* (Cth), s 64B (Family Law Act).
[4] Children Act, s 11J.

enforcement order: that the non-compliant parent undertake a minimum of 40 hours and a maximum of 200 hours of unpaid work (what is more commonly known as 'community service').[5] An enforcement order can only be made if AA persuades the court beyond reasonable doubt that BB failed to comply with the order.[6] An enforcement order can be suspended and will be for most first and minor breaches.[7] The unpaid work under the enforcement order is organised by the National Offender Management Service. In the absence of a separate application to commit to prison, the court cannot on an application for an enforcement order, order a person's committal.[8] Separately to an enforcement order, the court can order BB pay compensation to AA for financial losses as a result of the child arrangements order being breached.[9]

It is a complete defence to an application for an enforcement order for BB to prove on the balance of probabilities that they had a 'reasonable excuse' for not complying with the child arrangements order.[10] Whether such an excuse is reasonable will depend on the facts of each case. Arguments about what amounts to a reasonable excuse can range from the 'innocent' excuse of a car breaking down on the morning of handover to the excuse which features most prominently in those high conflict cases and which, for understandable reasons, are most heavily litigated – that the child does not want to see their non-resident parent. The writer does not suggest that this latter excuse is one which is capable of being 'reasonable'.

It is suggested this scheme is problematic:

- There are only two remedies (unpaid work or committal);
- Those remedies are draconian and deny the court a menu of remedies that might suit less serious breaches – a 'blunt tool'. Notably, there are no 'welfare focussed' remedies, such as participation in parenting courses.
- Whilst the court of its own motion can vary the existing child arrangements order, there is no express remedy to address the child's loss of time with their parent in circumstances where the excuse is 'reasonable' and nor is there statutory recognition that reviewing arrangements to address that loss of time might be beneficial to the child;
- There is no remedy for third parties who aid non-compliance with a child arrangements order.

Practitioners will no doubt be all too familiar that a consequence of these difficulties is that the court is often reluctant to exercise powers of enforcement except in the most serious cases of non-compliance. When non-compliance can appear to have no consequences, applicants can be left wondering what the point of the legislation is. In some respondents it can no doubt leave a feeling of impunity. It is suggested that if compliance with orders is in the child's best interests (which it obviously is), then an ineffective enforcement system to underpin and promote that compliance is inconsistent with achieving best interests. It is these circumstances which give rise to the question of whether there is a legitimate alternative approach.

The Australian Law Position

[5] Ibid, s 11J(2).
[6] Ibid, s 11J(2).
[7] Ibid, s 11J(9).
[8] *CH v CT (*Committal: Appeal) [2018] EWHC 1310 (Fam), [2019] 1 FLR 700.
[9] Children Act, s 11O.
[10] Ibid, s 11J(3).

Proceedings for non-compliance with parenting orders are called 'contravention' proceedings. In addition to contravention proceedings applications can be brought to enforce an order (such as requiring a passport application to be signed) and for a person's committal for contempt. This article will not explore either of these latter remedies.

Unlike English enforcement proceedings, proceedings for contravention can be brought against both persons who are personally bound by the parenting order (such as the parents named within it) *and* third parties who are not personally bound by their terms (perhaps a connected relative or other individual).[11] A person expressly bound by a parenting order can contravene it by either: 1) intentionally failing to comply with it;[12] or 2) making no reasonable attempt to comply with it.[13] A person who is *not* bound by the order can nonetheless contravene it by either: 1) intentionally preventing the person bound by it from complying;[14] or 2) aiding or abetting contravention of the order by a person bound by it.[15]

These powers flow from express statutory duties on third parties not to hinder or prevent a child from living with a person named under a parenting order and not to hinder or prevent a child from communicating and spending time with a person specified in an order.[16] There are no equivalent provisions in English legislation.

As in England, applicants must prove contraventions beyond reasonable doubt.[17] Similarly, a defence of reasonable excuse is available. Whilst 'reasonable excuse' is not exclusively defined under Australian law, it is carefully framed. It is, for example, a reasonable excuse to contravene the order if, on reasonable grounds, it is believed necessary to protect the health and safety of another person (including the child).[18] However, and what is crucial, the contravention must be for no longer than is necessary to protect that person's health.[19] The contravention cannot be open ended. A parent's subjective belief, even one which is honestly held, that their actions are in the child's bests interests are irrelevant to assessing the excuse[20] and not capable of establishing a reasonable excuse.[21]

Unlike the provisions of the Children Act 1989, a reasonable excuse is not an absolute defence to the making of a court remedy in all cases. Whether a reasonable excuse is a defence to the court imposing a remedy depends on which tier the contravention falls into.

Tiers of Contravention

Contraventions and breaches of private law children orders differ significantly from case to case. Whereas the English law regime provides only limited powers to respond to this complex reality (what this article describes as a 'blunt tool') the Australian scheme recognises this reality with three distinct bands of remedy. Those remedies serve three goals of progressive

[11] Family Law Act, s 70NAC.
[12] Ibid, s 70NAC(a)(i).
[13] Ibid, s 70NAC(a)(ii).
[14] Ibid, s 70NAC(b)(i).
[15] Ibid, s 70NAC(b)(ii).
[16] Ibid, ss 65M-65P.
[17] Ibid, s 70NAF.
[18] Ibid, s 70NAE(5)(a).
[19] Ibid, s 70NAE(5)(b).
[20] *Ongal v Materns* [2015] FamCAFC 68 at [47].
[21] *Gaunt* (1978) 4 Fam LR 305, 308.

seriousness, each of which is intended to promote the child's welfare through compliance with the parenting order:

- Prevention;
- Remediation; and
- Punishment.

The first tier is engaged when both a contravention and a reasonable excuse are proved.[22] The legislation establishes a duty on the court in those circumstances to consider making an order to "compensate" for the time lost by the contravention,[23] however the court must not make such an order if it would not be in the child's best interests to do so.[24] There is no equivalent provision in English law requiring the court to address itself to the time the child lost with the other parent and certainly not in circumstances where a breach of an order was as a result of a reasonable excuse.

The second tier is engaged for less serious contraventions without a reasonable excuse for the contravention. The menu of remedies, which can be imposed alone or in combination with each other, are:

- Require the contravening party to attend a post-separation parenting programme;[25]
- Compensate for lost time;[26]
- Require the contravening party to enter into a bond for up to two years with or without a financial surety;[27] and
- Fine a party who refuses to enter into a bond.[28]

Bonds are not directed at punishment or merely concerned with imposing the possibility of a fine for future non-compliance by the contravening parent (in the region of £1,200), they can carry with them conditions directed at securing ongoing achievement of the child's best interests. Conditions that may be imposed as part of a bond include requirements to attend family counselling and family dispute resolution.[29] Unlike an English enforcement order for unpaid work, which can only be made after *some* (not necessarily paramount) consideration is given to the child's welfare,[30] the Australian legislation requires no consideration of the child's welfare for the making of a second tier order except in the case of the making of an order compensating for lost time, when the making of the welfare order must be in the child's best interests.[31]

The third tier is reserved for the most serious breaches where, as with the second tier, a reasonable excuse is not proved on the balance of probabilities. An order under the third tier can only be made when either: 1) no previous contravention order has been made, but the

[22] Family Law Act, s 70NDB.
[23] Ibid, s 70NDB(1)(c)-(d).
[24] Ibid, s 70NDB(2).
[25] Ibid, s 70NEB(1)(a).
[26] Ibid, s 70NEB(1)(b).
[27] Ibid, s 70NEB(1)(d).
[28] Ibid, s 70NEB(1)(da).
[29] Ibid, s 70NEC(4).
[30] Children Act, s 11L(7).
[31] Family Law Act, s 70NEC(5).

contravening party has behaved in a way that showed a serious disregard of their obligations;[32] or 2) the court has previously imposed a contravention order.[33] The menu of remedies under the third tier include:

- A community service order for a maximum of 500 hours (most equivalent to an English order for unpaid work);[34]
- As with the second tier, require the contravener enter into a bond;[35]
- A fine up to about £7,000;[36] and
- Sentencing the contravener to imprisonment.[37]

A sentence of imprisonment for contravention of a parenting order may be for a term of up to 12 months[38] and can be suspended on such terms and conditions the court determines.[39] A sentence of imprisonment must only be imposed if it would not be appropriate to deal with the contravention with any other order.[40] An example of a sentence of imprisonment being imposed is *B & W (No.1)*.[41] In that case the non-resident parent (the mother) retained the children from their father for a little short of two months and, during that period, took them to a different Australian state. The Federal Magistrates Court, even accepting it was the mother's first contravention of a parenting order, imprisoned her for seven months because of the deliberate and continuing nature of her actions.

Conclusions

It will be apparent from this description of the remedies available under Australian law that it is vastly different from the position in the Children Act 1989. The question that inevitably arises is whether a system of enforcement that provides for just an order of unpaid work (and committal if a separate application made) is adequate to safeguard children's best interests? It is suggested that there are a number of key advantages to the Australian position, which speak to the English system being inadequate:

- A very wide menu of options that equip the court with the tools to respond to the circumstances of each particular case, rather than one single remedy, which is often unattractively draconian.
- Alternatives to punitive remedies, such mandatory parenting courses, counselling and dispute resolution, which are directed at securing sustained positive welfare outcomes.
- Statutory recognition that the loss of time with the non-residential parent might be to a child's disadvantage, even in circumstances of a reasonable excuse, and recognition that the loss of time should be reviewed by the court with a view to "compensatory time" being ordered.
- A tightly framed, although not exhaustively defined, description of what a 'reasonable excuse' amounts to, which reduces the scope for non-compliance.

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[32] Ibid, s 70NFA(2).
[33] Ibid, s 70NFA(3).
[34] Ibid, s 70NFB(2)(a).
[35] Ibid, s 70NFB(2)(b).
[36] Ibid, s 70NFB(2)(d).
[37] Ibid, s 70NFB(2)(e).
[38] Ibid, s 70NFG(1).
[39] Ibid, s 70NFG(5).
[40] Ibid, s 70NFG(2).
[41] [2003] FMCAfam 101.

- An intelligible and readily understood statutory framework of increasing seriousness.
- Scope to enforce orders against third parties.

It might be argued that such a comprehensive enforcement system is inconsistent with a drive to reduce family law litigation - that the availability of these legal remedies would do nothing but encourage recourse to the court. The writer has in mind HHJ Wildblood's notable closing remarks in *Re B (A Child) (Unnecessary Private Law Applications)*:[42]

> "Do not bring your private law litigation to the Family court here unless it is genuinely necessary for you to do so. You should settle your differences (or those of your clients) away from court, except where that is not possible. If you do bring unnecessary cases to this court, you will be criticised, and sanctions may be imposed upon you. There are many other ways to settle disagreements, such as mediation."

If this criticism is to be levelled against the Australian system, then there are four observations which it is suggested are, in their totality, a complete answer to that criticism. First, the alternative of limited enforcement remedies under English law has hardly deterred litigation or reduced the number of high conflict cases. Secondly, an intelligible and effective system of enforcement is far more likely to encourage compliance with orders and reduce litigation than a system which is seen to lack efficacy. Thirdly, effective means of enforcing orders as a means of securing children's welfare are essential to the effective functioning of the rule of law. If compliance with orders of the court is seen even to be occasionally optional, then confidence in the family law justice system is ultimately undermined. Fourthly, having amongst the menu of available remedies options such as parenting courses, counselling and dispute resolution, is far more likely to reduce litigation in the long-term than a system which lacks such options.

What then for those parents trying to manage through the pandemic? It is suggested that for those parents struggling for direction during the pandemic the Australian system fosters more certainty than the English system. For the resident parent with a reasonable excuse arising from the pandemic (perhaps linked to health and the need to isolate), the law shields them from punitive measures. Yet, what is key and distinct from the English system is the expectation that "make-up" arrangements will be considered once the reasonable excuse lifts – thus the parent knows that a reasonable excuse cannot be a permanent bar to contact. The effect is to drive parents to collaborate rather than litigate. For the non-resident parent faced with a genuine reasonable excuse they have the comfort of this expectation and, in most cases, the benefit of a collaborative approach. In those small number of high conflict cases where there is no reasonable excuse and the pandemic is a pretext to frustrate relationships between them and their children, the remedies to promote their children's welfare through compliance with the parenting order are broad and capable of being tailored to the needs of each case. It is a system with much to commend itself to English legislators.

[42] [2020] EWFC B44 at [9].