



Compliance with and enforcement of family law parenting orders: Views of professionals and judicial officers

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ANROWS acknowledges the Traditional Owners of the land across Australia on which we work and live. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and future, and we value Aboriginal and Torres Strait Islander histories, cultures and knowledge. We are committed to standing and working with Aboriginal and Torres Strait Islander peoples, honouring the truths set out in the [Warawarni-gu Guma Statement](#).

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ANROWS acknowledges the lives and experiences of the women and children affected by domestic, family and sexual violence who are represented in this report. We recognise the individual stories of courage, hope and resilience that form the basis of ANROWS research.

Caution: Some people may find parts of this content confronting or distressing. Recommended support services include 1800RESPECT (1800 737 732) and Lifeline (13 11 14).

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Key definitions

Bond	The court may order a person who has contravened a parenting order without reasonable excuse to enter into a bond: FLA s 70NEB(1)(d). Bonds last for a specified period of up to two years and may impose various conditions, such as the requirement to be of good behaviour and attend family counselling: FLA s 70NEC(2), (4). Failure to comply with a bond without reasonable excuse may result in the court imposing a fine or revoking the bond to deal with the initial contravention of the parenting order: FLA s 70NEC(3).
Coercive control	While there is no single agreed definition of coercive control, research indicates that it generally involves conduct that is intended to dominate and control another person, usually an intimate partner, but it may also occur in the context of a familial or carer relationships (ANROWS, 2021). It is regarded as being perpetrated predominantly by men against women and may include threats to harm; physical, sexual, verbal and/or emotional abuse; psychologically controlling acts; financial abuse; social isolation; systems abuse, which involves using systems, including the legal system, to harm the woman; stalking; deprivation of liberty; intimidation; technology-facilitated abuse; and harassment (ANROWS, 2021).
Consent order	Consent orders are court orders that may be made 1) without litigation following the filing of an Application for Consent Orders (and the proposed consent orders, together with a Notice of Risk in parenting matters); or 2) in matters where litigation is on foot following the filing of the proposed consent orders and an annexure or submission in court outlining how the proposed consent orders address allegations of abuse or family violence and risk to children. Proposed consent parenting orders will be endorsed where the court is satisfied that they are consistent with the best interests of the child/children in the relevant matter: FLA s 60CA.
Contravention	Parenting orders are contravened when a person bound by the order has intentionally failed to comply or made no reasonable attempt to comply with the order: FLA s 70NAC(a). Parenting orders can also be contravened by a person not bound by the order if they have intentionally prevented a person bound by the order from complying with it or have aided or abetted the person bound by the order to contravene it: FLA s 70NAC(b).

Family consultant	Family consultants are psychologists or social workers with specialist expertise in child and post-separation family issues who are appointed to conduct child and family assessments for Child Impact Reports (also previously known as FLA s 11F reports) or Family Reports (FLA s 62G) ordered by the court in parenting order proceedings: FLA s 11A. Family consultants include Child Experts who are employed by the court with duties additional to their family consultant role and Regulation 7 family consultants who are private practitioners who have satisfied the court that they have the qualifications and expertise to undertake the duties of a family consultant and are appointed pursuant to Regulation 7 of the Family Law Regulations. ¹
Family dispute resolution (FDR)	A process that occurs outside the court whereby an independent family dispute resolution practitioner helps people affected (or likely to be affected) by separation or divorce, or persons who may be applying for parenting orders, to resolve disputes relating to each other or the care of children: FLA s 10F.
Family dispute resolution practitioner	An independent person who helps people resolve disputes with each other or relating to the care of children through family dispute resolution: FLA s 10F. Practitioners must be either accredited, engaged or authorised to act as family dispute resolution practitioners as per the various means outlined in s 10G of the FLA.
Family violence	Under the <i>Family Law Act</i> , family violence refers to behaviour that coerces or controls a family member (including relatives, de-facto partners and spouses) or causes them to be fearful: FLA s 4AB(1). Behaviours that may constitute family violence include assault, sexual abuse, stalking, repeated derogatory taunts, intentionally damaging property, and financial abuse: FLA s 4AB(2). For the purposes of the FLA, a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence: s 4AB(3). Examples of situations that may constitute a child being exposed to family violence are included in s 4AB(4).
Make-up time	Where the contravention of a parenting order results in a person not spending time with or living with the child under the order, the court may make a further parenting order providing for additional parenting time compensating that person for the time lost. This order can be made regardless of whether there was a reasonable excuse for contravening the order: FLA s 70NDB(1) or not: FLA s 70NEB(1)(b).
Parenting order	An order dealing with matters specified in s 64B(2) of the FLA, such as with whom a child is to live, the time a child is to spend with persons, the allocation of parental responsibility for a child, and the communication a child is to have with persons: FLA s 64B(1)-(2). Parenting orders may be made in favour of a parent of the child or another person: FLA s 64C.

¹ See further www.fcfcfa.gov.au/fl/pubs/court-child-experts-faq

Registrar	In the family law jurisdiction of the Federal Circuit and Family Court of Australia, registrars exercise judicial power delegated to them by judges. Their key functions generally involve presiding over initial court events, managing cases in Court, and conducting internal dispute resolution events. The use of registrars allows judges to allocate more time to hearing and determining complex matters. ²
Senior registrar	Although senior registrars can exercise all the powers of a registrar, their work primarily involves determining interlocutory applications and presiding over interim hearings where parties disagree. Senior registrars also have additional powers to registrars, such as the power to make orders for child maintenance and summarily dismiss proceedings. ³
Systems abuse	Systems abuse involves the use of systems and processes, including the legal system, by perpetrators of domestic and family violence to assert power and control over the other party. Litigation tactics may be used to "gain an advantage over or to harass, intimidate, discredit or otherwise control the other party". ⁴
Vexatious litigation	Vexatious proceedings are defined in FLA s 102QB as including proceedings that are an abuse of the process of a court or tribunal; proceedings instituted to harass, annoy, to cause delay or detriment, or for another wrongful purpose; proceedings instituted or pursued without reasonable grounds and proceedings conducted in a way so as to harass, annoy, cause delay or detriment or achieve another wrongful purpose.

2 See further www.fcfcoa.gov.au/fl/registrars

3 See further www.fcfcoa.gov.au/fl/registrars

4 See further dfvbenchbook.aija.org.au/understanding-domestic-and-family-violence/systems-abuse/

Acronyms

AIFS	Australian Institute of Family Studies
ALRC	Australian Law Reform Commission
ANROWS	Australia's National Research Organisation for Women's Safety Ltd
FCoA	Family Court of Australia
FCCoA	Federal Circuit Court of Australia
FCFCAA	<i>Federal Circuit and Family Court of Australia Act 2021</i> (Cth)
FCoWA	Family Court of Western Australia
FCFCoA	Federal Circuit and Family Court of Australia
FDR	Family dispute resolution
FDRP	Family dispute resolution practitioner
FLA	<i>Family Law Act 1975</i> (Cth) (as amended)
FRC	Family relationship centres
JSC	Joint Select Committee on Australia's Family Law System
JO	Judicial officer

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Executive summary

Background

This report sets out the findings of one part of a four-part research program that examines compliance with and enforcement of family law parenting orders. These findings are based on two elements: the views of 343 professionals who work with separated parents who completed an online survey, and those of 11 judicial officers who exercise family law jurisdiction and participated in one-on-one interviews. The other three parts of the research program are based on data collection from family law court files involving contravention applications, an online survey of parents and carers with family law parenting orders, and an analysis of the approaches applied to contravention in three international jurisdictions.

The policy context for this research is a developing family law program in Australia following recommendations handed down by a series of inquiries including one by the Australian Law Reform Commission (ALRC) in 2019 and one by the Joint Select Committee on Australia's Family Law System in 2021 (JSC). Each of these inquiries suggested a need for a raft of changes to the family law system, relevantly concerning parenting matters generally and contravention matters particularly. The government response to the ALRC Inquiry noted its recommendations in relation to contravention and indicated there should be "substantial further work" to assess options for reform to the contravention regime (Australian Government, 2021, p. 34). At the same time, a new court structure has recently taken effect, replacing two separate courts, the Family Court of Australia (FCoA) and the Federal Circuit Court of Australia (FCCoA), with one court, the Federal Circuit and Family Court of Australia (FCFCoA). This restructure is accompanied by a range of changes to the way the court operates, including the implementation of a new National Contravention List administered by registrars.

The current regime for responding to breaches of family law parenting orders is contained in Division 13A of Part VII of the *Family Law Act (1975)* (Cth) (FLA). Where an application in relation to contravention is lodged, respondents have the opportunity to establish they had a "reasonable excuse" for non-compliance. This may include a lack of understanding of their obligations under the order or that it was necessary to protect the health and safety of a person, including the

child who is the subject of the order. Where a contravention is upheld, responses may include varying the order and orders for make-up time. More punitive options include bonds, fines and imprisonment.

Contravention applications are not particularly common, numbering some 1,140 a year (ALRC, 2019, p. 93) and reflecting about 8 per cent of all applications for final orders in parenting matters. There is no current empirical evidence on the operation of the contravention regime in Australia.

Aim and objectives

The primary aim of the research program is to examine the factors that influence non-compliance with parenting orders, including issues arising from family violence and safety concerns, and the operation of the contravention regime. A further aim is to examine the impact of penalties as a means of deterring non-compliance or as a factor that might deter a party from seeking safe parenting orders. The research is informed by 10 research questions addressing these overarching concerns. The four particular aspects of the research questions addressed in this report are:

- What are the leading causes of non-compliance with family law parenting orders?
- How do parents respond to non-compliance with parenting orders?
- Is there any evidence that tougher penalties or enforcement are effective at reducing the incidence of non-compliance?
- Does the risk of penalties deter parties from contravening orders or seeking the protection of the courts through a change of orders where there are ongoing concerns of family violence?

Given that this report addresses these questions as one part of a four-part research program, the findings should be considered preliminary in nature. They are based on the observations and experiences of professionals and may not be representative of the experience of the broader population of parties to parenting orders. Final conclusions on the basis of synthesised and triangulated evidence, together with a more extensive literature review, will be presented in the final report due in the first half of 2022.

Method

The findings in this report are based on data collected through an online survey of 343 professionals undertaken between November 2020 and June 2021 and open-ended interviews with 11 judicial officers from the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia. The interviews were undertaken between March and August 2021. The sample of professionals comprised almost 50 per cent lawyers, 23 per cent family dispute resolution (FDR) practitioners and 9 per cent professionals who work in family and domestic violence services. On average, legal profession participants had 16 years of experience in practice.

The topics covered in the survey and interviews included views on the characteristics of parents affected by non-compliance with parenting orders, the causes of non-compliance with parenting orders, the effectiveness of the system for responding to non-compliance with parenting orders, the impact of punitive approaches and how the system could be improved. In addition to closed response questions, the survey included seven open-ended response options. For each of these questions, between 147 and 196 respondents provided answers, yielding important and detailed insights.

Findings

Drivers of non-compliance

The findings in this report demonstrate that non-compliance arises from a complex range of issues, with five overlapping themes emerging as particularly significant: family violence and safety concerns, child-related issues, circumstances where parents' behaviour is seen as particularly difficult (including situations where systems abuse may be occurring), orders that are seen as unworkable for technical or substantive reasons, and the existence of a contravention regime that is widely regarded as ineffective. Professionals also referred to a small subset of cases, potentially involving issues such as mental health problems, they described as intractable. In each of these areas, a complex interaction between personal characteristics, systemic issues and, potentially, professional practices gives rise to the circumstances in which non-compliance occurs.

How parents respond to non-compliance

Advice-seeking in relation to non-compliance with parenting orders is fairly frequent, with one quarter of participating professionals indicating that half or more of their client enquiries concerned these issues. Depending on the underlying circumstances, professionals generally indicated providing advice that prioritised responses involving FDR, counselling or lawyer-led negotiation. The exception to this was where safety concerns were relevant and legal advice or legal action were most commonly recommended. Professionals indicated it was not uncommon for clients to be complying with parenting orders they did not believe were safe, with 88 per cent of the sample indicating this applied to their clients "almost always", "often" or "sometimes".

Professionals also indicated a range of issues deter parents from addressing non-compliance with parenting orders, including fear of the other party and the delay, cost, trauma and uncertainty associated with legal proceedings. The financial cost associated with legal proceedings was the most commonly identified obstacle to taking action in relation to compliance, with 96 per cent of the sample agreeing this discourages clients from taking action. Similarly, reluctance to re-engage with a court process and the level of complexity associated with legal proceedings were seen as obstacles by 93 per cent and 88 per cent of participants respectively. Fear of the other party was nominated as an obstacle by 80 per cent of the sample.

Effectiveness of the system and the impact of penalties

A majority of the professionals involved in the survey and interviews considered the system for responding to contraventions was ineffective, with 56 per cent disagreeing with the proposition that the regime is effective in discouraging non-compliance with parenting orders and only 14 per cent agreeing.

Underlying these views is a range of issues relating to the varied circumstances in which non-compliance arises and the system's capacity to address these circumstances. These views suggest that at a systemwide level, challenges

exist in two main areas. The first is identifying, assessing and managing risks arising from family violence and other complex behaviours, including systems abuse. Better ways of addressing risk issues in the family law system was endorsed by 84 per cent of the sample as a measure that would reduce non-compliance. The second is ensuring orders meet the needs of children and young people, including through more effective avenues for participation and responding to changes in their needs over time. Seventy-nine per cent of the sample agreed that more effective and widely available processes to support the participation of children and young people would reduce non-compliance.

It is also noteworthy that the highest levels of support for measures to reduce non-compliance were accorded to therapeutic strategies. Educative and therapeutic support for ongoing communication received endorsement from 92 per cent of the sample. Facilitating therapeutic assistance for underlying issues prior to final orders being made received endorsement from 91 per cent of the sample. Together with evidence of a preference for mediation and counselling-based responses rather than legal responses in most instances (with the exception of safety concerns) among professionals, these findings reinforce the limitations of purely legal responses.

In relation to the impact of penalties, views were varied. Some professionals indicated that, in part, the ineffectiveness of the contravention regime stemmed from a reluctance on the part of courts to apply punitive responses where a contravention was upheld. From the perspective of some judges and some other professionals, however, the dilemma that punitive responses raised was that they may adversely affect children and young people, either through diminishing the financial resources available to them or depriving them of a parent who is important to them. Of seven options for addressing contraventions, punitive responses drew the lowest level of overall endorsement from the survey sample. Only one third agreed that prison was an “appropriate and sufficient option”, compared with three quarters who endorsed a variation of existing parenting orders, which was the most favoured response.

Conclusion

The drivers of non-compliance with parenting orders are complex. Systemic issues contribute, including shortcomings in the responses to family violence and safety concerns and limitations in the way the system supports the participation of children and young people. At the same time, professional views suggest there is also a small subset of cases that for various reasons, including mental health issues and systems abuse, are intractable.

The operation of the existing contravention regime is seen as ineffective for a range of reasons. These include the limited application of punitive responses, which are seen by some decision-makers and professionals to raise a conflict with child-focused decision-making. Further, professionals indicate parents are reluctant to use the system for reasons that include cost, delay, trauma, uncertainty about the outcome and fear of the other party.

Overall, these preliminary findings suggest that the effect of the inclusion of punitive response options in the regime may have unintended consequences. Findings that indicate professionals commonly see clients who comply with orders that are considered to be unsafe, together with evidence on professionals’ views on the reasons people do not take action in relation to compliance, suggest the format of the system is inconsistent with user needs. In particular, the qualitative insights indicate that as a “quasi-criminal” jurisdiction (due to the inclusion of criminal penalties), the contravention regime requires a level of evidentiary specificity that is difficult to satisfy. Along with the cost, complexity and stress associated with legal proceedings, this contributes to the inaccessibility of the current regime. At a broader level, there is also significant concern that the punitive aspects of the regime are incompatible with a child-focused response.

Implications for policy

These findings suggest policy responses to non-compliance with parenting orders should take into account several issues. Non-compliance with parenting orders arises from a complex range of dynamics. Systemic factors include shortcomings in the identification, assessment and management of risk. There are

limited measures for supporting the participation of children and young people, including in terms of explaining court outcomes, leading to orders susceptible to implementation difficulties. This indicates that wider systemic adjustments in these areas are required to support the development of parenting orders that are sustainable and implementable.

Several aspects of the operation of the contravention regime are seen as inconsistent with client needs. It is seen as slow, costly, technical, potentially traumatic and potentially open to misuse. Further, professional views indicate that orders considered to be unsafe may nonetheless be complied with for a range of reasons including fear of the other party and reluctance to engage with a court process again. This suggests, and there is substantial support among professionals for, greater emphasis on problem solving and therapeutic approaches to address the underlying causes of non-compliance. Support for the provision of post-order information and guidance to facilitate improved understanding of court orders and their obligations also featured in professionals' responses as a means of addressing non-compliance based on misapprehension.

In terms of any policy development to strengthen the regime's operation in a punitive sense, the findings indicate caution is warranted. Although it is clear that some professionals view penalties as necessary for a subset of particularly difficult cases, the findings in this report indicate that it may be challenging to develop a scheme that targets that particular subset with responses that are appropriate in a way that does not create or exacerbate unintended consequences. Such unintended consequences include creating further impediments for people with safety concerns seeking safer outcomes and providing further opportunities for systems abuse. Moreover, the application of punitive responses may also involve adverse outcomes for children and young people, including pressure to comply with arrangements that are not safe or in their best interests.

Implications for practice

For practitioners, these findings place focus on improving the identification and management of safety and risk issues. When working with parents for the development of parenting orders, it is critical that practitioners ensure that safety and risk are adequately assessed and considered in the parenting arrangements. Where orders have resulted in parenting arrangements that are unsafe (either from the outset or because circumstances change), it is important that clients are supported to seek safe parenting arrangements, including through accessing legal advice or instigating legal action where necessary. For some parents, it may be appropriate to attempt to resolve issues through counselling or negotiation, but this requires careful consideration and the use of skilful practitioners to ensure that safety is maintained. Where possible, steps that address the root causes of safety concerns should be taken, including seeking personal protection orders and therapeutic assistance. Children that have been exposed to family violence or other harmful behaviour may also need to be included in personal protection orders and may need therapeutic assistance.

In relation to children and young people, it is important that the process of developing parenting orders be attentive to their needs and wishes. In particular, children and young people should be consulted on parenting arrangements, and their views, including on their own safety, should be taken into account. Outcomes should be explained to children and young people. Where the needs of children and young people change, parents should be encouraged to ensure that parenting arrangements adapt to these changes, including with the use of mediation and counselling.

In developing parenting orders, professionals should take care when using templates and precedents. They should ensure that the orders that are drafted accommodate the needs of the particular children and young people involved. They should also ensure that the orders are clearly drafted and that the obligations imposed by them are clearly understood by their clients. In the case of FDRPs, this should entail explaining the obligations to both parties.

Introduction

This report provides findings from the first stage of an extensive empirical examination of compliance with and enforcement of family law parenting orders in Australia. The project is funded by ANROWS as part of the research program associated with the Fourth Action Plan of the *National Plan to Reduce Violence Against Women and their Children 2010–2022* (the National Plan). The findings in this report are based on two elements of the project that examine professionals' views and experiences: an online survey of professionals who work with separated families and interviews with judicial officers. Findings from three further elements will be presented in the final report due for completion in 2022. These further elements are an analysis of data from family law court files involving contravention matters; an online survey of parents with parenting orders that examines their experiences with compliance and non-compliance with parenting orders; and an examination of the enforcement regimes in three international jurisdictions: England and Wales, New Zealand and Michigan (United States). The findings in this report should therefore be considered preliminary in nature and based on the observations and experiences of professionals. As such, they may not be representative of the experience of the broader population of parties to parenting orders. Final conclusions on the basis of synthesised and triangulated evidence from the other elements of this project, together with a more extensive literature review, will be presented in the final report due in the first half of 2022.

It should be noted that at the time the fieldwork for this report was completed, the three relevant courts were the Family Court of Australia (FCoA), the Federal Circuit Court of Australia (FCCoA) and the Family Court of Western Australia (FCoWA). From September 2021, the Australian Government's restructure of the courts will mean that the Family Court of Australia and the Federal Circuit of Australia no longer exist as independent entities and will be replaced by the Federal Circuit and Family Court of Australia (FCFCoA). The position of the FCoWA remains unchanged, although appeals from that court will be heard in Division 1 of the FCFCoA.

Policy context

Under the Fourth Action Plan of the National Plan (Council of Australian Governments [COAG], 2019), improving support and service system responses for women and children who experience family and domestic violence is identified as one of five national priorities. The current research was commissioned by ANROWS as part of its Fourth Action Plan research program. From the outset of the National Plan, the family law system has been identified as a critical element in the service system response to family and domestic violence (e.g. Strategy 5.1; COAG, 2010, p. 26), in the context of a series of intersecting systems that are intended to meet the needs of women and children affected by family violence. In the past 15 years, it has become increasingly clear that the family law system represents a frontline response in this context, as evidence (e.g. Kaspiew et al., 2015) has demonstrated that families affected by family violence and safety concerns are concentrated in the caseloads of services across the family law system but especially the family law courts (see further below). In 2019, the Australian Law Reform Commission (ALRC) acknowledged the challenges this poses, in light of little progress towards the creation of a nationally streamlined, coherent, and integrated approach to meeting the needs of children and families across the family, law, child protection, and family violence jurisdictions. (ALRC, 2019, p. 37)

With an active program of reform underway across the family law system (Australian Government, 2021), changes intended to improve responses to matters involving family violence and safety concerns are part of a developing reform agenda. At the same time, the reports of two recent inquiries have suggested a need for amendments to the parenting order enforcement regime in Australia, which is contained in Division 13A of Part VII of the *Family Law Act 1975* (Cth) – henceforth referred to as “FLA”. The Australian Government has accepted the ALRC’s recommendations that the existing legislative provisions be simplified and clarified and that a presumption be introduced that a costs order against the contravening party should follow a contravention application being upheld (see Recommendation 42, ALRC, 2019, p. 21; Australian Government, 2021, p. 36). Further ALRC recommendations involved legislative amendments that would require parents to meet with a family consultant to have their obligations explained to them after court orders

are made (Recommendation 38) and legislative amendment to allow judges to make orders for family consultants to provide post-order case management, with family consultants having power to refer matters to a contravention order list (Recommendation 39; p. 343). The Australian Government response noted both of these recommendations (pp. 34–35) and stated that “substantial further work is necessary [to assess] options to address non-compliance with, and enforcement of, court orders” (Australian Government, 2021, p. 34).

The report of the Joint Select Committee on Australia’s Family Law System (JSC) made recommendations for procedural and substantive changes to the enforcement regime (Recommendation 19; JSC, 2021, p. xii). It recommended the establishment of a national, registrar-led contravention list for handling contravention matters. It further recommended that stronger penalties for non-compliance be considered. The Australian Government has not yet responded to the JSC report. The final report of this research project will consider these recommendations on the basis of the insights from the complete research project.

Enforcement of family law parenting orders has been the subject of longstanding concern (e.g. Family Law Council, 1998). From the perspective of systemic responses to family violence and child safety concerns, two main sets of issues are raised in relation to the regime. The first concerns the potential for the punitive responses available to courts as a response to contravention (see further below) to operate as a disincentive for parents who have parenting orders and are concerned for their child’s safety to seek safer parenting orders. In this context, the contravention regime may give rise to unsafe compliance. The second concerns the potential for the contravention regime (as well as other aspects of the FLA and other systems and processes, including child support and child protection) to become part of an ongoing family violence dynamic, identified with a pattern of coercive control (e.g. Fitch & Easteal, 2017; Kaye et al., 2021, p. 21). From this perspective, non-compliance or legal action in relation to contravention may be part of a dynamic of ongoing abuse.

Parenting orders and separated parents

Research evidence demonstrates that the vast majority of parents separate with little or no reliance on the family law system for making parenting arrangements (Kaspiew et al., 2015, p. 160). The groups that are most likely to have recourse to family law system pathways (family dispute resolution [FDR], lawyer-led negotiation and courts) to work out parenting arrangements are characterised by complexity stemming from the presence of factors such as family violence, safety concerns for themselves or their child as a result of ongoing contact with the other parent, mental ill health and substance addiction (Kaspiew et al., 2015, p. 16).

Although the FDR provisions in the FLA are predicated on families affected by family violence and child abuse being exceptions to the requirement to attempt FDR, the evidence nonetheless establishes that FDR clients represent a significant proportion of these families. Almost three quarters of FDR users reported emotional abuse, one quarter reported physical violence, nearly half reported mental health problems and one quarter had safety concerns for themselves and/or their child as a result of ongoing contact with the parent (Kaspiew et al., 2015, p. 16).

Families with complex issues are even more strongly represented in lawyer pathways. Among parents who reported that they sorted out their arrangements through the use of lawyers, most (86%) reported a history of emotional abuse, more than one third reported physical violence, half reported mental ill health and one third had concerns for their own safety and/or their child's safety as a result of ongoing contact with the other parent (Kaspiew et al., 2015, p. 16).

Court users had the highest proportions of complexity indicators: emotional abuse was pertinent for 85 per cent, physical violence for 54 per cent, mental ill health for 59 per cent and safety concerns for 46 per cent (Kaspiew et al., 2015, p. 16).

Findings on the concentrations of multiple issues among families who use the system (alcohol or drug use, problems with gambling, pornography, social media use, in addition to those already referred to) accentuate the point that the whole family law system, and particularly the courts, service a complex and particularly high-risk client group. Among court users, 38 per cent reported four or more of these issues.

Findings on the concentrations of multiple issues for those who resolved through lawyers were 27 per cent and those who resolved through FDR were 21 per cent. By comparison, just 11 per cent of parents who arrived at parenting arrangements through discussions between themselves reported four or more indicators of complexity (Kaspiew et al., 2015, p. 16).

This evidence demonstrates that the parents who obtain family law parenting orders are a particularly complex group, with concentrated levels of risk indicators. In light of the small proportion of parenting orders that involve contravention matters (see further below), it is important to emphasise that the contravention regime is applied to a small subset of a particularly complex group of families.

The enforcement regime in Division 13A of Part VII of the *Family Law Act 1975* (Cth)

Court powers in relation to non-compliance with parenting orders are set out in FLA Part VII, Division 13A. The broad framework of the present contravention regime is based on legislative amendments introduced in 2002. These amendments created a “three-tier regime” involving preventative measures, remedial measures and sanctions (Chisholm, 2018, p. 23). In Part VII, Division 13A, Subdivision 13D deals with situations where a contravention is established but the contravening party can establish they had a reasonable excuse. Subdivision E deals with contraventions where reasonable excuse is not established but the contraventions are “less serious”. Subdivision F deals with contraventions without reasonable excuse that are “more serious”. A greater range and severity of responses and penalties is available under Subdivision F. When large-scale reform to the FLA and the family law system was implemented in 2006, some further limited changes were made to Part VII, Division 13A. These included powers concerning compensation for reasonable expenses incurred as a result of a contravention and a presumption that legal costs would be awarded where a party was found to have committed a contravention under Part VII, Division 13A, Subdivision F, which deals with more serious breaches (Chisholm, 2018, pp. 24–25).

The courts’ powers in relation to contravention operate where a parenting order is not complied with in circumstances where a party subject to the order has intentionally failed to comply with it or made no reasonable attempt to comply with it (FLA s 70NAC). Parties against whom a claim of contravention is made have the opportunity to argue that they had a reasonable excuse to contravene the parenting orders (s 70NAE). Circumstances in which a reasonable excuse may be established include those where the party alleged to have committed the contravention can show they did not understand the obligations established (s 70NAE (2)) or they believed on reasonable grounds that the contravention was necessary to protect the health and safety of a person, including the child who is the subject of the order: s 70NAE (4), (5) and (6). The civil standard of proof, the balance of probabilities, applies to these determinations: s 70NAF(1) and (2).

Where a court finds that a party has contravened a parenting order without reasonable excuse, a range of responses are open to it (s 70NEB). Under subdivisions E and F of Division 13A

of Part VII, different responses are set out for “less serious” (Subdivision E) and “more serious” contraventions without reasonable excuse (Subdivision F). The factors that determine whether a matter should be dealt with as a “less serious” or “more serious” contravention include whether previous contravention applications have been upheld against the contravening party: s 70NFA(30). Importantly, a court may deal with a Subdivision F contravention under Subdivision D where it considers this is more appropriate.

Options available for less serious contraventions include orders for make-up time, allowing the parties to lodge an application to change the order or requiring them to enter into a bond. Conditions imposed under a bond may include attendance at family counselling, family dispute resolution or appointments with a family consultant. Options available where a more serious contravention is found include orders for community service, bonds, fines of up to 60 penalty units and imprisonment. The required standard of proof varies according to the option but for some of the more severe options, such as imprisonment, the criminal standard of proof – beyond reasonable doubt – applies to establishing the grounds for making of an order (s 70NAF(3)).

If a “less serious” contravention application is upheld under Subdivision E, s 70NEB explicitly states that the court may order that the contravening party pay all or some of the costs of the other party or parties (sub-s 1(f)) even if it makes no other orders in relation to the contravention: sub-s1(g). If a “more serious” contravention application is upheld under Subdivision F, a presumption applies that a court must make a costs order against the contravening party unless the court concludes this would not be in the best interests of the child concerned: s70NFB(1)(a).

Across the three family law courts (the FCoA, the FCCoA and the FCoWA), about 15,000 applications for final orders in parenting matters (pursuant to the court’s jurisdiction to make these orders under Part VII of the FLA) are dealt with annually (ALRC, 2019, pp. 86-87, 106). More than half of these matters settle by consent at some point on the litigation pathway, with the remainder requiring a judicial determination (ALRC, 2019, p. 250).

In the context of the volume of applications for final orders dealt with by the courts, contravention applications are not particularly common. In the 2017–18 financial year, for example, the FCoA and the FCCoA dealt with approximately 1,143 contravention applications in child matters (ALRC, 2019, p. 93), which comprise approximately 8 per cent of all applications for final orders in parenting matters.

Procedural approaches

Family Court of Australia and Federal Circuit Court of Australia

An Application – Contravention form is used when a party is alleging a breach of a parenting order under Division 13A and seeking an order from the court imposing a punishment or other consequence on a person for the breach.

Section 70NFB of the FLA provides that the powers of the court in relation to contraventions range from the enforcement of an order to the punishment of a person for failure to obey an order. As foreshadowed above, orders that may be made in these proceedings include orders providing for:

- the resumption of the arrangements set out in an earlier order
- a further order to compensate a person for lost time with the child/children
- the variation of an existing order
- placing a person on notice that if the person does not comply with an order, the person will be punished
- punishing a person by way of a fine, community service order (see FLA s 70NFD), bond (e.g. to attend counselling or FDR; see FLA s 70NFE) or imprisonment (see FLA s 70NFG).

At the time of writing, Chapter 21 of the *Family Law Rules* (see further Appendix C), together with relevant information available on the court's website,⁵ encourages parties to consider the result that they want to achieve before filing a contravention application. This information suggests that if parties do not want the other party to be punished for

the breach but rather seek "a speedy remedy to ensure the resumption of the arrangements set out in an earlier order", they may choose to file an Application in a Case, rather than an Application – Contravention.⁶

When an Application – Contravention form is filed, it is to be accompanied by the order, agreement or undertaking that is alleged to have been breached, an affidavit setting out the alleged contravention/s and the facts relevant to these contravention/s, and either a valid s 60I certificate or Affidavit of Non-filing of FDR certificate. There is no prescribed form for a party to respond to a contravention application; however, the "respondent" may file an application seeking a variation of the order that is alleged to have been breached or make counter allegations regarding contravention of a parenting order.

As outlined in the discussion relating to the improvement of compliance later in this report, a National Contravention List is to be introduced by the FCFCoA on 1 September 2021. This specialised court list will be administered by registrars who will triage and assess contravention matters and allocate them to senior judicial registrars or judges for resolution where required.

Family Court of Western Australia

Parties in parenting matters where there has been non-compliance can lodge a Contravention Application (Form 18) setting out the precise details of the alleged contravention/s or an enforcement application in the form of an Application in a Case (Form 2) as a means of enforcing the parenting orders made. In the process of requisitions on the Contravention Application (where the applicant has not met the formal requirements of the application) or in the course of hearing the application, the court may inform the parties of the alternative means of enforcing the orders via the Application in a Case process where the intention is to enforce the orders as opposed to having the contravening party sanctioned in accordance with the contravention regime. The Western Australian process also involves the facilitation of a without-prejudice conference with a registrar to support the parties to resolve the issues that are the subject of the contravention application. This process supports the parties to understand the content of the

⁵ See, for example, <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/forms-and-fees/court-forms/form-topics/applications/form-app-contravention>

⁶ Ibid.

orders and their obligations pursuant to the orders or to support the resolution of issues emerging in the implementation of the orders at this early stage in the contravention application process.

Support services

In addition to the legislative regime, there is a service response to assist parents with compliance. The Australian Government funds a support service specifically intended to help parents to comply with parenting orders, the Parenting Orders Program – Post-separation Co-operative Parenting Program (POP-PSCPP), which parents can be ordered to attend. The program concentrates on working with families described as high conflict to help them to focus on the needs of their children. The most recent data available, from 2014, indicates that in that year 4,473 clients were registered with POP services and 4,529 with Supporting Children After Separation (SCASP) services (KPMG, 2016, p. 20). These services are located in family relationship centres (FRCs), which also provide FDR among other services.

Existing research

There is no recent Australian empirical research on the current contravention regime. In 2004, Rhoades published a study based on 100 court files listed for hearing for enforcement in 1999. The main findings of that study indicated the most common underlying issues were the resident parent's concern about the "child's safety" or about the "contact parent's parenting capacity" and outcomes generally did not result in a breach being found but rather resulted in a variation in parenting arrangements (Rhoades, 2004, p. 3).

Since that research was published, two significant sets of reforms have been implemented: the 2006 shared parenting reforms and the 2012 family violence reforms. The legislative context for making parenting orders, and the enforcement regime itself, have changed significantly.

The extremely limited recent evidence base comprises a recent evaluation (Clancy et al., 2017) of two pilot programs intended to encourage compliance with court orders and divert families from contravention proceedings. This study highlighted the following dynamics among a "significant proportion" of the 160 adult clients who used the program: "power imbalance, controlling and abusive behaviour including emotional and physical family violence, significant loss and trauma, financial hardship and mental illness and substance use" (p. 48).

A more general insight into parenting order compliance comes from recent research on the needs of children and young people in separated families (the CYPSF study; Carson et al., 2018). The results suggest that if the process for developing parenting orders is not attentive to a child's needs, then compliance with the orders may be susceptible to difficulties. Children and young people who participated in the CYPSF study identified a need for parenting arrangements to reflect safety concerns,⁷ and that these arrangements may require change over time to better reflect their best interests. However, most young participants in the study reported that they did not have the opportunity to effectively participate in decision-making relevant to their care, with a number of young participants in cases characterised by issues such as family violence particularly adamant about the importance

of having an opportunity to communicate their views and experiences to inform the decision-making process. Of note, "perceived inaction on the part of family law system professionals, particularly in response to safety concerns raised by children and young people themselves, was identified as causing distress by a number of young participants who reported some level of engagement with family law system professionals" (Carson et al, 2018, p. viii). Some described their frustration with living in unsafe arrangements and not being heard as leading them to take drastic action, with one young participant running away from home and two young participants destroying their parents' property in order to express their views in the context of their safety concerns.

International evidence

The empirical evidence base internationally is also sparse. In the United Kingdom, a small-scale study based on data from the publicly funded organisation that provides social science support to the family law courts in England and Wales, the Children and Family Court Advisory and Support Service (CAFCASS), examined parenting matters that returned to court (Halliday et al., 2017). Of 40,599 private law cases handled in 2016–17, 30 per cent were returns of court (p. 2). Of these returning cases, 24 per cent involved enforcement applications. An analysis assessing the primary reasons for matters returning to court in a subsample of 100 cases found the two most common reasons for a return to court were high levels of conflict between the adults ($n = 39$) and safeguarding (child protection or compromised child welfare) concerns ($n = 36$) raised by one or both parties. Two other significant drivers, though to a lesser extent than conflict and safeguarding, were changes in life circumstances ($n = 16$) and the child's wishes and feelings ($n = 9$; p. 10). Of the subset of 27 cases that were enforcement matters out of the 100 cases subsampled, the most common driver was conflict between the adults ($n = 16$). Safeguarding ($n = 5$) and the children's wishes and feelings ($n = 4$) were less common, and changes in life circumstances were least common of all ($n = 2$; p. 11).

The CAFCASS findings for return cases are consistent with a 2013 study by Liz Trinder and colleagues based on 205 enforcement applications in England in 2012 (Trinder et al., 2013). They found that most enforcement applications had

⁷ Half of the parents of children and young people participating in the CYPSF study reported safety concerns for themselves and/or their children as a result of ongoing contact with the other parent.

been made by non-resident fathers in circumstances where contact arrangements had broken down completely. Most commonly, conflict between the parents “prevented them from making a contact order work reliably in practice”. The second largest group of cases involved “significant safety concerns” and the third largest group involved older children who themselves wanted to stop or reduce contact (p. 2).

In 2007, The Hague published a comparative study on family rights enforcement approaches within European countries (de Roij et al., 2007). In addition to a useful comparison of diverse approaches across the European Union, the study included a survey that examined, among other things, views on enforcement approaches based on a sample comprised primarily of law, social science and research professionals ($n = 448$). Although the survey examined views on the drivers of non-compliance with parenting arrangements, no questions specifically raised issues related to family violence and safety concerns. The study concluded that the survey findings indicated that rather than problems with the legal regimes themselves being drivers of enforcement problems, issues related to “human aspects” were to blame:

The adult with whom the child lives is seen as a main factor in making enforcement problematic. The second human factor in creating problems in the enforcement is the child, who may not be willing to co-operate. (p. 130)

Research aims

This mixed-method project has been designed to examine the drivers of non-compliance with parenting orders and the operation of the parenting order enforcement regime in Australia. The project is based on three main empirical elements and a desktop review of three international jurisdictions (England and Wales, New Zealand and the state of Michigan in the United States). The three empirical elements are a quantitative study based on data from court files involving matters where a contravention application has been made (“Contravention Matter Analysis”), a study based on views of professionals who work with separated families (“Views and Experiences of Professionals”) and a survey of parents and carers with parenting orders (“Parents and Carers Survey”). This report presents the findings of the study based on professionals’ views: 343 professionals completed an online survey and 11 judicial officers participated in qualitative interviews.

Commentary on the contravention regime tends to focus on a dynamic where parents with more time with the children impede the operation of orders that allow for the other parent to spend time with the children (Tolmie, 1998). Informed by local and international research on parenting disputes, this research examines a wide range of dynamics, including the issues that underlie non-compliance with parenting orders and the factors that do or don’t support effective operation of the contravention regime. The significance of this report is that it examines key issues from the perspective of professionals who work with separated parents. This provides insight into the circumstances of parents who seek advice on non-compliance and the advice that is given in these circumstances. The survey instrument was designed to elicit views on a range of issues that potentially underlie non-compliance, including issues related to entrenched conflict and perverse behaviour, safety concerns, child-related issues and systems abuse. The final report on the research will expand on these insights by providing direct, quantitative evidence on dynamics and outcomes in contravention matters that are considered by courts through the court file analysis. It will also provide direct evidence on parents’ experiences with compliance and non-compliance through the Parents and Carers Survey.

Research questions

Ten research questions are addressed in this mixed method research project. The aspects of the research questions that this report addresses are in bold.

- 1. What are the leading causes of non-compliance with family law parenting orders?** How frequently are allegations of family violence and sexual abuse raised as justifying breaches of parenting orders? Had these concerns also been raised during the application and trial for parenting orders?
- 2. How do parents respond to non-compliance with parenting orders?** What are the characteristics of parents who lodge contravention applications?
3. What is the proportion of contravention matters where there is alleged violence that are sought to be enforced by the mother as compared to by fathers?
4. What are the characteristics (personal and socio-demographic) of parties (applicants and respondents) who report family violence and/or child safety concerns and are involved in contravention proceedings?
5. How many parties (applicants and respondents) involved in contravention proceedings are self-represented? What are the personal and socio-demographic characteristics of those who self-represent? How common are allegations and/or findings in relation to family violence and or child abuse in relation to parties who self-represent (applicants and respondents)?
6. In the court’s consideration of the contravention/enforcement application, how much consideration or exploration is there of allegations and evidence of violence?
7. Where contravention proceedings are brought, what decisions are judges making (e.g. changing the orders; enforcing the orders; punishing the non-compliant party)?
8. Is there a particular trend in terms of a court response when family violence is used as a reasonable excuse to defend a breach? For example, are there penalties for the breach, or is it more likely that orders are changed in favour of those alleging family violence?

9. Is there any evidence that tougher penalties or enforcement are effective at reducing the incidence of non-compliance?
10. For those matters where there are ongoing concerns of family violence, does the risk of penalties deter parties from contravening orders or seeking the protection of the courts through a change of orders?

Methodology

Data collection

The aim of this element was to examine professional practices and experiences relevant to the operation of the enforcement regime and to generate data to assist in the interpretation of findings from the Contravention Matter Analysis and the Parents and Carers Survey.⁸ The online survey of professionals was available for completion between November 2020 and June 2021 and took between 20 and 30 minutes to complete. Interviews (about one hour in duration) with judicial officers were conducted between April and August 2021. The online survey covered the following topics:

- participant demographic and professional characteristics, including training
- the nature of the participant's professional involvement with parenting orders
- practices relevant to developing and explaining parenting orders to clients
- the extent to which the participant's practice involves issues relating to compliance with and enforcement of parenting orders
- views on the reasons for non-compliance and the advice given to clients depending on different reasons
- views on the extent to which contravention applications could be part of a pattern of vexatious litigation
- views on the effectiveness of the contravention regime, including how compliance could be improved and non-compliance could be reduced
- impact of the COVID-19 pandemic on compliance and non-compliance with parenting orders.

The topics covered in the judicial officer interviews were similar but adapted to examine the specific role fulfilled by judicial officers as decision-makers under the Part VII Division 13A regime. Additional question areas included:

- challenges involved where litigants in contravention matters are self-represented
- whether procedural improvements could be made to the handling of contravention matters

⁸ Ethical clearance for this research project was provided by the Australian Institute of Family Studies Human Research and Ethics Committee (2020-07), by the Family Court of Australia and Federal Circuit Court of Australia Research and Ethics Committee and by the Western Australian Department of Justice Research Applications and Advisory Committee (Project ID 469).

- whether Part VII Division 13A is an effective response to contravention matters and the options available to responding to non-compliance are sufficient and appropriate
- whether the penalties such as bonds, fines and imprisonment deter non-compliance with parenting orders or the raising of concerns about family violence and safety
- how the contravention regime could be improved
- the impact of the contravention regime on children and young people.

The question of vexatious litigation was explicitly raised in the interview schedule but the questions concerning the causes of contravention applications and the options for addressing them also elicited discussion of this issue.

Professional participants for the online survey were recruited through multiple channels including the federal family law courts (for professionals based in courts), the FCoWA professional bodies such as the Family Law Section of the Law Council of Australia and Family Relationship Services Australia, and ANROWS's fortnightly newsletter, Notepad.

Participants for the judicial officer interviews were recruited through the FCoA, the FCCoA and the FCoWA.

Sample characteristics

Survey participants

The online survey was fully completed by 301 participants. An additional 439 participants provided partially completed surveys. Of the partial surveys, 42 were completed to a sufficient extent to be included in the final sample of 343 participants. Legal sector professionals, including judicial officers, were the largest group of participants (almost half), with solicitors accounting for 42 per cent, barristers for 4 per cent and judicial officers for 4 per cent. The majority of legal sector professionals (74%) worked in private practice, with 16 per cent coming from community legal centres and 8 per cent from legal aid commissions.

The next largest professional group represented was FDR practitioners, reflecting almost one quarter (23%) of the sample. Also represented in the sample were domestic and family violence service workers (9%) and professionals working in post-order programs (6%), family relationships counselling services (5%) and children's contact services (3%).

The majority of the sample was female (81%), with men representing 17 per cent, and "prefer not to say" responses accounting for 2 per cent.

The largest age range represented in the sample was 55 years or older, at 35 per cent. The two middle age brackets, 35–44 and 45–54, each accounted for about one quarter of participants (25% and 23% respectively). Fifteen per cent of participants were between 25 and 34 years and less than one per cent were under 25 years.

Most of the sample had substantial professional experience, with an average practice duration of 16 years for legal sector participants, 10 years for FDR practice participants, nine years for family and domestic violence sector professionals and seven years for professionals from other post-separation services (FRCs, post-order programs, children's contact services).

Variations emerged in the formal training reported by participating professionals. Legal sector professionals were less likely to report having undertaken formal training in family violence (55%), child abuse/neglect (33%) and child development (27%) as compared to FDR practitioners (81%, 46% and 58% respectively), domestic and family violence sector professionals (90%, 53% and 50% respectively) and other non-legal professionals including post-order program professionals (80%, 61% and 65% respectively; see Appendix B, Table B8).

Legal sector professionals were also less likely to report having undertaken formal training in trauma-informed practice (36%), child-inclusive practice (17%) or training relating to cultural sensitivity and awareness (40%) than were FDR practitioners (59%, 71% and 70% respectively), domestic and family violence sector professionals (87%, 60% and 70% respectively) and other non-legal professionals

including post-order program professionals (80%, 59% and 76% respectively; see Appendix B, Table B8).

The states with the largest populations also had the greatest representation in the sample: 32 per cent for New South Wales, 27 per cent in Victoria and 23 per cent in Queensland. Representation from the other states was Tasmania 6 per cent, Western Australia 4 per cent, South Australia 3 per cent, Australian Capital Territory 3 per cent and Northern Territory 1 per cent.

Judicial officers

The judicial officer interview sample ($n=11$) comprised six participants from the FCoA, four participants from the FCCoA and one participant from the FCoWA. This included five men and six women drawn from New South Wales (4), Victoria (3), Queensland (2), Tasmania (1) and Western Australia (1). The length of experience as a judicial officer in the sample ranged from under five years to more than 20 years, with most having been appointed more than 6–10 years prior to the interview and only a small number of participants having less than five years' experience on the bench.⁹

Analysis

The quantitative data in this report have been analysed using descriptive analysis techniques including the presentation of one-way frequencies and cross-tabulations. Bivariate analysis compared outcomes between different characteristics or time periods (e.g. pre-COVID and COVID) and whether differences between groups were statistically significant, and this was assessed using McNemar's chi square test.

Unless otherwise indicated in the report, when reporting statistics, the general approach was to include only valid responses; that is, non-responses such as "Do not know" or "Cannot say" were excluded from the analysis. For some survey items, such responses made up a considerable proportion of responses and, where this occurred, these responses have been included in the results (e.g. see Tables 2 and 3).

⁹ In this report, judicial officers participating in interviews are referred to by anonymous participant reference numbers. However, all quotations from interviews with judicial officers are reported without participant reference numbers to ensure anonymity.

In general, results are not provided when a base sample involves fewer than 30 participants.

In relation to the qualitative data analysis for both the interviews with judicial officers and open text survey responses, a process of initial open coding was undertaken to identify the key themes and patterns in the data. This was followed by further theoretical and selective coding to examine similarities and variances between the emerging themes and patterns, which led to the development of the core themes – those with the highest frequency and most relevance to the examination of the research questions (Charmaz, 2000; Dey, 1999; Janesick, 2000; Kelle, Prein, & Bird, 1998; Punch, 1998; Ryan & Bernard, 2000).

Limitations

This report reflects the views of professionals (including judicial officers) who work with separated parents. The information in this report consequently reflects the issues that come to their attention in their professional capacities and, as such, represents a partial insight into the dynamics underlying compliance and non-compliance with parenting orders. As such, they may not be representative of the experience of the broader population of parties to parenting orders.¹⁰ Moreover, the sample was recruited on an opt-in basis and therefore reflects the views and experiences of the professionals who were motivated to complete the survey. It is uncertain how representative this sample is of the total group of professionals involved in this field.

It should also be noted that this report addresses some aspects of the research questions on the basis of one element of a four-part methodology. For this reason, the conclusions should only be considered preliminary in nature.

¹⁰ The preliminary findings in this report do not specifically consider the unique challenges and experiences faced by Aboriginal and Torres Strait Islander peoples and certain vulnerable cohorts and as such may not be regarded as applicable for all family law court clients.

Structure of this report

This report has seven further sections. The following five sections present the substantive findings from the data. These sections consider: the aim of the contravention regime from the perspective of judicial officers and survey participants, professional practices in relation to parenting orders, the client caseload concerning contraventions according to professionals, views on the drivers of non-compliance, and assessments of the effectiveness of the contravention regime and how it could be improved. The two last sections provide discussion of the implications of the findings for policy and practice, bearing in mind that these are preliminary insights from one part of a four-part research program.

The aim of the contravention regime

This section presents insights into how judicial officers and family law system professionals view the aim of the contravention regime. Views are varied, reflecting the complex nature of the system and its client base. There is recognition of the symbolic role of the regime in upholding the rule of law, as well as acknowledgement of the tensions this raises in its practical operation.

Judicial officer views

Judicial officer views on the regime varied from those who endorsed the importance of its role in upholding the authority of the court to those who questioned its compatibility with a child-focused approach. These insights highlight tensions central to understanding the strengths and weaknesses in the operation of the regime. From a legal perspective, the compliance regime is designed to ensure that the parties bound by parenting orders comply with them; this is seen as critical to upholding the authority of the court and the rule of law. However, given that parenting orders are made in the exercise of best interests jurisdiction (FLA s 60CA), a tension can arise between the punitive aims of the contravention regime and child-focused decision-making. Further, judicial officers noted that contraventions arise in a range of circumstances, including situations where non-compliance arises from complex emotional dynamics and those where contravention processes are being used abusively. It should be noted that a contravention matter that proceeds to judicial determination has progressed through a registrar-based process allied to triaging, meaning the judges see the matters that have not been filtered out as a result of this process. Their reflections pertain to a small subset of intractable matters but are also valuable in understanding the wider setting in which these matters occur.

In reflecting on the aims of the contravention regime, judicial officers also raised a range of points relevant to how it functions in a conceptual sense. The discussion sets out the range of views expressed by judicial officers.

Overall, the complexity arising from the conceptual tensions outlined above were seen as creating a lack of clarity about its aims:

[The aim of the regime is] confused, I think. It's based on punishing the contravener, where in some cases that's probably a good thing, where in other cases it's not a good thing, depending on the particular circumstances. (JO)

Some interviewees saw the punitive aspects of the regime as important in reinforcing the need for compliance: "The main aim is to obtain compliance with orders and the main tool in obtaining compliance with orders is making it look punitive." (JO)

Echoing this view, another judicial officer suggested that the aim of the regime is to simply "get people to stick to the orders that were made." This judicial officer then argued that the regime is purposefully designed to establish an image, or "an anxiety about consequences for breach", to manage "difficult" parties:

Sensible law-abiding people follow the orders and negotiate and agree flexibility around the orders. Difficult people give over to themselves a latitude in the orders that make the orders merely advisory as opposed to ruling on the ground ... For many people, unless there's consequences, or at least an anxiety about consequences for breach, they'll only follow the orders when it suits them. (JO)

However, some participants also raised the point that a punitive approach was inappropriate for some contravention matters, particularly where the issues arose in the context of complex emotional dynamics following relationship breakdown, including unresolved grief. In some circumstances, contravention applications were seen as an inappropriate problem-solving mechanism:

... our, if you like, underlying subconscious desire [is] to solve the family's problems. And we know that, frankly, most contravention hearings won't solve the problem. It's just a manifestation of a bigger problem ... (JO)

For this reason, one judicial officer spoke of the regime having a broader purpose than penalisation:

Well, the aim of course is to achieve compliance but it has a further aim, it also aims to try and remedy some of the difficulties that are experienced. Family life is dynamic and children's needs change as they get older but orders are set in place in theory at least until they're 18. And so sometimes the parents don't have the ability to reach an agreement about how to make the changes necessary or how to achieve the appropriate level of flexibility, and so if a matter comes before us, it is sometimes possible to be assisting of parents to come to an agreement about a variation of the orders moving forward. So it's not just a penalisation process but it's meant to provide better outcomes for children. (JO)

For some judicial officers, the aspects of the regime that were not punitive – such as the ability to order make-up time – were important mechanisms for getting the orders working again:

I think the aim of the legislation was to do exactly what I said, to just get it [contact] all back on track. And to that end, I really do think the make-up time provision is terrific, because that's about getting everything back on track and giving a soft – a little bit of something to the noncustodial parent, usually, that they get a little bit of extra time. (JO)

These elements of the regime were seen as important in reducing opportunities for the regime to be used by one parent to punish the other or perpetuate conflict.

More broadly, there was also an appreciation of the tension in maintaining focus on the children's needs and interests in applying the contravention regime:

I think [the contravention regime is] focused on a punishment, and I don't think – I think it should be solely focused on what are the underlying causes and how they can be addressed in a child-focused way. (JO)

Some judges saw the graduated range of options available to respond to contraventions as important, even though they meant the scheme was complex:

[The contravention regime] is to make sure people do comply with orders that have been made, so this finality, they don't come back and have to relitigate ... There's a good aim, and they have got a regime that's a rounding up in the contravention scheme of the less serious to the more serious ... As the offence becomes more serious, the standard of proof becomes higher, so they've certainly tried to do it. I think that's the purpose of it, to try and make people – the orders are here, get out there, you've got to make it work, get on with your life. (JO)

Survey of professionals

This section considers the aims of the contravention regime on the basis of qualitative insights from judicial, legal and non-legal professionals participating in the survey of professionals who provided a response to the free text question seeking views on the aims of the contravention regime. Professionals' views on the aim of the regime included the aim of ensuring compliance with parenting orders, upholding the authority of the court and the orders made, and deterring non-compliance. Some professionals described the regime as directed at facilitating the maintenance of the parent–child relationship post-separation. By way of contrast, other participating professionals associated the aim of the regime with identifying and addressing the underlying reasons for compliance and then to support future compliance with parenting orders. For these professionals, the aim was less rigid, with a more flexible approach that focused on workable outcomes that reduced conflict and were consistent with children's best interests. The discussion illustrates this range of views captured in the extended survey responses.

Just over half of the participating professionals providing an open text response in relation to the aims of the contravention regime identified the aim as being to ensure compliance with parenting orders, providing a remedy where there had not been compliance and enabling serious non-compliance to be brought to the court's attention ($n = 87; 51\%$).

The main aim is to ensure compliance with orders. The difficulty is that orders may have been made without considering the matter through a trauma-informed lens and an understanding [of] how events occurring in the past may impact parties in the present. I have heard many

a judge say "That all happened in the past. I'm interested in what is happening now" without an understanding of the complexities of trauma and the many ways it can manifest. (Solicitor, female, Qld)

To ensure compliance with court orders by threats and coercion precisely that which we eschew in inter parties' behaviour. This is a real issue for me. (Judicial officer, NSW)

Originally it was to ensure compliance but now it is a paper tiger and is rarely used. (Solicitor, female, NSW)

Consistent with the data from the interviews with judicial officers, some professionals indicated that the aim was to maintain the authority of the court or to uphold public faith in the legal system and the rule of law ($n = 15$; 9%).

Simply to maintain the authority of the court and provide some avenue of redress if genuinely needed. But it is rarely helpful to the actual situation. (Solicitor, female, Qld)

A person has the right to rely on court orders. Especially in the case of children not seeing a parent due to non-compliance without reasonable excuse, there needs to be an effective and timely consideration of the matter. If there is to be no consequence of non-compliance then the court should be considering the appropriateness if [sic] making any orders at all. The court risks looking like a toothless tiger if there is no recourse to address non-compliance with orders. (Solicitor, female, ACT)

The main aim is to set precedents and get out amongst the general public the message that it is not ok to contravene orders, it's a serious matter and something will be done about it. (FDR practitioner, male, NSW)

To ensure compliance with court orders and the rule of law whilst acting in the best interest of the child. (Barrister, male, Vic)

Some participating professionals described the aim of the contravention regime as to deter parties from breaching their parenting orders or to "scare parties into compliance" ($n = 20$; 12%). Some professionals identified the aim as punitive or quasi punitive ($n = 14$; 8%) and a small number of professionals described the aim of the regime as to discourage further litigation and the lodging of further applications ($n = 7$; 4%).

To deter parents from contravening by imposing penalties. (Solicitor, female, Qld)

To punish and rehabilitate the contravening party. I think that a party is more likely to continue contravening orders if they are not appropriately punished for their actions. (Solicitor, female, Vic)

To ensure parties comply and avoid further litigation (Solicitor, female, Qld)

The problem is that the aim of the contravention regime is to punish and the focus is on the children's best interests. Often that means that parents are not punished as it is not found to be in the children's best interests for punishment of a parent. (Solicitor, female, NSW)

Other professionals providing an open text response in relation to the aims of the contravention regime suggested that the aim was to acknowledge the importance of the child's relationship with both parents and to facilitate that relationship ($n = 27$; 16%).

To ensure that the parents respect the children's right to have both parents in their life and to work together to achieve that. To give the children regular, consistent time with their parents and create stability and continuity for them in the future. To hold people accountable for their actions and care and respect given to the children. (Solicitor, female, NSW)

To maintain a meaningful relationship between children and parents. (FDR practitioner, female, NSW)

To ensure that children have spent sufficient time with each parent in order that they are able to sustain a meaningful relationship with them. (Barrister, female, NSW)

While acknowledging the aim is to facilitate the parent-child relationship, two other participating professionals reflected that, in practice, it was to enforce parents' rights ($n = 2$; 1%). For example:

In theory, the main aim is to ensure children see their parents as agreed by parents – or ordered by the court. However, my experience has been that the contravention regime is to enforce parent "rights", rather than what's best for the child. If there is a power imbalance (such as

that in the dynamics of family violence), then I believe it would be unlikely that the person subject to violence would initiate contravention applications. The parent who habitually used/uses power in the relationship, however, is more likely to slap contravention orders on the other party as a sign they still wield power – it is not about the children, it is about them. (Domestic and family violence professional, female, ACT)

Triaging cases of non-compliance, identifying the underlying reasons for non-compliance and addressing those reasons was an aim identified by some professionals who provided an open text response in relation to the aims of the contravention regime ($n = 19$; 11%). Some identified the aim of the contravention as to de-escalate the conflict between the parents and their children's exposure to it, and to set boundaries and guidelines to assist the parties to work together as well as to encourage them to work together to resolve their differences ($n = 8$; 5%).

To set boundaries and guidelines to assist parents to work together at some level to decrease the exposure of their child/ren to parental conflict. (FDR practitioner, female, Qld)

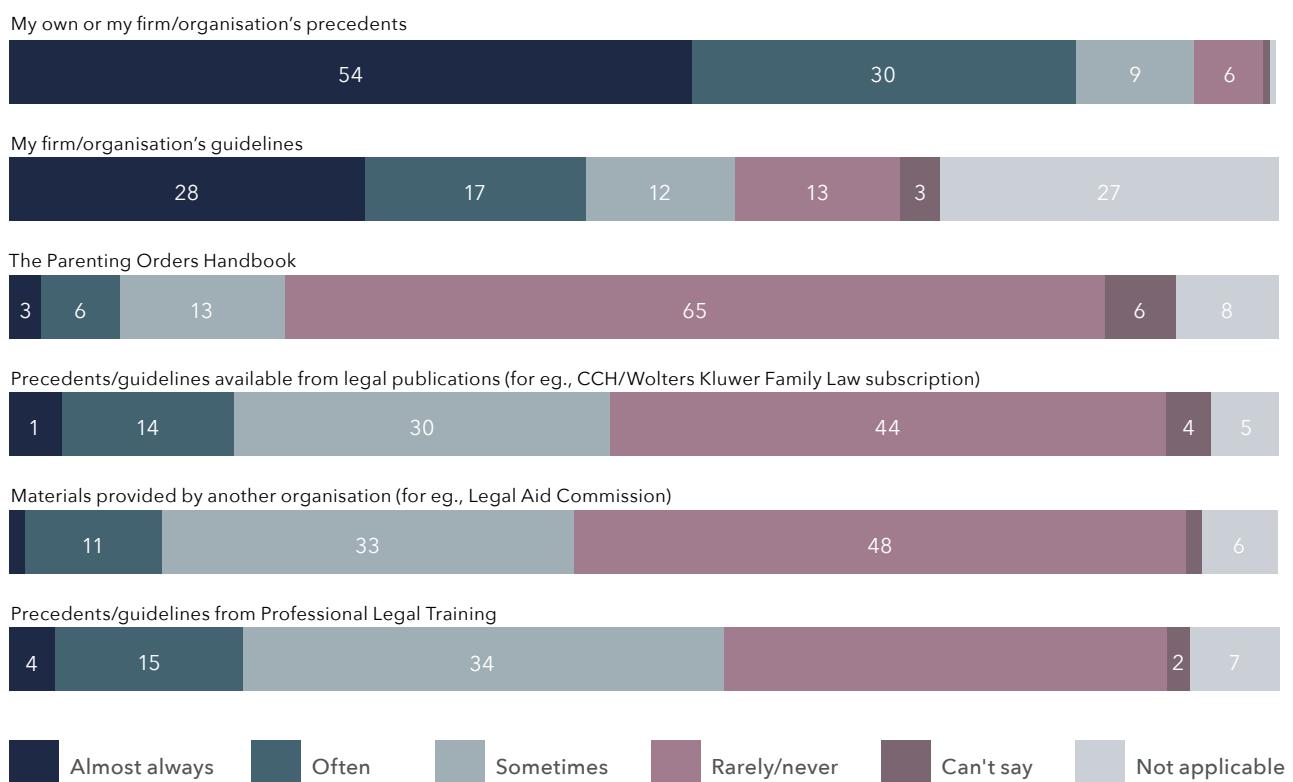
To seek to encourage parents to negotiate/mediate and also to identify underlying reasons for non-compliance and address these. (Family and relationship counselling service professional, female, Vic)

The contravention regime is set up to hopefully triage non-compliance of orders into degrees of seriousness and provide intervention where appropriate. (FDR practitioner, female, NSW)

Interestingly, one fifth of professionals providing an open text response indicated that the aim of the contravention was unclear, that it didn't work or that there was no aim ($n=35$; 20%): "I honestly don't know, it is such a joke. So slow and useless that we don't even use ... even for flagrant cases." (Solicitor, male, Qld)

Practices in relation to parenting orders

Figure 1: Professionals' use of precedents and guidelines when drafting parenting orders



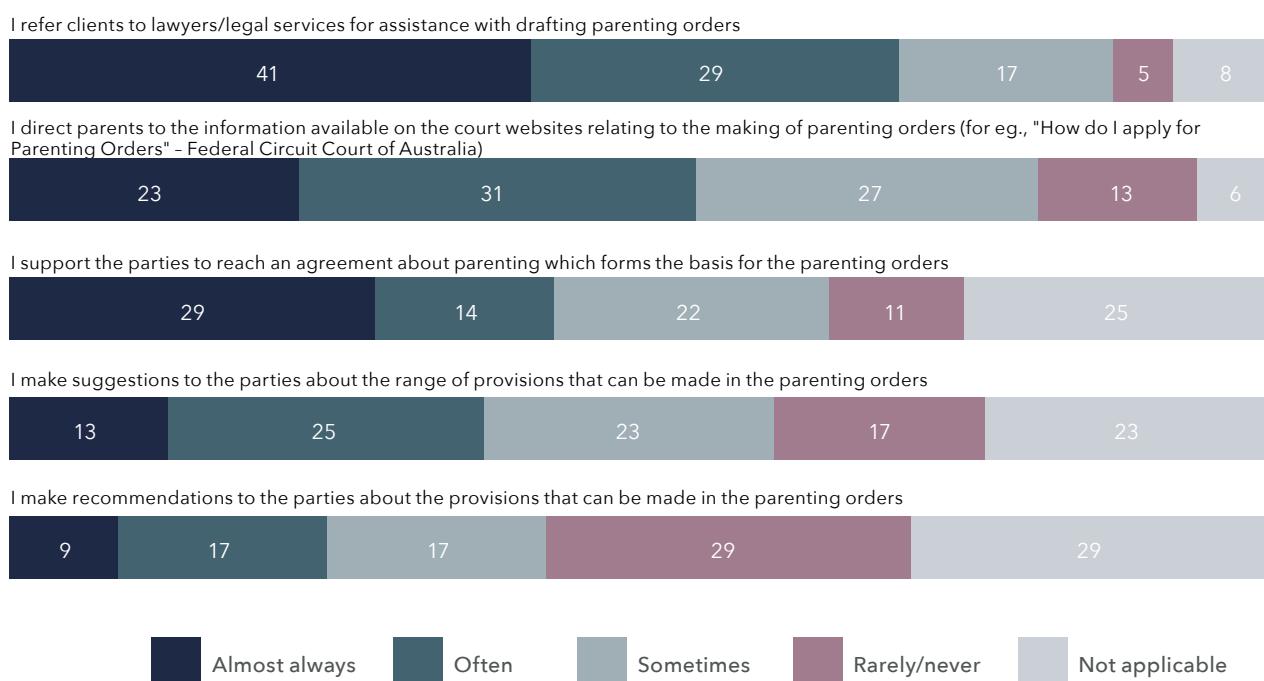
Note: Sample sizes across the items: $n = 166-182$.

This section sets out insights into professional practices concerning the development of parenting orders and the explanation of obligations under orders. These insights are important to understanding the extent to which professional practices may contribute to non-compliance as a result of issues with the development and drafting of orders and a lack of awareness among parents and children and young people of the obligations created by orders.

Precedents and guidelines

Participants who indicated they have been involved in drafting parenting orders ($n = 183$) were asked to also indicate the frequency with which they used six possible sources as parenting order templates, and they were given the opportunity to identify further sources in an open-ended

text box. As depicted in Figure 1, the most frequent templates were precedents provided by the participant's own firm or organisation (almost always: 54% and often: 30%). Guidelines provided by the participant's firm or organisation were also commonly used (almost always: 28% and often: 17%). The use of precedents and guidelines provided by legal subscription services such as CCH/Wolters was less common with 44 per cent of the sample indicating they used this source "rarely/never". Other sources, such as material provided by another organisation such as a legal aid commission or professional legal training provider were even less common. The option that drew the highest proportion (65%) of "rarely/never" responses was the free resource funded by the Attorney-General's Department, the *Parenting Orders Handbook*, which has been available since 2016.

Figure 2: Advice provided by professionals to support clients to draft parenting orders

Note: Sample sizes across the items: $n = 139-148$. Very few respondents opted for "Can't say" ($n = 0-2$ across the items) and such responses were excluded from the analysis.

A limited number of responses in the "Other" category referred to a more open-ended approach to developing orders. These responses referred to understanding the needs of the children and the parties in the context of the legal framework in Part VII of the FLA.

- Other sources identified in the open-ended responses included:
- orders from published judgements and those developed by other practitioners
 - the participant's personal bank of precedents
 - specialised sources such as the Australian Federal Police website for Airport Watchlist Orders and the Australian Workplace Drug Testing Service for drug testing orders.

Practices in supporting clients to develop parenting orders

Where professionals indicated they were not involved in drafting parenting orders ($n = 148$), they were asked to indicate how frequently they adopted five strategies for supporting clients who were developing parenting orders. It is worth noting that these professionals were typically FDR practitioners (38%), followed by domestic and family violence professionals (18%), post-order program professionals (14%), and family relationships counsellors (10%). Other professionals were from a range of services such as children's

contact services, men and family relationships services, and legal services (e.g. solicitors).

Three of the response options were intended to assess the extent to which directive and less directive approaches were taken. The less directive approach concerned "support[ing] the parties to reach an agreement about parenting which forms the basis for the parenting order". This less directive approach was the most common of the three and was applied "almost always" by 29 per cent of participants who answered these questions and "often" by 14 per cent (see Figure 2).

The next least directive response concerned making "suggestions to the parties about the range of provisions that can be made in the parenting orders". Only 13 per cent indicated they took this approach "almost always" and 25 per cent applied it "often".

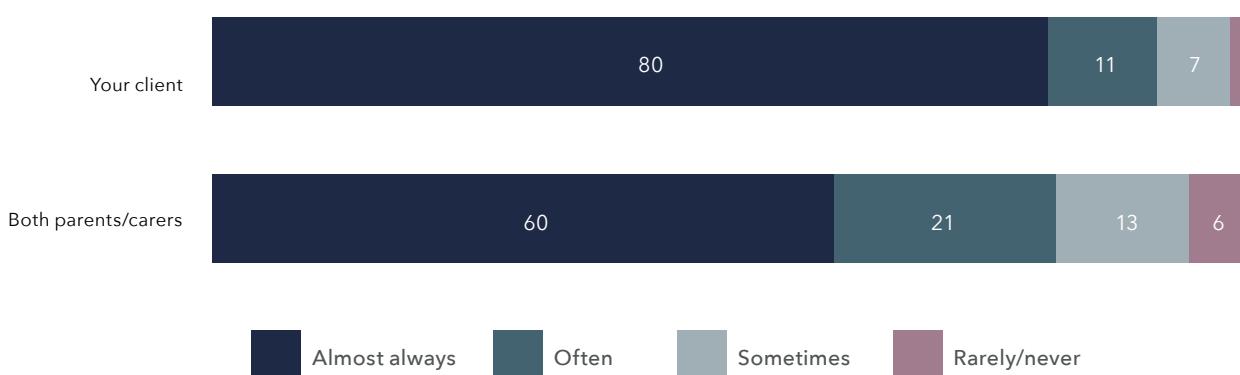
The most directive approach was a response indicating the participant made "recommendations to the parties about the provisions that can be made in the parenting orders". Only 9 per cent applied this "almost always" and 17 per cent applied it "often".

The other two responses concerned practices of referring clients for legal assistance with drafting orders and referring them to information on court websites, such as the "How do I apply for Parenting Orders" page on the Federal Circuit Court

Table 1: Professionals explaining orders and obligations before finalising agreements/orders

	Almost always	Often	Sometimes	Rarely/never	Not applicable	Total	n
All							
Your client	95.5	1.1	0.6	0.0	2.8	100.0	179
Both parents/carers	22.9	5.1	17.2	34.4	20.4	100.0	157
The child/children ^a	5.4	5.4	8.8	50.0	30.4	100.0	148
Other	9.2	1.8	14.7	15.6	58.7	100.0	109
All (exclude NA)							
Your client	98.3	1.1	0.6	0.0	..	100.0	174
Both parents/carers	28.8	6.4	21.6	43.2	..	100.0	125
The child/children	7.8	7.8	12.6	71.8	..	100.0	103

Note: ^a Excludes a small number of "Can't say" ($n = 3$) responses in order to simplify the table.

Figure 3: Professionals explaining the consequences of non-compliance

Note: Sample sizes: "your client" $n=170$, excluding a small number of responses of "can't say" ($n=2$) and "not applicable" ($n=1$) in order to simplify the data; "both parents/carer" $n=70$, excluding responses of "can't say" ($n=1$).

of Australia website. Referral for legal advice was the most common practice overall, with 41 per cent indicating they did this "almost always" and 29 per cent "often". Directing parents to the court website was nominated comparatively less often but was still part of the practice of a majority of participants, with 23 per cent doing it "almost always" and 31 per cent "often".

Explaining orders and obligations

The survey examined professional practices in explaining orders and obligations among participants who indicated they were involved in drafting parenting orders. In terms of explaining orders, the question asked participants to nominate how frequently they explained the orders to their own client, both parents/carers and the child/children. Unsurprisingly, the vast majority of participants (96%) indicated explaining

orders to their own client "almost always" (shown in Table 1). It was less common for participants to indicate that they explained orders to both parties/carers, with 23 per cent saying they did this "almost always", 5 per cent "often" and 17 per cent sometimes. Explaining orders to children was very infrequent with fewer than 10 per cent of participants choosing any of the frequency ranges and half saying they rarely/never did it.

The findings in relation to orders not being explained to children are consistent with research evidence indicating insufficient emphasis on supporting children's participation needs (e.g. Carson et al., 2018). To the extent that non-compliance may be driven by children and young people themselves (see further below), these findings suggest that, at least in part, this may arise as a result of poor engagement with children and young people, including in providing explanations of court outcomes.

Figure 4: Professionals providing clients with court fact sheets

Note: Sample sizes: "Compliance with parenting orders" $n=162$, excluding a small number of responses of "can't say" ($n=1$); "Parenting order - Obligations ..." $n=164$.

Consequences of non-compliance

Practices in explaining the consequences of not following parenting orders were also examined, specifically in relation to whether such explanations were provided to the participants' own clients and both parents and carers (Figure 3). This question followed the preceding question in relation to explaining orders/agreements to clients, both parties and the children. The survey asked whether, "When explaining the orders/agreement to your client, do you explain the consequences of not following (i.e. contravening) parenting orders". The majority (81%) indicated explaining this to their own client "almost always", with 11 per cent saying they did this often. A smaller majority (60%) indicated explaining the consequences to both parents/carers of not following orders "almost always" and 21 per cent "often".

The proportions of participants who nominated "often", "sometimes" and "rarely/never" responses, particularly in relation to explaining consequences to their own clients, indicate that there are some professional practices that may contribute to non-compliance because parents/carers do not understand the consequences of not following parenting orders.

Court fact sheets

Fact sheets are available on the websites of the FCoA and FCCoA that deal respectively with the topics of "Compliance with parenting orders" and "Parenting orders – Obligations, consequences and who can help". The extent to which professionals refer clients to these resources was assessed in the survey and is shown in Figure 4. A majority of participants indicated doing this with each of these resources, with around half saying they did this "almost always" and 9 per cent "often".

Participants also had the opportunity to expand on their answers by indicating what other practices they engaged in to ensure obligations were understood. The provision of a letter of advice was most commonly mentioned by the 10 respondents who provided a comment.

Summary

Although these findings demonstrate that explaining orders and the consequences of contravening them is majority practice among professionals, there are some aspects of practice that raise concern. In terms of the substantive content of the orders, there is evidently a significant reliance on precedents in drafting orders. While this may be appropriate from a technical perspective, particularly where the orders are well-drafted, it also raises the possibility that the process of developing orders may in some circumstances be insufficiently attentive to the particular individual needs and circumstances of children and young people and their families.

Further, indications that explaining the consequences of contravening the orders, and the orders themselves, is not universal practice reveal that some parties bound by the orders may not understand their obligations or the consequences of not complying with them. In addition, the lack of explanation of orders to children and young people may contribute to non-compliance that is driven by children and young people themselves.

The significance of these findings in the extent to which professional practices contribute to non-compliance will be assessed in the final report, in the context of the findings from the Survey of Parents and Carers and the court file analysis.

Clients seeking advice in relation to non-compliance

Table 2: Proportion of client enquiries seeking advice about compliance with a parenting order that involves a contravention, by occupation

Proportion of enquiries	Legal court professionals (%)	FDR practitioners (%)	DFV professionals (%)	Other professionals (e.g., FRC) %	Total (%)
About three-quarters or more of enquiries	41.1	20.3	13.3	21.7	30.8
More than half but less than three-quarters of enquiries	9.5	11.4	10.0	6.5	9.3
About half of enquiries	16.1	15.2	10.0	15.2	15.3
Less than half of enquiries	22.6	35.4	50.0	32.6	29.6
Cannot say	10.7	17.7	16.7	23.9	15.0
Total	100.0	100.0	100.0	100.0	100.0
N	168	79	30	46	334

Note: Total proportion includes n=11 "other" occupations not reported separately.

This section provides insight into the extent and nature of client enquiries relating to contravention matters in the professional experiences of the participants in the survey. The discussion first sets out findings concerning the proportion of client enquiries that relate to compliance with and alleged contravention of family law parenting orders, the extent to which these inquiries involve a likely contravention, and differences in these areas in the pre-COVID and COVID periods.

Proportion of matters involving compliance and alleged contraventions

Overall, enquiries relating to compliance and alleged contravention are not especially common but do arise regularly. One quarter of participating professionals indicated that half or more of their client enquiries concerned these issues (See Table A1, Appendix A).

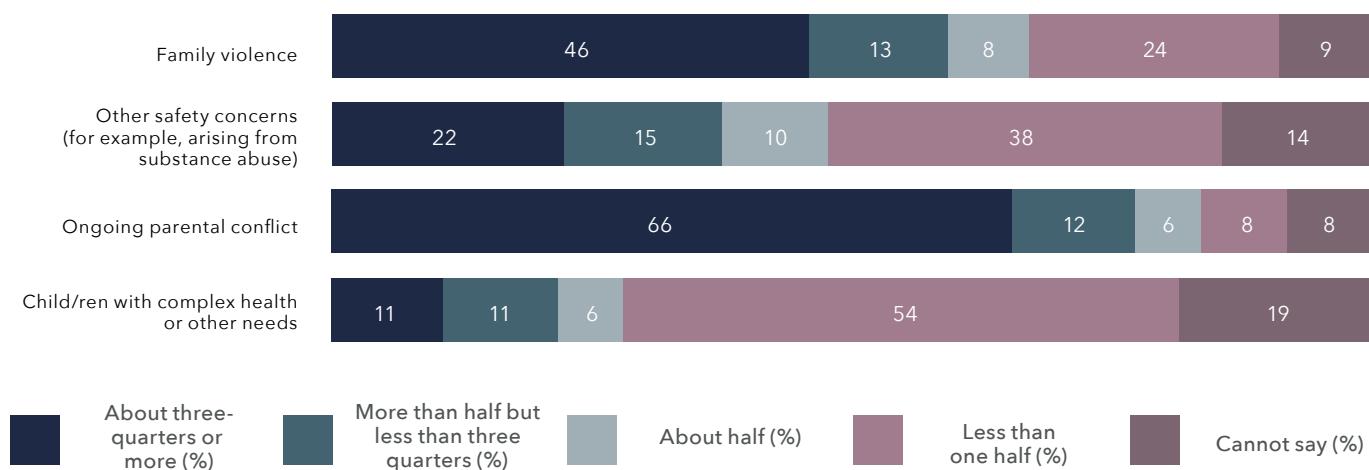
Participants were asked to indicate the proportion of such enquiries that related to a contravention. This assessment requires the exercise of professional judgement as to whether, under Division 13A of Part VII of the FLA, the factual situation as understood by the participant would amount to a situation where a contravention application could be made. Table 2 shows just over three in ten (31%) of the sample indicated that three quarters or more of enquiries fell into this category. A similar proportion (30%) of participants indicated that less than one-half of enquiries fell into this category. Legal professionals were the most likely of the professional groups to indicate that client enquiries involved a contravention, with 41 per cent indicating that three quarters or more of client enquiries about compliance involved a contravention. This contrasts with 20 per cent of FDR practitioners. Two related issues may be of relevance in understanding these patterns. First, as noted earlier, lawyers deal with a more complex client base than FDR practitioners. Second, lawyer responses may involve a more legalistic analysis being applied to client problems. Advice-giving practices in relation to specific circumstances that arise in contravention matters are examined in more detail below.

Table 3: Impact of the COVID pandemic on client enquiries seeking advice about compliance with parenting orders, by occupation

Proportion of enquiries	Legal court professionals (%)	FDR practitioners (%)	DFV professionals (%)	Other professionals (e.g., FRC) %	Total (%)
Yes - receiving more enquiries	61.2	49.4	56.7	57.4	58.2
Yes - receiving less enquiries	2.4	5.1	3.3	0.0	2.7
No change in enquiries	27.6	34.2	20.0	23.4	27.0
Do not know/cannot say	8.8	11.4	20.0	19.1	12.2
Total	100.0	100.0	100.0	100.0	100.0
N	170	79	30	47	337

Note: Total proportion includes n= 11 "other" occupations not reported separately.

Figure 5: Proportion of enquiries relating to alleged contraventions involving families characterised by specific issues



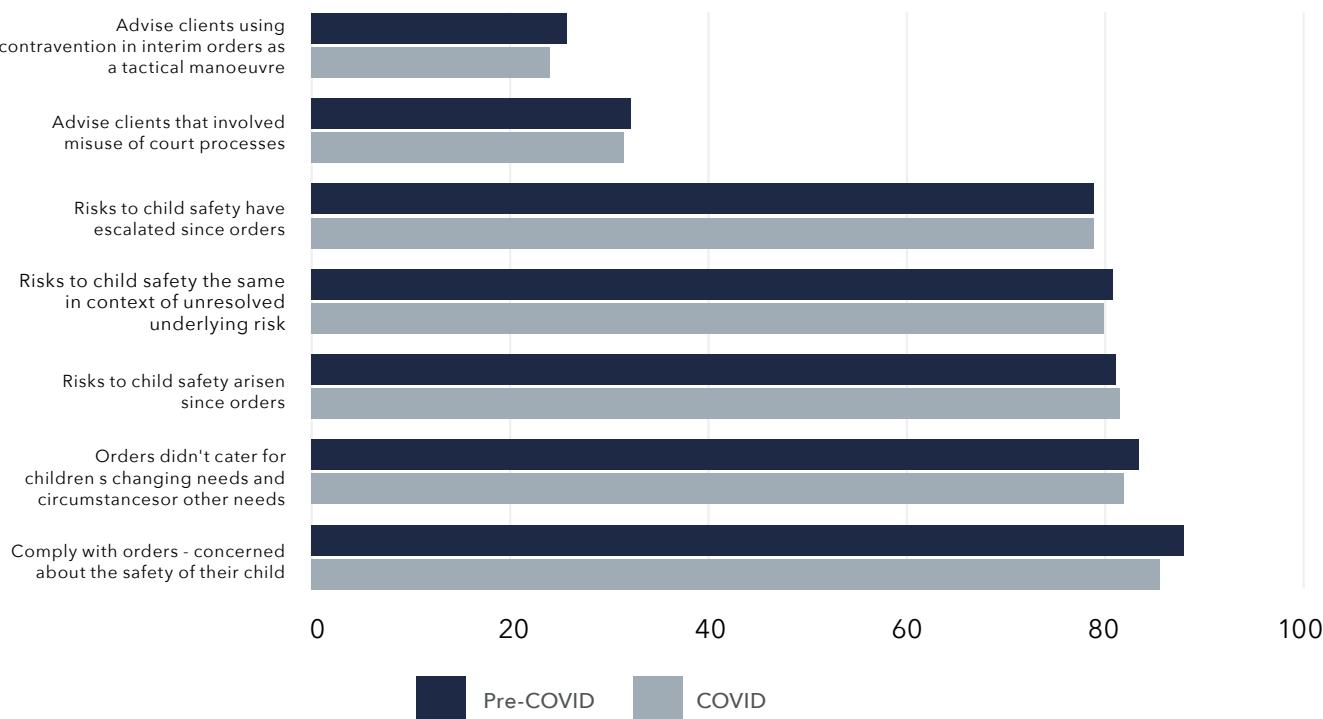
Impact of COVID pandemic on volumes of client enquiries

The survey also asked participants to indicate whether they had observed any impact on clients seeking advice about compliance during the COVID pandemic. Overall, 58 per cent of participants indicated a rise in client enquiries (Table 3). This was particularly marked for legal/court sector professionals (61%), domestic and family violence professionals and professionals working in FRCs and allied services (each 57%). Almost half of FDRPs indicated receiving more enquiries about compliance. Very small proportions (2.7%) indicated receiving less enquiries and just over one quarter overall indicated enquiries had stayed the same.

Characteristics of families where a contravention was alleged

In relation to the enquiries that involved an alleged contravention of parenting orders, participants were asked to indicate the proportion of matters that involved four underlying dynamics: family violence, other safety concerns (e.g. arising from substance abuse), ongoing parental conflict and children with complex health or other needs (Figure 5). Ongoing parental conflict was the most commonly identified dynamic, with 66 per cent of the sample indicating this applied to three quarters or more of their presenting contravention clients. This was followed by family violence, with 46 per cent of the sample indicating this dynamic was relevant to three quarters or more of their contravention clients.

Figure 6: Proportion of professionals reporting "Almost always", "Often", "Sometimes" for nominated client responses or professional advice, by pre-COVID and COVID time period



Other safety concerns were less commonly identified, with 22 per cent of the sample indicating these concerns applied to three quarters or more of the sample. The least commonly identified issue was children with complex health or other needs, with 11 per cent of the sample identifying such issues as relevant to three quarters or more of the sample.

In relation to the predominance of dynamics involving ongoing parental conflict, it should be noted that it is probable that past or ongoing issues with family violence are also associated with these matters, given the profile of families who use lawyers and courts to make parenting arrangements, discussed earlier (Kaspiew et al., 2015, p. 16). Given concerns about uneven practices in screening for and identifying family violence (Kaspiew et al., 2015b), in the context of a tendency among some professionals to focus on conflict rather than family violence (National Domestic and Family Violence Benchbook, n.d, 3.1), it is likely that matters considered to involve ongoing conflict may also involve family violence.

Although professional responses reinforce the dominance of conflict and family violence as relevant to the underlying dynamics associated with contravention matters, they also substantiate the varied circumstances in which contravention matters arise. Although safety concerns and complex health needs among children are not as commonly identified, they are nonetheless an evident issue in some circumstances.

Circumstances in which a contravention was alleged

The survey assessed the circumstances that applied to clients who sought advice in relation to alleged contraventions. Participants were asked to identify the frequency with which seven possible scenarios arose, in the context of pre-COVID and COVID time periods. This series of questions focused on three main issues: safety concerns, changes in children's needs and misuse or tactical use of court processes. Specifically, the responses referred to:

- clients who comply with orders even though they are concerned about the safety of their child
- clients for whom the risks have arisen since the orders were made
- clients for whom the risks to child safety have escalated since the orders were made
- clients for whom risks to child safety have stayed the same since the orders were made in the context of unresolved underlying risk issues
- clients for whom the orders did not adequately cater for children's changing needs and circumstances
- advising/representing clients in contravention matters that involved a misuse of court processes
- advising/representing clients using the contravention application with respect to interim orders as a tactical manoeuvre.

Figure 6 sets out the proportion of participants who indicated that these scenarios applied to their clients “almost always”, “often” or “sometimes” in both the pre-COVID and COVID reference periods. Table B6 in Appendix B sets out the full distribution of responses. It is notable that no statistically significant differences in responses were evident for the two reference periods. Key findings:

- The scenario where clients complied with orders despite being concerned about the safety of their children was the most commonly identified scenario (88% pre-COVID and 85% during COVID).
- The scenario where orders did not cater for children’s changing needs and circumstances was the next most relevant (83% pre-COVID and 82% during COVID).
- In relation to the other risk-related scenarios – newly arisen risks, unresolved underlying risks and escalation in risk – findings were similar for both periods, with these issues being identified by about 80 per cent of participants.
- Substantially smaller proportions of participants indicated advising clients in matters involving a misuse of court processes (about 32%) and in circumstances where contravention applications were being used for tactical reasons in interim matters (about 25%).

Drivers of non-compliance

This section examines the drivers of non-compliance with parenting orders from the perspective of family law system professionals and judicial officers. The discussion first sets out findings from the survey of professionals, followed by insights from the interviews with judicial officers.

In the survey of professionals, views on the drivers of non-compliance were assessed on the basis of questions asking participants to indicate the frequency with which 11 possible underlying dynamics were evident among the clients who sought advice about contraventions. There was also an open-ended response option allowing participants to offer additional reasons for non-compliance. The sequence of questions was asked for two separate reference periods: prior to and after the onset of the COVID-19 pandemic in Australia. As Figure 7 indicates, the 11 response options covered a range of possible reasons, namely:

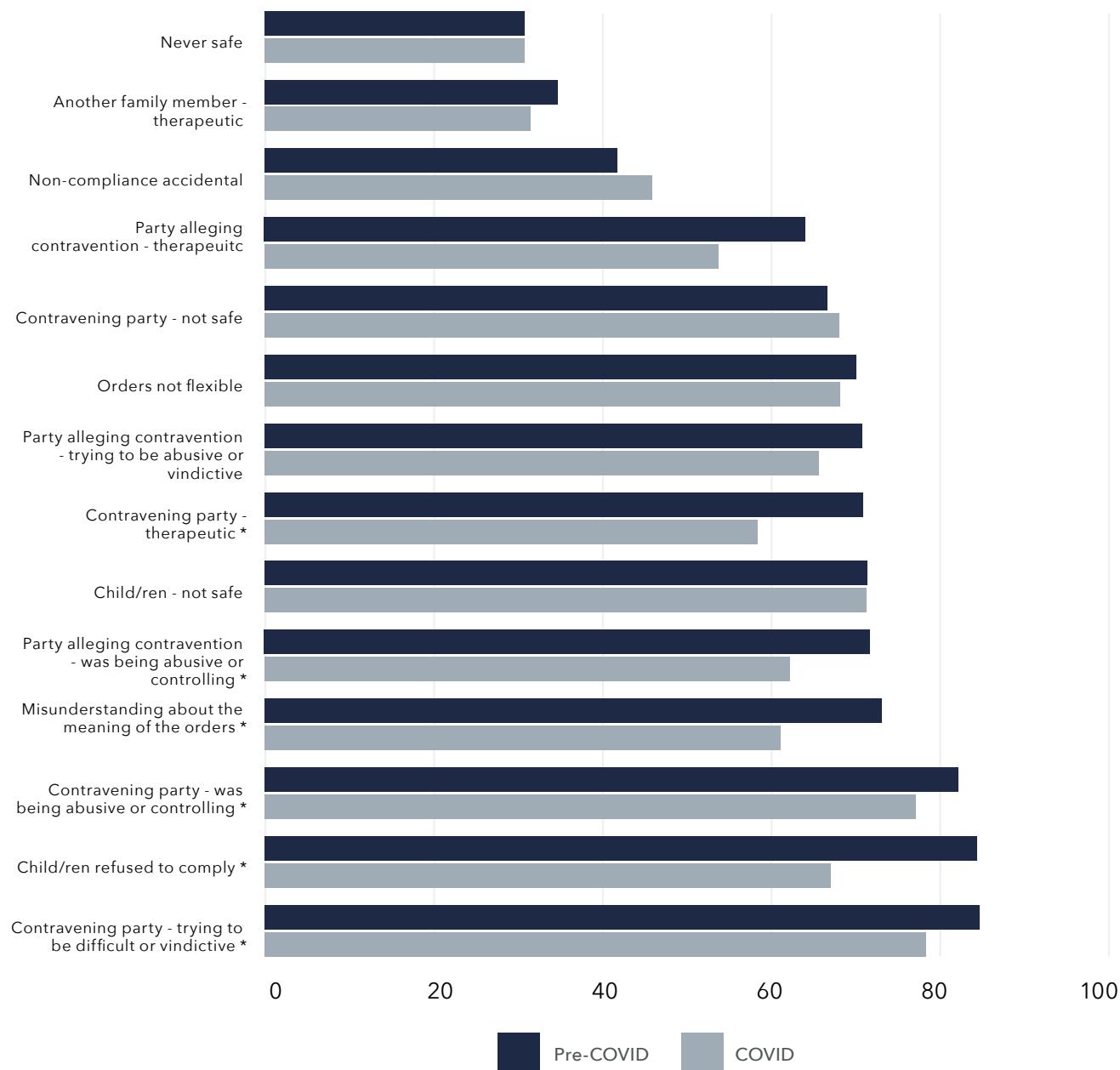
- The non-compliance arose from a misunderstanding of the orders.
- The non-compliance was accidental.
- The child refused to comply.
- The orders were not flexible enough to accommodate changes in the child's activities.
- It was no longer safe for the contravening party to comply with the orders.
- It was no longer safe for the child to be required to comply.
- It was never safe to comply with the orders.
- The contravening party had not received therapeutic assistance with underlying issues.
- Another family member had not received therapeutic assistance with underlying issues.
- The party alleging the contravention was trying to be difficult or vindictive.
- The contravening party was being abusive or controlling.

Figure 7 sets out response patterns in relation to this series of questions for both the pre-COVID and COVID time periods. The bars depict the proportion of responses that fell into the "almost always", "often" or "sometimes" response options. The other response options were "rarely/never", "cannot say" and "not applicable". Tables B1 and B2 in Appendix B set out the full distribution of responses among these options.

The findings support an assessment of the most common drivers of non-compliance with parenting orders from the perspective of professionals and the extent to which there were any differences in this between the two time frames.

- In the pre-COVID period, the three most commonly identified drivers of non-compliance were that the contravening party was trying to be difficult or vindictive, the children refused to comply with the orders, and the contravening party was being abusive or controlling.
- Although these three reasons were identified as occurring almost always, often or sometimes by 80 per cent or more of participants, six other responses were also nominated by close to 70 per cent of participants. These were that it was not safe for the contravening party to comply, the orders were not flexible enough to accommodate changes in the children's activities, the party alleging the contravention was trying to be abusive or vindictive, the contravening party had not received the therapeutic assistance required, it was not safe for the children to be required to comply, and there was a misunderstanding about the meaning of the orders.
- In the COVID reference period, the distribution of responses was broadly similar, with some exceptions. The findings suggest that dynamics concerning safety did not change, with almost identical response patterns to the options concerning the children's orders not being safe for children (70%) and the orders never having been safe (30%). The areas that were seen less as drivers of non-compliance in the COVID period compared to the pre-COVID period to a statistically significant extent were:
 - the contravening party trying to be difficult or vindictive
 - children refusing to comply with the orders
 - the contravening party being abusive and controlling
 - a misunderstanding about the meaning of the orders
 - the party alleging the contravention being abusive or controlling
 - the contravening party not receiving therapeutic assistance.

Figure 7: Proportion of professionals reporting "Almost always", "Often", "Sometimes" to nominated reasons for the contravention of parenting orders, by pre-COVID and COVID time periods



Note: * Indicates difference statistically significant at $p < 0.05$ using McNemar's chi square test.

In considering the varied dynamics underlying non-compliance with parenting orders (since March 2020), it is notable that the two response options that drew the highest proportion of "almost always" and "often" responses were the two that referred to problematic behaviour on the part of the contravening party (See Table B2 in Appendix B). The response option referring to the contravening party being difficult or vindictive was nominated as occurring "almost always" by 10 per cent of participants and "often" by 27 per cent. Patterns for the response option referring to the contravening party as being "abusive or controlling" were similar to this at 10 per cent and 26 per cent respectively.

Participants were less often inclined to assess the difficulties as being with the party alleging the contravention (since March 2020): abusive or controlling behaviour was imputed to this party "almost always" by 7 per cent of participants and "often" by 19 per cent. Similarly, abusive or vindictive behaviour by the party alleging contravention was said to occur "almost always" by 7 per cent and "often" by 19 per cent.

Further analysis of these data in the pre-COVID period according to whether the legal or court professionals had received family violence training or child development training reflected broadly similar patterns to the pre-COVID

Table 4: Most frequently reported advice or assistance provided in response to each issue relating to the contravention of parenting orders, by pre-COVID and COVID time periods

Issue relating to contravention of parenting order	Advice given 12 months prior to the introduction of COVID restrictions in March 2020	Advice given in the period since March 2020 (when COVID restrictions were introduced)
Misunderstanding of the orders	1. Attend mediation/FDR 2. Commence negotiation with the other party or through their lawyer 3. Legal action not cost-effective	1. Attend mediation/FDR 2. Commence negotiation with the other party or through their lawyer 3. Seek legal advice
Accidental non-compliance	1. Legal action not cost-effective 2. Attend mediation/FDR 3. Discussion with other party	1. Attend mediation/FDR 2. Discussion with other party 3. Seek legal advice
Insufficient flexibility to accommodate changes in children's activities	1. Attend mediation/FDR 2. Commence negotiation with other party or through their lawyer 3. Seek legal advice	1. Attend mediation/FDR 2. Seek legal advice 3. Commence negotiation with other party or through their lawyer
Children refusing to comply	1. Attend mediation/FDR 2. Attend counselling 3. Commence negotiation with other party or through their lawyer	1. Attend mediation/FDR 2. Seek legal advice 3. Attend counselling
No longer safe for the contravening party to comply	1. Seek legal advice 2. Commence negotiation with other party or through their lawyer 3. Attend mediation/FDR	1. Seek legal advice 2. Commence negotiation with other party or through their lawyer 3. Attend mediation/FDR
No longer safe for the children to comply	1. Seek legal advice 2. Commence negotiation with other party or through their lawyer 3. Issue legal proceedings	1. Seek legal advice 2. Attend mediation/FDR 3. Commence negotiation with other party or through their lawyer
Never safe to comply	1. Seek legal advice 2. Issue legal proceedings 3. (equal) Commence negotiation with other party or through their lawyer 3. (equal) Attend mediation/FDR	1. Seek legal advice 2. Attend counselling 3. Attend mediation/FDR
The contravening party had not received therapeutic assistance with the underlying issues	1. Attend mediation/FDR 2. Attend counselling 3. Seek legal advice	1. Attend counselling 2. Attend mediation/FDR 3. Seek legal advice
The party alleging the contravention had not received therapeutic assistance with the underlying issues	1. Attend counselling 2. Attend mediation/FDR 3. Seek legal advice	1. Attend counselling 2. Seek legal advice 3. Attend mediation/FDR

Another family member had not received therapeutic assistance with the underlying issues	1. Attend counselling 2. Seek legal advice 3. Attend mediation/FDR	1. Attend counselling 2. Seek legal advice 3. Attend mediation/FDR
Contravening party being difficult or vindictive	1. Attend mediation/FDR 2. Seek legal advice 3. Commence negotiation with other party or through their lawyer	1. Attend mediation/FDR 2. Seek legal advice 3. Commence negotiation with other party or through their lawyer
Party alleging the contravention was trying to be abusive or vindictive	1. Attend mediation/FDR 2. Seek legal advice 3. Attend counselling	1. Attend mediation/FDR 2. Seek legal advice 3. Attend counselling
Contravening party was being abusive or controlling	1. Seek legal advice 2. Attend mediation/FDR 3. Commence negotiation with other party or through their lawyer	1. Seek legal advice 2. Commence negotiation with other party or through their lawyer 3. Attend mediation/FDR
The party alleging the contravention was being abusive or controlling	1. Seek legal advice 2. Attend mediation/FDR 3. Attend counselling	1. Seek legal advice 2. Attend mediation/FDR 3. Attend counselling

data described above, with the most commonly nominated reasons for contraventions being child refusal, the contravening party trying to be difficult or vindictive, or being abusive or controlling (Appendix B; Table B7). It is notable, however, that legal or court professionals who had received training in family violence or child development were more likely than legal or court professionals without this training to nominate reasons including:

- It was no longer safe for the child to comply with the orders (75% legal/court professionals with family violence training and legal/court professionals with child development training cf. 60% without family violence training and 67% without child development training).
- It was no longer safe for the contravening party to comply with the orders (69% legal/court professionals with family violence training and 70% legal/court professionals with child development training cf. 51% without family violence training and 58% without child development training).
- The contravening party had not received therapeutic assistance for the underlying issues (73% legal/court professionals with family violence training and 83% legal/court professionals with child development training cf. 60% without family violence training and 62% without child development training).
- The orders were not flexible enough to accommodate the changes in the child/children's activities (73% legal/court professionals with family violence training and 64% legal/

court professionals with child development training cf. 57% without family violence training and 64% without child development training).

- The party alleging the contravention has not received therapeutic assistance for the underlying issues (62% legal/court professionals with family violence training and 70% legal/court professionals with child development training cf. 51% without family violence training and 54% without child development training).
- The party alleging the contravention was being abusive or controlling (71% legal/court professionals with family violence training and 76% legal/court professionals with child development training cf. 62% without family violence training and 64% without child development training).

Although the proportions were small, substantially more legal and court professionals with family violence training or child development training indicated that it was never safe to comply with the orders as the reason for the contravention (22% and 26% respectively) as compared to those without family violence or child development training (11% and 14% respectively; see Appendix B, Table B7).

Advice provided in relation to non-compliance

The findings reported in this section return to the results from all professionals who participated in the survey. The survey assessed participant advice-giving practices in relation to the scenarios outlined in the preceding section, to shed light on how family law system professionals apply the Part VII Division 13A regime. This section of the survey assessed the extent to which the scenarios are considered to amount to issues that attract the application of the Division 13A regime and the resolution options most frequently suggested to clients. The analysis expands on the findings set out in the section above concerning the proportion of matters where participants assessed that a contravention that a court may uphold may have occurred.

In relation to each of the 11 scenarios considered in the preceding section, 10 response options in relation to the advice the participant provided and the frequency with which it was provided were available. These were:

- advised that the behaviour described did not constitute a breach of the orders
- advised that the contravention was not serious enough to warrant any action
- advised that the contravening party could establish a reasonable excuse
- advised the client that they should discuss the matter with the person contravening the orders
- advised that legal action was unlikely to be a cost-effective approach to addressing the contravention
- recommended that the parties attend counselling
- recommended that the person seek legal advice
- recommended that the parties attend mediation/FDR
- recommended commencing negotiations with the other party or through their lawyer
- recommended that the person issue legal proceedings.

The analysis depicted in Table 4 demonstrates a general pattern where advice-giving practices prioritise legal advice or negotiation mechanisms and mediation/FDR. Counselling was more likely to be recommended where the underlying

issues involved children refusing to comply, there was a therapeutic issue involved or the matter involved abusive or controlling behaviour on the part of the person alleging the contravention. Advice involving legal action, including instigating legal proceedings, was given more in relation to safety issues than other issues.

It is noteworthy that three other possible responses were nominated by some participants but not to an extent that meant they were in the top three for frequency. These were that the behaviour described did not constitute a breach of the orders, that the contravention was not serious enough to warrant action, and that the contravening party could establish a reasonable excuse.

Some differences were evident in advice-giving practice in the COVID period (indicated with bold font in Table 4, based on data reported in Appendix B Tables B3 and B4). Notably, there was greater emphasis on seeking legal advice where orders were misunderstood or children were refusing to comply. It is difficult to be certain about the reasons for these differences; however, it would appear that in the context of these issues arising in the COVID period, legal advice, rather than mediation or counselling, may have been seen as a quicker and more appropriate response.

Drivers of non-compliance: Qualitative insights

The judicial officer interviews and free text questions in the survey of professionals also canvassed views on the factors that lead to non-compliance. Three main themes are evident in the range of responses provided: problematic interpersonal dynamics, concerns about safety issues, and the poor formulation of orders. The insights set out in this section expand understanding of the issues that underlie the patterns in the survey responses described above.

Problematic interpersonal dynamics and personal characteristics

In keeping with the predominance of survey responses relating to behaviour that is abusive or vindictive as underlying contravention applications, judicial officers identified a range of relevant interpersonal dynamics. These included longstanding conflict and mistrust that had not been addressed by the orders, abusive and controlling behaviour on the part of the party alleging the contravention, unwillingness to support the other parent's relationship with the child (usually on the part of the parent with most time) and parents behaving in a way that is not child-focused.

This observation described the array of interpersonal issues that one interview participant associated with contraventions:

[The main underlying causes of parenting orders being contravened are] the personalities of the parties and the underlying conflict. It's a symptom of why they needed court orders in the first place. I mean, really, sensible people, absent family violence, drug abuse, personality disorder, mental health problems, severe irritation with the other person, the other parent, don't need court orders. Hence, contraventions of court orders are related to those same underlying problems ... The intersection of mental health, personality disorder and the emotional upset and grief of the breakdown of an intimate relationship where children are in the middle of it. (JO)

Judicial officers suggested that these are often longstanding issues that were not addressed by the parenting orders or "where the consent order Band-Aids it together on the day, but ... the sore has never really been healed" (JO).

Awareness of contravention applications as a means of perpetuating control was referred to by several judicial officers, including one who explained the dynamics in these terms:

Continuing family violence is one of the factors. I'm convinced that some parties to litigation use contravention proceedings as a way to intimidate or control their former partner and/or their children. These often arise in the context of minor breaches of return of a child at 5:30 or refusal to send a child because the child's sick or unwilling on one side. (JO)

Other interpersonal dynamics driving non-compliance were seen to arise in the context of relationships that were characterised as "high conflict", as in this example:

So, you get the high conflict people who want to fight about anything. So, I didn't get the authority to the doctor when you went to the doctor to take the child to get a cough mixture, you know? Now you've got to tell me, that's equal shared parent responsibility ... Okay, I understand that may be a contravention, but that's a lot different in my view to someone who's just had an order made by a court and within two weeks is not complying with it because they don't like the order of the court. They don't appear, they just don't comply. (JO)

In some instances, this was seen as a reflection of the parents' failure to maintain a child-focused approach, which might be remedied with therapeutic assistance:

I'm sure that there are instances where parents just don't understand that this isn't about them, it's just about the kids, where therapeutic assistance would be good for both of them. (JO)

... it is fair to say that the contraventions, as I said at the beginning, are always representative or illustrative of an underlying problem. And if you can be blunt about it, no contravention application takes place between two people who like each other. They only happen where the emotions are visibly, negatively engaged. So, I would actually like to think that we could have some sort of system whereby some form of counselling might assist them to find better ways to communicate and make the orders work, rather than just coming back into court and sending each other rude messages themselves or through their lawyers. (JO)

Some judicial officers suggested that in circumstances where parents become fixated on "adult issues" that can be readily amplified in the context of separation, a contravention hearing can offer an opportunity for the court to remind them of the impact of this behaviour on their child's wellbeing:

... they're not child-focused ... So, it's this fixation, in that case, a fixation on the parent's issue. And it's not an issue that would usually be valid ... So, it's just unrealistic expectations that aren't even contained in the order. So, when you read the order, there's no reason for them to

have stopped. And when you ask them about why they stopped ... it'll be some incident that has been blown up to be bigger than Ben Hur ... A lot of the time I have to remind them. And I really hammer home that, "What you're doing here is not child focused. What you're doing here is completely about yourselves. And what you're doing is messing up your child's emotional wellbeing." (JO)

In other situations, contraventions were attributed to one or both parents being stubborn and inflexible:

When two adults become conflictual, it's often because of the way they interpret things and look at things or suspect that there's an element of malevolence behind anything raised by their former partner and so they become suspicious and one will become less flexible than the other would like. And sometimes it's not a two-way street and sometimes it is. One might be wanting some flexibility but not prepared to give it a major role, and that seems to be a common occurrence as well. (JO)

In their experience, some participants suggested that the parent with primary care of the children is more often the one who is determinedly non-compliant:

There's a cohort of parents – and I'm loathe to say mothers, but my gut feeling is it's more mothers than fathers – who just determine that they will not obey orders. And frankly, there's not an awful lot you can do with them, because unless you can determine that it's really better off for the child to be living with the other parent, a parent who is determined not to let the other parent spend time with the child will get there eventually. Because they'll brainwash the child to it, eventually. (JO)

However, some judicial officers reflected that there is often a history of mistrust and valid concerns underlying such oppositional behaviour:

Because what you'll find in these sort of cases is mum, and not without reason, thinks dad's a hophead. And she's scared that he'll go on the gear when the child's in his care. The child's only three or four years old. It's a very reasonable concern. But she consented because there was a family report and an ICL that said he's got his act together. But she's never really accepted that. Once

again, as I said, not without cause. And the child will come back cold, and not having been changed properly and things like that. And mum will ask some questions and there'll be a disclosure that dad's had a lot of friends around, and it all seems a bit strange. And she leads to the conclusion he's dealing drugs or something. And down goes time. (JO)

On the other hand, a lack of intention to ever comply with parenting orders was identified in some instances, particularly in situations where a party might have been self-represented. These descriptions convey the way some judicial officers see these dynamics:

I'm talking about where people consciously, and I just had one the other day ... They entered into a range of orders in relation to time with the child, conducted the property hearing, she didn't do very well because she'd lied so much and now we've got a contravention. She never had any intention of complying with the order she entered into. Never. They're the ones I'm talking about, and fathers do it, too, it's not just mothers. Fathers do it, too. (JO)

... there are, rarely, but there are cases where someone just doesn't care what's been ordered. (JO)

The survey of professionals' open text responses included experiences that were consistent with some of the problematic interpersonal dynamics.

One fifth of participating professionals providing an open text response in relation to the causes of non-compliance identified the deliberate disregard for court orders by parties who did not take court orders seriously due to their disrespect for the court process and perceived lack of consequences for their breaches of court orders ($n = 29$; 20%).

Non-compliance can be deliberate in that the client never had any intention of complying but agreeing to orders was the quickest way to resolve the litigation. (Solicitor, female, NSW)

Some participating professionals nominated entrenched parental conflict and acrimony, vindictive parents and personality disorders as causes of this non-compliance ($n = 26$; 18%):

Entrenched parental conflict is a major problem and, in my experience, there is more of a problem on the side of contravening parents rather than those alleging contraventions. There is certainly an underlying element of many contravening parents assuming that there will be no consequences associated with their contravention of the orders. Can lead to a thin end of the wedge issue, where contraventions can escalate over time. (Solicitor, male, Qld)

In my experience, contravention is usually a result of a parent being vindictive and angry. (FDR practitioner, female, Qld)

Ongoing conflict with the other parent who they blame for the breakdown of the relationship. I think parents don't understand how important for the children it is to rebuild a relationship as co-parents and that contravening orders is so damaging to the co-parenting relationship. (FDR practitioner, female, NSW)

Ongoing conflict, coercive power and control, and a lack of child focus and the needs of the child. (Post-order program professional, male, NSW)

Personality disorders – the extent to which matters that end up in the Family Court involve at least one party with a high-conflict personality disorder. There needs to be more funding for identifying and diagnosis within the Family Court system. The lack of appropriate responses to coercive control/family violence where one party fears retribution from the other against themselves or their children. (FDR practitioner, female, Vic)

Personality disorders are prevalent in family law court proceedings, but rarely addressed. Many of the litigated contravention proceedings are due to personality disorders yet still not addressed. (Solicitor, female, Vic)

Insufficient pre- and post-order support for parties ($n = 17$; 12%) and their unresolved underlying issues ($n = 9$; 6%) were described by professionals as causes of non-compliance:

... in my experience, non-compliance occurs when parents are bullied into accepting arrangements that they do not agree with, when orders (usually by consent) have unrealistic expectations, when issues of abuse are not fully

investigated, and when underlying issues regarding the end of the relationship are not addressed or are ignored. (Post-order program professional, female, NSW)

Non-compliance usually arises from unresolved issues between the parents. (Solicitor, male, Tas)

Safety concerns

Seven judicial officers referred to safety concerns as an issue affecting contravention matters during the interview. These issues were said to lead to contraventions because, for example, "the safety concerns were not brought to the court's attention, misunderstood, or ignored, or in some way pushed aside" at trial (JO) or because the trial judge had made a finding that there was no unacceptable risk of sexual abuse, which the mother did not accept (JO). Others identified "safety and family violence" as "a common defence" (JO) that is made in the reasonable excuse context, or raised concerns that the courts are likely to see greater numbers of family violence-related contraventions in the future because of reductions in the availability of legal aid for parents (JO). Almost one fifth of professionals in their survey responses referred to circumstances relating to domestic and family violence and safety concerns in the context of unsafe parenting orders and "justifiable non-compliance" in these circumstances ($n = 28$; 19%).

Two judicial officers identified that non-compliance in some cases stemmed from orders that were inappropriate or unsafe and should not have been made by the court in the first place:

There are times where orders are made by consent and, or, by a judge that are not in children's best interests because the mother may not have spoken up about the violence and the poor behaviour and the fear and all those things because she was frightened, or for other reasons. That does happen, and if the judge who's making the order doesn't know about that, there's not much we can do about it. We're not responsible for that. If people don't tell us, we can't know. They, to me, fall into the category where the orders should never have been made and they're unworkable ... If there were safety concerns that were not brought to the court's attention, misunderstood, or ignored, or in some way pushed aside and so the court didn't take proper cognisance of them, they're unworkable.

The order should never have been made in the first place, they're just wrong. There's a good reason. If there's issues about your child's safety, be it emotional, psychological or physical, well then you shouldn't comply with an order. That's what a protective parent does. (JO)

... given the financial constraints on ... Legal Aid, who can now only appoint independent children's lawyers where there are allegations of violence ... which means that there is less assistance for parties in formulating resolutions or addressing the court. So, we've got less skills at the Bar table, I think you're going to have more problems with compliance because what judges tend to do is get people to settle on something. It might be unworkable but at least if they get rid of it for the day, they don't have to do a decision, it's considered a win. And I think we're going to get unsatisfactory, unprincipled agreements and that leads to contraventions. (JO)

Systems abuse

Concern about the legal system being used to perpetuate a family violence dynamic or to perpetuate litigation was raised by eight judicial officers and 31 professionals in open-ended text responses. These descriptions included repeated non-compliance and vexatious litigants using the system to continue to perpetrate abuse, as well as inappropriate responses by the court to domestic and family violence and coercive control and prevailing power imbalances ($n=31$; 21%).

Continuing family violence is one of the factors. I'm convinced that some parties to litigation use contravention proceedings as a way to intimidate or control their former partner and/or their children. (JO)

Post-separation legal systems abuse is common in the Australian family law system. Perpetrators of violence are supported by the legal system to continue their abusive behaviours on their victims (ex-partner and child/ren) under the guise of parenting. Legal system professionals need to receive mandatory education on domestic and family violence. (Domestic and family violence professional, female, Qld)

Poorly formulated orders

Problems with the orders themselves, either because these were poorly drafted in a technical sense or were more substantively problematic in the nature of the arrangements they provided for, were also discussed by judicial interviewees. In this context, a range of issues, in addition to poor drafting, were seen to give rise to problems, including orders made by consent.

In terms of orders being unworkable in substantive terms, the following quotations illustrate how this can arise:

And so some of the orders prepared by lawyers and/or litigants in person, but certainly the ones in person, are often just unenforceable. They just say things there that a judge thinking about it at all wouldn't have probably made the order. (JO)

... sometimes the orders are simply unworkable, particularly orders where parties might've come to their own agreement. Someone's trying to enforce an order that's five years old and the child's now 13. What was suitable for them at eight is not suitable for them at 13, it just isn't going to work ... There's been a significant change in parents' needs. Other marriages, relationships, they've lost their job, their home; parents' circumstances significantly change. (JO)

Other examples of unworkable orders included orders that involved equal time arrangements for toddlers, pick-up arrangements that conflicted with a parent's availability and travel arrangements that were not practicable. They included both orders drafted by unrepresented parties as well as orders drafted or made by the court:

Well, they have equal time arrangements for two year olds. Rubbish. They have an order that only the father can pick the children up from school at 3 o'clock and he's got a job where he works 'til 5, and the mother won't let the grandparents pick the child up, or his new partner, or someone else. They provide that the children [are] with their mother five days a week and with their father every weekend, so their mother and the children never get a weekend together. The distance that the children are required to travel is just impossible ... an order

[provided] that a child was to travel to [different state], a young child, eight-year-old child, every second weekend to spend time with their father... often that's the bulk of them, the consent orders that are unworkable. But there are orders that judges make which are just outrageous. That happens. (JO)

Some judicial officers identified poor drafting of court-endorsed orders as a source of contraventions:

I've come to the view that a lot of them [contravention applications] stem from bad initial orders. Badly worded, badly – outside of jurisdiction ... in Australia the majority of parenting orders are made by consent. That is, that they are people who use the consent process, it used to be in the Magistrates' Court or courts of summary jurisdiction, often, certainly in the Family and Federal Circuit Court where they can file a consent order. And these are often prepared by unrepresented litigants, just Mum and Dad getting together and putting some words on a bit of paper, or with lawyers who have helped to resolve the matter. So the majority of contraventions, the majority I can say with confidence, run from consent orders. (JO)

Orders of this nature were identified as being prone to misunderstanding and consequently non-compliance. For example:

I think, at times, there is genuine confusion amongst the parents themselves as to what the orders mean, or that the parents are working across purposes to what the orders say, and they take different interpretations of it. So, I think that is one, where they really do have a disagreement or a misunderstanding about what the court orders actually mean. (JO)

I mean, so many over the years, but you get a badly worded order that involves things that are really important like when do Christmas holidays start, or when do holidays start? And now we've got more schools with pupil-free days, or private schools that finish on a Wednesday, and well, I want half the holidays. Oh yes, it says gazetted holidays, this is the public – so parents who want to find a conflict will find one. And so our aim is to say, "Well look, we want to try and – rather than deal with the contravention can you try and find a solution here?" (JO)

As observed by the last quoted judicial officer, when making parenting orders for parties who do not have a cooperative post-separation relationship, tightly drafted orders that attempt to cater for an infinite variety of circumstances may be favoured ahead of those that allow for reasonable flexibility. However, the following judge points out that long and complex orders can be difficult to follow or impractical to implement and can sometimes lead to non-compliance:

Occasionally you see orders where without goodwill and cooperation, there is an ambiguity, which then will rarely be consistently interpreted. It will be opportunistically interpreted. There's then a tension, inevitable tension between having tightly, well-drafted orders that cater for an infinite variety of future developments relating to children, there's a tension between that, and a tension between workable orders. Because to have those tightly drawn orders, they'll go for many pages. Parties are driving along in the car, particularly in the day and age of who has a paper copy of their orders anyway. They're on a phone, they're on an email somewhere. And who has the intellectual capacity to memorise the orders. So, the longer they are, the more difficult they are to remember and follow, the shorter they are, and easier to follow, the more they require sensible cooperation and give and take. And there's an inherent contradiction between, I want sensible give and take in my orders, but I need orders. (JO)

In the Survey of Professionals, practical difficulties with implementing the orders were also identified as causes of non-compliance ($n = 7; 5\%$), as was the potential for parties to misunderstand their orders ($n = 7; 5\%$) or situations where orders were unworkable or poorly drafted ($n = 16; 11\%$):

Often parents agree to orders that are subsequently (or even at the time) unworkable because of difficulty and cost (financial and emotional) of court proceedings. So, perhaps, more exploration with parents of how the orders can work and how to deal with any difficulties. (FDR practitioner, female, WA)

The amount of disputes regarding compliance of orders that stem from orders being poorly drafted is staggering. Sometimes they are so complex and allow for so many different circumstances and exceptions that the parties are guaranteed to have interpretation and thus compliance disputes. Sometimes they are so devoid of necessary

detail that constant issues are bound to arise, and likely result in further litigation. Lawyers and judges need to have the specific individuals and conflict before them in mind when deciding how to draft orders (i.e. some parties need immensely prescriptive orders, for others, sweeping simple orders are best). Spending more time to ensure clarity and consideration at the drafting stage can save literally years of litigation down the track. (Solicitor, female, state/territory not disclosed)

Judges complain about poorly written orders but do not change them or write new orders that are complained about subsequently. (Post-order program professional, male, Vic)

Poorly drafted orders, significant changes in circumstances, time, new partners, new siblings, new jobs, the vicissitudes of life and the never-ending changes we all go through. (Judicial officer, NSW)

Other causes nominated by professionals included adolescent children who for various reasons have chosen to reduce or discontinue contact with the other parent ($n = 7$; 5%) or that the orders were not sufficiently child-focused or accommodating of their views in the first place ($n = 13$; 9%).

Court orders need to be more future-focused and provide options for parents, particularly as their child(ren) age but also provide regular opportunities for them to amend agreements and facilitate better communication. The way the system is set up, most court orders are not fit for their purpose within five years of being made. (FDR practitioner, female, NSW)

[The] cost of time and travel – children playing sport – having a life with their friends and school mates – puts pressure on them not to be away for the weekend. (FDR practitioner, female, Vic)

Systemic issues such as the costs and delays associated with engaging in the court process were also identified by professionals providing an open text response on the question of the causes of non-compliance ($n = 15$; 10%).

Summary

This section has examined how contravention matters feature in the caseloads of family law system professionals, including the frequency and nature of enquiries about contraventions, the circumstances in which they arise and the advice provided to clients about their options in responding to non-compliance. Overall, the findings demonstrate that non-compliance arises in a varied range of circumstances, including difficult behaviour (including perverse or controlling behaviour) on the part of parents, safety concerns and children refusing to comply with orders. Advice-giving practice prioritises FDR, counselling or lawyer-led negotiation rather than court action, although court action is commonly advised for safety concerns.

Client enquiries about contraventions are not uncommon. Where enquiries are made, they not infrequently involve situations that a professional assessment indicates amounts to a contravention under the legislative regime. More than half the professionals surveyed indicated that enquiries about contraventions increased during the COVID-19 pandemic.

The surveyed professionals report that the two most common sets of characteristics identified among clients who seek advice about contraventions involve ongoing parental conflict (66% indicating this applies to three quarters or more of clients) and family violence (46% indicating this applies to three quarters or more; see Figure 5). Less commonly identified are other safety concerns (22% indicating three quarters or more). Situations involving children with complex health or other needs are least commonly identified, with 11 per cent saying this was relevant to three quarters or more of client enquiries. These findings demonstrate the varied range of situations underpinning advice-seeking about contravention matters.

In relation to a more specific set of questions about the circumstances of clients who are seeking advice, professionals indicated that issues related to risk and changes to children's needs or circumstances were more common than issues relating to tactical use or misuse of litigation. However, the qualitative data from judicial officers and open-ended text responses from professionals place significant emphasis on the misuse of litigation and the impact that this can have on

families, indicating this issue raises some serious concerns. Circumstances in which orders were complied with despite concerns about risk, or where risks had escalated or risen newly, were identified as relevant by majorities of professionals. Similarly, 82 per cent of professionals indicated seeing clients where orders did not cater to children's needs pre-COVID, as did 82 per cent during COVID (Figure 6).

In contrast, circumstances involving misuse of court processes were identified as relevant by only three in ten surveyed professionals, with fewer (close to one-quarter) identifying tactical use of contraventions applications in interim proceedings as occurring almost always, often or sometimes.

The survey also examined participants' views on the drivers of non-compliance based on 14 possible drivers that ranged from accidental non-compliance to non-compliance based on safety concerns, or abusive or vindictive behaviour. Non-compliance based on abusive or vindictive behaviour and child-led non-compliance were most commonly nominated (Figure 7). It is also notable that for each of the possible options, more than 50 per cent of the sample indicated they happened almost always, often or sometimes. There were only three options that were nominated to a lesser extent: accidental non-compliance (45%), another family member had not received therapeutic assistance (31%), and/or it had never been safe to comply with the orders (30%). There were limited differences in responses pertaining to the COVID and non-COVID time frames, with less emphasis on child-led non-compliance and abusive or vindictive non-compliance in the COVID period.

Consistent with the survey responses, the insights from judicial officer interviews and professionals' open-ended survey responses placed the focus on difficult or abusive behaviour as a driver of non-compliance in several different ways. These data suggest that contraventions reflect a range of features, including a lack of child focus and mistrust among parents determined to perpetuate conflict, abusive and controlling behaviour on the part of the party alleging contravention, and perverse behaviour on the part of non-complying parents. As with the survey responses, some judicial officers and survey participants also highlighted concerns about safety and family violence, acknowledging

that due to systemic issues, including a lack of resources, non-compliance arose in relation to orders that should possibly never have been made in the first place. Judicial officers and survey participants also spoke of orders that were poorly formulated either for technical or substantive reasons. In the first category were orders that were poorly worded and confusing or ambiguous and in the second were orders that did not fit the circumstances of the child, either from the outset or through the passage of time.

Overall, the advice that participants indicated giving to clients in relation to non-compliance varied according to the underlying problem identified. However, advice that prioritised lawyer-led negotiation, FDR or counselling was generally given more frequently than advice that would lead to legal action being instigated. It was not uncommon for participants to provide advice indicating that legal action would not be cost-effective. The exception to this was in relation to circumstances involving safety concerns, with this being the only scenario where issuing legal proceedings was one of the top three forms of advice given. Where non-compliance arose from changes in children's circumstances or children refusing to comply, the advice given prioritised FDR, counselling and, to a lesser extent, obtaining legal advice or commencing lawyer-led negotiation.

Effectiveness and improvement

This section sets out findings on professionals' views of the effectiveness of the system and how it could be improved. It commences by describing findings based on an overall assessment of effectiveness, followed by evaluations of the effectiveness of particular aspects of the system. It then sets out professionals' perspectives on how the system could be improved. Quantitative insights from the survey data are supplemented by qualitative insights derived from the judicial interviews and the survey open-ended text boxes. As noted earlier, these data were collected prior to the restructure of the FCoA and the FCCoA into the FCFCoA (see further below).

Overall assessments of effectiveness

Survey participants were asked to provide a global assessment of the effectiveness of the enforcement/compliance regime through two questions. The first question asked them to indicate their level of agreement with the statement that "the enforcement regime is effective in encouraging compliance with parenting orders." The second question asked them to indicate their level of agreement with the statement that "the enforcement/compliance regime is effective in discouraging non-compliance with parenting orders."

Analysis of the responses to both questions indicates that the majority of respondents do not consider the compliance/enforcement regime is effective in either of these respects. Mean scores of responses to the first statement totalled 2.25, on a scale of 1–5 with 1 denoting strongly disagree and 5 strongly agree. Mean scores in response to the second statement were only slightly higher at 2.37.

Figure 8 shows respondents most frequently disagreed with the statement in relation to effectively discouraging non-compliance, with almost one third (32%) disagreeing and almost one quarter (24%) strongly disagreeing. Neutral responses stood at 24 per cent. Only 14 per cent indicated positive agreement that the regime discourages non-compliance (11% "agree" cf. 3% "strongly agree").

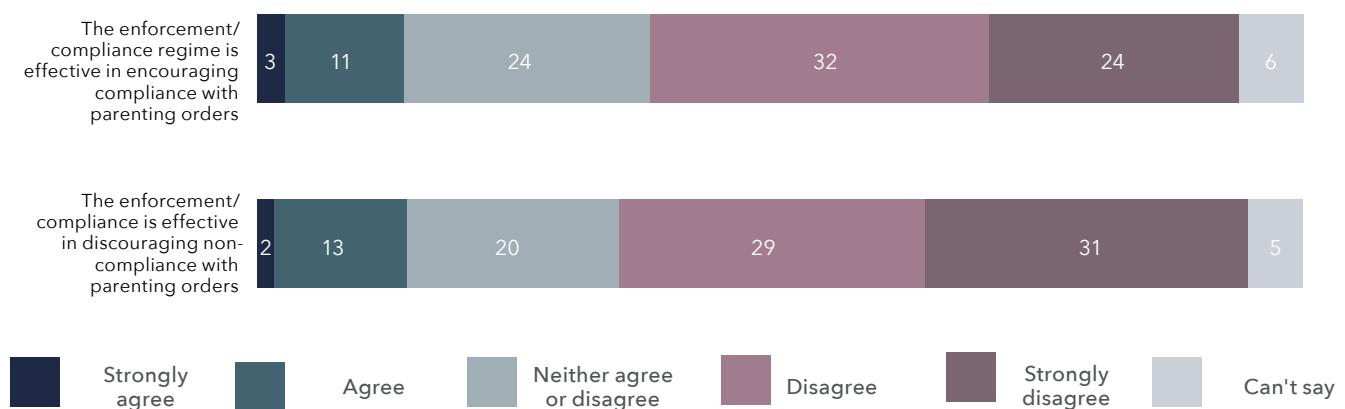
Most respondents also disagreed with the statement in relation to effectively encouraging compliance, with 29 per cent selecting disagree and 31 per cent strongly disagree. Neutral responses (neither agree nor disagree) were offered by 20 per cent. Positive responses were least frequent and clustered in the "agree" category rather than the "strongly disagree" category (13% cf. 2%).

Which aspects of the regime are seen as effective?

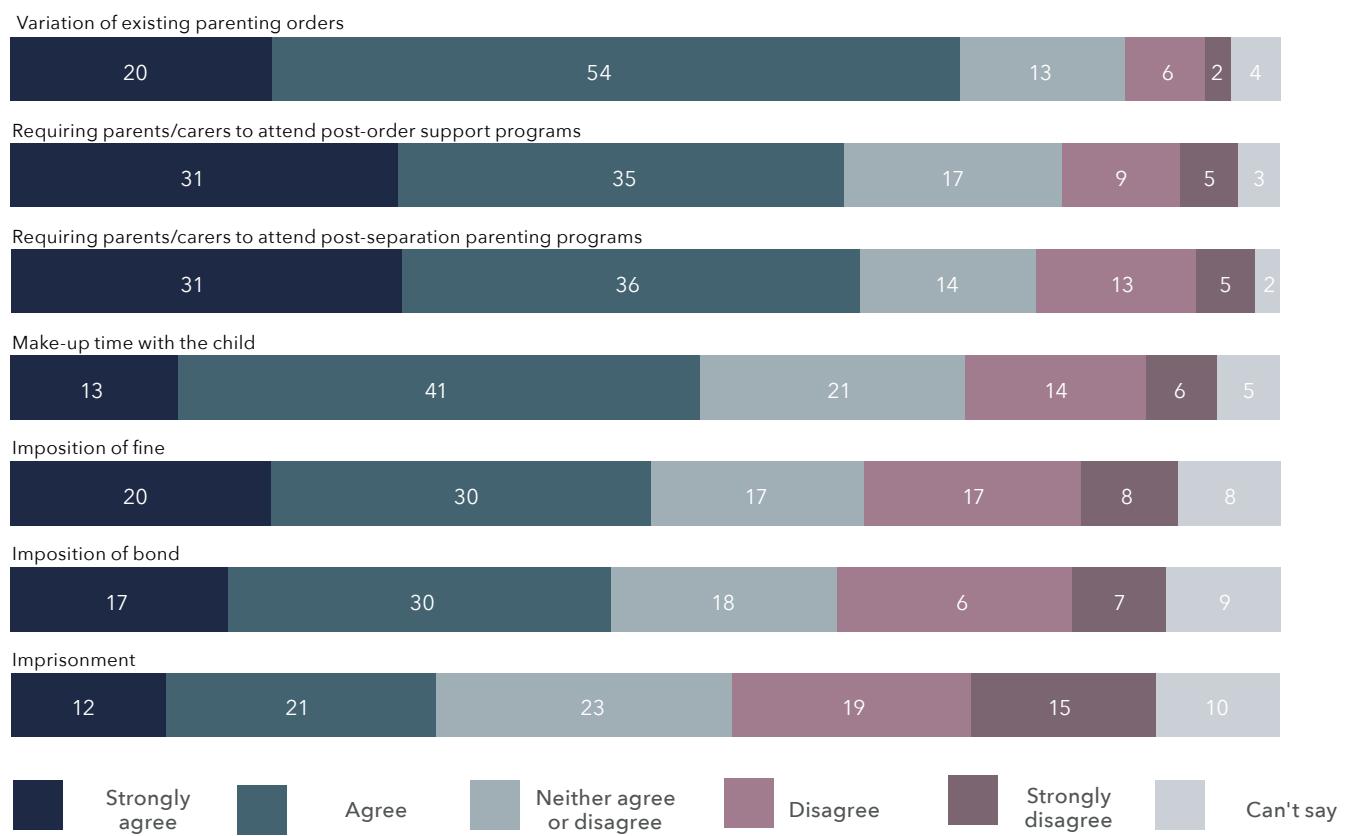
This section examines views of professionals on different options available for responding to contraventions to provide further insight into the aspects of the regime that are seen as more or less effective. Survey participants were asked to indicate the extent to which they considered seven options were "sufficient and appropriate" responses. These options were:

- variation of existing parenting orders
- requiring parents/carers to attend post-order support programs
- requiring parents/carers to attend post-separation parenting programs
- ordering make-up time with the child
- imposing a fine
- imposing a bond
- imprisonment.

Figure 9 demonstrates that the option of varying the existing parenting orders drew most support, with the majority of the sample either strongly agreeing (21%) or agreeing (54%) that option was appropriate and sufficient. Majorities also endorsed post-order parenting programs and post-separation parenting programs (more than two thirds each, with strong agreement by about 30%). Although there was still majority support for make-up time with the child, this was endorsed less strongly than the other options, with only 13 per cent in strong agreement and 41 per cent in agreement.

Figure 8: Views on the effectiveness of current enforcement and compliance regime

Note: Sample size $n = 307$ for the first question; $n = 306$ for the second question.

Figure 9: Agreement/disagreement that current options for addressing contraventions are sufficient and appropriate

Note: Sample sizes across the items: $n = 296$ – 302 .

The punitive options in response to contravention drew lower levels of endorsement. Although fines were endorsed by half the sample, one quarter of the sample disagreed they were appropriate and sufficient. Similarly, the imposition of a bond was endorsed by less than half (47%) and disagreed with by more than one quarter (26%). Responses to the option of imprisonment were varied with similar proportions in the positive and negative responses categories (34% agreeing and 33% disagreeing). This option also drew the strongest neutral (23% neither agree or disagree) and uncertain (10% can't say) responses.

Judicial officer views

The judicial officer interviews also canvassed views on whether the contravention regime had a deterrent effect and whether options for responding to contraventions were appropriate and sufficient. Despite the earlier discussion about the important symbolic function of the contravention regime, there were a number of factors seen to undermine its capacity to deter contravention. Response options that dealt sensitively with family dynamics and children's needs were generally viewed more favourably than punitive responses.

Penalties and deterrence

The judicial interviews were another source of insight into whether the contravention regime had a deterrent effect. Notably, some participants indicated their insight on this question was limited because they only saw the matters that came before them in court, rather than having a wider exposure. Otherwise, views on this point were varied. Among the points raised were that the contravention regime was not applied extensively enough to have a deterrent effect.

The fear of prison, and – I mean, find a person who's ever known another person who's ever been charged. So how could they be scared by it? It's completely abstract. (JO)

A related point concerned the fact that penalties for contravention do not address the drivers of non-compliance, including orders that weren't workable in practice, so the influence of the contravention regime on behaviour related to compliance was limited.

Most contraventions arise for broader reasons, and people don't think about penalties when they don't comply because I suspect that penalties are fairly rare. (JO)

Another participant suggested that in some circumstances, non-compliance arose from perverse and irrational behaviour meaning that deterrence was irrelevant.

What I would say is that there is a very small cohort of cases where it would seem that almost no penalty is going to make any difference. (JO)

Response options: Appropriate and sufficient?

Judges were also asked to consider whether the options for addressing contraventions were appropriate and sufficient. Responses raised four related themes in connection with the available options.

First, there was discussion of the tension between applying a child-focused approach and applying the penalties in the contravention regime. For this reason, responses such as varying the orders or making orders for make-up time were seen by some judicial officers as preferable to more punitive responses where possible.

... you can order make-up time, which I find is really effective if it's just one of those cases where somebody has been silly and been behaving badly. (JO)

However, other judicial officers expressed reservations about the impact of make-up time on children, as this participant explained:

Make-up time is usually helpful from an adult's perspective but isn't really good for a child to be spending all this extra time and breaking their routine. So that's usually something that I grapple with a bit. (JO)

In relation to punitive responses, such as fines and imprisonment, some participants raised concern about the adverse consequences of these options for children. Fines were seen as diminishing the financial resources available to the child and imprisonment was seen as detrimental to children as a result of its negative impact on parents.

I think in [15+] years I don't think I've fined anyone. I've

stopped parents seeing children. I've changed parenting arrangements. In some rare occasions I've made costs orders, but I've never imposed a penalty because that just takes money from the child. (JO)

Otherwise, if we're talking about fines or imprisonment, that's just another way of driving a phenomenal wedge between the child and the other parent. (JO)

Imprisoning a primary carer of a child, I'd struggle with that one because I certainly don't want to bring upon the children, the hurt and the harm of their parents' poor behaviour. (JO)

There was also concern that invoking the contravention regime had the potential to exacerbate the conflict between the parents with adverse consequences for the children.

Once you start down the contravention path, it's really hard to get people back out of it, in the sense that they suddenly become opponents, instead of people who should be working together. (JO)

At the same time, there was acknowledgement that the more punitive options – seen as options of last resort – may have to be applied in rare cases where contraventions were particularly egregious.

I've never actually put anyone in prison, I've had a couple of suspended sentences. And I know some judges might be seen to be tougher on that, and maybe I'm a bit soft on them, maybe that's that underlying sort of best interest of child argument, and what effect there's going to be on the child if you put Mum into prison. But I think there are cases where it should be appropriate ... Bonds are a good effective way of trying to get the message through, but you've to remember if someone's not – if someone is just not going to comply ... once or twice, then you've got to look at other remedies. You've got to say well, is this important enough to remove a child from that parent, or is there some other variation in the order required? (JO)

Views on factors that discourage parents from taking action in relation to compliance

In order to assess professionals' views on the factors that potentially deter parents from taking action in relation to non-compliance with parenting orders, participants in the survey were asked to indicate agreement or disagreement with nine factors that could operate in this way. They were:

- the financial cost associated with the legal proceedings
- the level of complexity associated with the legal proceedings
- fear of the other party
- uncertainty about the potential outcome
- concern about the potential outcome on themselves
- concern about the impact of the potential outcome on the child/ren
- concern about the impact of action in relation to non-compliance on the other party
- reluctance to engage with a court process again
- COVID-19 related circumstances.

The top four factors seen as impediments to clients taking action in response to non-compliance are connected to the legal character of proceedings. The factor most strongly recognised as an impediment was the cost of legal proceedings, with 96 per cent of the sample (including 75% strongly agreeing) endorsing this response. Reluctance to engage with a court process again also drew strong endorsement (94%). A strong majority (88% including 56% strongly agree) also agreed that the level of complexity associated with the legal proceedings deterred action. Finally, 84 per cent indicated that uncertainty about the potential outcome is an impediment. Close to eight in ten participants also endorsed three other factors as frequently of concern for clients:

- fear of the other party (80% including 45% strongly agreeing)
- concern about the impact of the potential outcome on the child/ren (82% including 39% strongly agree)
- concern about the impact of the potential outcome on themselves (78% including 37% strongly agree).

Figure 10: Agreement/disagreement that the nominated factors are significant in discouraging clients from taking action in relation to compliance

Financial cost associated with the legal proceedings



Reluctance to engage with a court process again



Level of complexity associated with the legal proceedings



Uncertainty about the potential outcome



Fear of other party



Concern about the impact of the potential outcome on the child/children



Concern about the impact of the potential outcome on themselves



Concern about the impact of the potential outcome on the other party



COVID-related circumstances



Note: Sample sizes across the items: $n = 298\text{--}306$.

The largest groups of responses to the two other options fell into the “neither agree nor disagree” category (close to 40%), although disagreement with these responses was also greater for these options than any other. In relation to concern about the impact of action in relation to non-compliance on the other party, one third disagreed. Similarly, in relation to COVID-related circumstances, one third disagreed.

Qualitative insights: Open-ended text responses

The open-ended text responses from the survey of professionals provide further insight into the features of the contravention regime that deter parties from taking action in relation to non-compliance. Factors nominated by professionals in these extended responses ranged from the perceived ineffectiveness of the existing contravention regime and the costs, delays

and complexities associated with contravention proceedings, through to hesitancy on the part of parties to return to court and the uncertainty associated with the potential outcomes in contravention proceedings.

An ineffective regime

Almost half of the professionals providing an open text response about features of the contravention regime that deter parties from taking action in relation to non-compliance described the contravention regime as ineffective as a means of combatting non-compliance and nominated the inadequate penalties and lack of consequences as a key factor ($n = 96$; 49%). For these participants, contravention applications were identified as ineffectual or not worth the effort:

It is weak and the consequences of being found guilty are generally less than [a] “slap on the wrist”. (Solicitor, female, state/territory not disclosed)

The end result of contravention/enforcements procedures ensure that the exercise is redundant. Parents return to court to have orders upheld only for them to be breached immediately. (FDR practitioner, male, Vic)

The outcome is unlikely to be satisfactory to the applicant. The process takes an inordinate amount of time. The process is ineffective, as there is usually only a “smack on the wrist” if that, in response to a contravention. (Solicitor, female, WA)

Courts are not proactive in enforcing orders. Clear breaches are disregarded. (Solicitor, female, Vic)

Contravention applications are known by family lawyers as being “toothless tigers”. (Solicitor, female, NSW)

Even if the other party is found to have contravened, there are not really any consequences ... They have to breach many times before the orders will be changed, and even then it is unlikely they will be fined or otherwise punished. (Solicitor, female, Vic)

Almost one quarter of professionals described a lack of judicial willingness to enforce orders and to issue penalties as factors that deterred parties from issuing proceedings for non-compliance ($n = 46$; 23%):

In my experience judges are resistant to hearing contravention applications. They prefer to reopen the case. I’m guessing it’s because they would have to apply the Briginshaw test¹¹ after a formal contravention hearing. (Solicitor, male, Qld)

Too many judicial officers put off hearing contraventions and their utility decreases with delay. (Judicial officer, NSW)

Judges often strongly discourage litigants from pursuing enforcement proceedings. I have seen this encourage recalcitrant litigants to continue breaching orders. (Solicitor, undisclosed, Vic)

The significant delay in having matters go before a judge and my observed tendency for judges being reluctant to actually make a decision on contravention applications.

In my experience, matters often get adjourned for no discernible reason while parties (often both parties) are desperate for someone with authority to determine what should happen about a compliance issue. (Solicitor, female, Vic)

The judges don’t have the time or inclination to hear them, so the delays go on for over a year usually. Each appearance costs money. More importantly, it doesn’t solve the problem. Say a child is refusing to go, you are better off getting interim orders for family therapy than trying to enforce the current orders. (Solicitor, male, Qld)

As foreshadowed in the open text response directly above, some professionals reflected on the adversarial nature of contravention proceedings and limitations in relation to resolving underlying issues ($n = 12$; 6%) including parent/child estrangement ($n = 4$; 2%) as deterrents in this context:

Court is adversarial. Families need education, support and therapy for best outcomes. (FDR practitioner, female, NSW)

It is a cumbersome ill-informed approach to deal with complex relationship issues and coercion is not a tool we should use in parenting matters. It is very different for property matters. (Judicial officer, NSW)

Costs and delays associated with proceedings

Consistent with the quantitative survey data, a substantial proportion (almost half) of the professionals providing an open text response on this issue also identified the costs associated with undertaking contravention proceedings as a deterrent to taking action in relation to compliance ($n = 95$; 48%). More than one third of professionals providing an open text response indicated that the length of time and delays associated with these proceedings was also a deterrent ($n = 76$; 39%):

The cost, time and what some see as a pointless waste of time as they see the court has no real power or chooses not to use its power to enforce the compliance by the contravening party. The cost of going to court to try and get compliance is again a cost the person suffering from the contravention has to pay and without a guarantee that their orders will be enforced without opening up the whole

¹¹ *Briginshaw v Briginshaw* (1938) 60 CLR 336; Evidence Act 1995 (Cth) s 140: set out the civil standard of proof, the balance of probabilities.

process again. They are unwilling to take the financial, physical and mental health risk. (Solicitor, female, NSW)

Contravention applications are cost prohibitive for most of my clients, especially in circumstances where the other party will receive only a “slap over the wrist” even where contraventions are flagrant and ongoing. Contravention applications made in the midst of ongoing litigation only serve to delay the matter further in a system where the delays are already inordinate. (Solicitor, female, Vic)

The time it takes and legal costs are huge detractors. (Solicitor, female, Qld)

The process is too slow, and often by the time the court gets around to doing anything the passage of time has made it pointless – children have become stable in the other household and it is not in their interests to be moved again. Non-complying parents often know this and take advantage of it. It is ridiculous that if you file a contravention on the first return, after waiting weeks or longer you end up before a registrar who has no power other than to yell at the non-complying parent. Then the matter is adjourned for many more weeks (at least) before you end up, if you are lucky, before a judge. I don’t ever give advice to even bother filing contravention applications, even for flagrant non-compliance, because it is such a waste of time. It is better to simply refile a new initiating application or application in a case seeking changed orders and, if necessary, a recovery order and costs. (Solicitor, male, Qld)

Complexity of the contravention regime

The technical requirements associated with issuing contravention applications and the burden and standard of proof applicable in contravention proceedings were identified by just over one third of professionals providing an open text response to this question ($n = 66$; 34%). These issues were also highlighted by judicial officers. For these participants, contravention applications and proceedings were described as cumbersome, confusing and prone to error, particularly for unrepresented litigants, with the formalities and evidence required deterring parties from taking action in relation to compliance:

The application process is particularly and unnecessarily

technical with pleadings in the application required to be very specific. Many applications made by unrepresented litigants are struck out for failing to comply and/or not meeting the technical requirements to find a breach. (Solicitor, female, Vic)

This point was also highlighted by judicial officers in interviews, who suggested that “because of the cumbersome nature of contraventions, and the expense involved, there is a systematic impediment to people bringing contravention applications” (JO). This includes the difficulties faced by self-represented litigants in “meeting the formal requirements for a contravention application” (JO), with one judicial officer noting that “the technicalities of filing a competent contravention application tend to defeat them” (JO). As this judicial officer said, the consequence of this circumstance is that the application is often “so poorly crafted that you have to strike it out” (JO). Another judicial officer noted as follows:

Contravention because it’s quasi-criminal is a very formal process, and it requires admissible evidence; they don’t understand what “admissible evidence” is. It’s conducted in a very formal way, because there are penalties which can be applied, in the event that a contravention is found to have occurred, and that process is very difficult for unrepresented people to understand. But usually, the problem is in the actual application. And in most cases, with self-represented litigants, the application is dismissed at the stage of finding there is no *prima facie* case, because they don’t know how to formulate the application and to formulate the charges. So very often, when you get an application for a contravention drafted by a self-represented litigant, you can’t actually formulate a charge. (JO)

Judicial officers also noted the difficulties self-represented litigants face in prosecuting and defending contravention applications in court, because of the level of formality demanded by their quasi-criminal nature:

If you have self-represented litigants who have little experience in the court system, they might struggle to prosecute a case which is quite a valid case. And I’m sure I’ve seen times where I felt that I needed to step in more than I probably should because there is a real issue that’s not going to be able to be dealt with because they didn’t have the skills to prosecute a case and, likewise, even to

defend a case. If a parent has real concerns for the wellbeing of the child, they're not always able to articulate that to the standard required. (JO)

A lot of our litigants in [registry 4] are self-represented. And the technicalities of filing a competent contravention application tend to defeat them ... And indeed where parties are self-represented, and a disproportionate, perhaps, percentage of contraventions will involve self-represented parties, the difficulty is often that the contravention is so poorly crafted that you have to strike

it out. Because you're dealing with what is sometimes described as quasi-criminal proceedings. (JO)

The nature of contraventions are almost [a quasi] like criminal proceeding. So if someone's wanting to enforce an order it will normally run for a day and both parties probably need to be legally represented. If they're not, then a valid claim may not succeed because of some technical fault. And each of the parties have to spend significant monies in relation to it. (JO)

Hesitancy in relation to returning to court and uncertainty associated with outcomes

Almost one quarter of professionals providing an open text response referred to the prospect of returning to court as a deterrent ($n = 44$; 22%). These professionals described clients who were traumatised as a result of their previous experiences of the court process and clients who were no longer willing to engage in litigation and who were exhausted by the other party. The uncertainty associated with the outcomes of contravention proceedings, the reluctance to reopen their family law matter, and fear of being disbelieved and labelled as a "no-contact parent" were factors identified as discouraging parties from pursuing non-compliance.

Clients have been so traumatised by the legal system in getting their parenting orders and they know that the courts will do nothing to help them seek compliance with parenting orders by the other party. (Domestic and family violence professional, female, Qld)

Just the notion of a "return to court arena" is enough to deter people from pursuing contraventions – the experience of court is so traumatising the contravention would

need to be very serious to motivate clients. (Family and relationship counselling service professional, male, ACT)

Professionals indicated that parties were afraid to issue proceedings based on a perceived lack of transparency and inconsistency in the decision-making process in contravention proceedings, as well as an identification of the court as insufficiently protective of parties in circumstances characterised by family violence or other power imbalances ($n = 42$; 21%). Some of these participants described clients who also feared reprisals from the non-complying party:

Women are being actively advised by lawyers against raising allegations of domestic violence or child abuse within the family jurisdiction due to the risk of being declared a hostile parent and having the children removed and placed with the perpetrator. Women are learning that the Family Court and FCC are unsafe jurisdictions to be avoided where possible. Women are often putting up with violent perpetrators rather than risk the Family Court giving unsafe fathers unsupervised contact or full-time care of children. (Solicitor, female, NSW)

Fear – of the other party and revenge/retribution; fear of the cost; fear of not being taken seriously, heard or understood; fear of the legal hurdles; fear for the wellbeing of the children. (Domestic and family violence professional, female, ACT)

Professionals also described circumstances characterised by domestic and family violence and the potential for the further proceedings to increase the risk of this violence or to entrench the conflict between the parties and to expose their children to violence and other adult issues ($n = 24$; 12%). Professionals also nominated a history of non-compliance and systems abuse as a form of family violence that emerged as a deterrent ($n = 25$; 13%):

It also fails to take into account circumstances where the domestic abuser has refined his skills in deliberately misinterpreting the orders, and/or engaging in small, seemingly inconsequential contraventions that build up to or which in combination make up serious problems for the mother and children. Over time, the mother's complaints are interpreted by her (previous) lawyer, the courts and the family consultant as someone who is being

difficult or using the legal process for ulterior purposes. She quickly learns to avoid the court process even where her safety is compromised. Examples include picking up or delivering the children at odd hours so the mother cannot maintain secure paid work, one party obtaining gig work paid by cash to avoid child support payments, using a new spouse to unilaterally change parenting arrangements in circumstances where the contravening party would otherwise not be in a position to assume such responsibility for the children, fighting over the cost of the children's clothing or associated needs when one party is earning at least four times more than the other. (Solicitor, female, NSW)

The threat of and use of systems to perpetrate post-separation family violence and to facilitate financial and emotional abuse through engagement in protracted legal processes. Fear of an escalation in family violence and risk to self and children if client challenges compliance issues. (Domestic and family violence professional, female, Tas)

A small number of professionals also indicated that the punitive nature of the contravention regime was a deterrent because parties did not want to punish the other party ($n = 2$; 1%) or identified the detrimental impact of such proceedings on children as a deterrent to issuing contravention proceedings ($n = 12$; 6%).

Views on factors that encourage client action in relation to compliance

The survey of professionals also provides insight into the views of professionals regarding the features of the contravention regime that encourage parties to take action in relation to non-compliance. These views are present in the open text survey responses. While a substantial proportion of participating professionals indicated that there were no features of the compliance regime that encouraged parties to take action, other professionals identified factors encouraging action in their extended responses to include the very existence of a legal process and the absence of other options to seek compliance.

Almost half of the professionals who provided an open text response in relation to the features of the contravention regime that encouraged parties to take action in relation to non-compliance indicated that there were no features that encouraged the parties to do so ($n = 67$; 43%), with some identifying the court process as a "structural deterrent" ($n = 6$; 4%), and others indicating that they were unsure of any features that encouraged action ($n = 4$; 3%):

No – clients are encouraged not to – judicial officers usually encourage people to agree to make-up time and then withdraw the contravention application. (Solicitor, female, NSW)

No, the system does not encourage clients to take action for non-compliance. (Solicitor, female, NSW)

However, other professionals identified the existence of an avenue for redress in circumstances of non-compliance as encouraging parties to take action, with clients having an opportunity to have their case heard and some chance of a remedy ($n = 17$; 11%):

The opportunity to engage in legal action really encourages some people – "I want my day in court"; "I'll get my lawyer onto you"; "See you in court!" (FDR practitioner, female, NSW)

The fact that they can get some make-up time and, in some cases, restore their relationship with the children can be incentive enough. (Solicitor, female, Vic)

A small number of participants suggested that court proceedings were easy to issue with prompt listing ($n = 3$; 2%) and limited risk of costs orders if unsuccessful ($n = 1$; 1%), and that by issuing, parties could deter future non-compliance ($n = 2$; 1%). Where parties could be identified as having a clear case supported by evidence ($n = 5$; 3%) or access to legal advice and support from legal and/or non-legal practitioners and capacity to issue proceedings, these were features of the contravention regime nominated as encouraging parties to take action in relation to non-compliance ($n = 11$; 8%). By way of contrast, one professional suggested that a lack of access to legal advice encouraged action pursuant to the contravention regime.

Some professionals reflected on the lack of other options open to parties ($n = 11$; 7%) or the identification of the court process as supporting parties to address the underlying issues ($n = 3$; 2%). In some instances, the safety and best interests of the children were the driving factor ($n = 5$; 3%):

Parents only take action for compliance if it is a last resort, because they cannot in general afford the costs for regular contraventions. (Solicitor, male, WA)

Where there is genuine concern for the children's wellbeing. (Barrister, female, NSW)

Of note, almost one in ten professionals providing an open text response indicated that the contravention regime provided an avenue for some parties to continue to harass and exert coercion and control over former partners ($n = 13$; 8%) or was used as a means of "punishing" the other party ($n = 14$; 9%):

Sometimes abusers like to maintain control of their co-parents through litigious processes. (FDR practitioner, female, Vic)

Our observation is that where family violence has occurred, the party alleging the contravention can file multiple contravention applications to keep the affected family member in the court system, particularly where the alleged contravention has occurred with reasonable excuse. (Solicitor, female, Vic)

Some people use the contravention system as a form of systems abuse where the threat of contravention, and applications for contravention, drag out for years. This directly benefits families where there is power and control and family violence at play. I would say that it works for perpetrators of family violence but for most people it is a waste of money and only leads to more "bad blood" between them and the children's other parent. (FDR practitioner, female, NSW)

Often clients who like to take control and manipulate use such regime. (Solicitor, female, Vic)

The enforcement regime encourages an adversarial, punitive approach and provides [an opportunity for] family violence perpetrators to systematically abuse victim survivors through these measures. (Child consultant, female, Vic)

Appears to work well for perpetrators of family violence. Can be used as a means of control post-separation. (Family support worker, female, Tas)

How could compliance be improved?

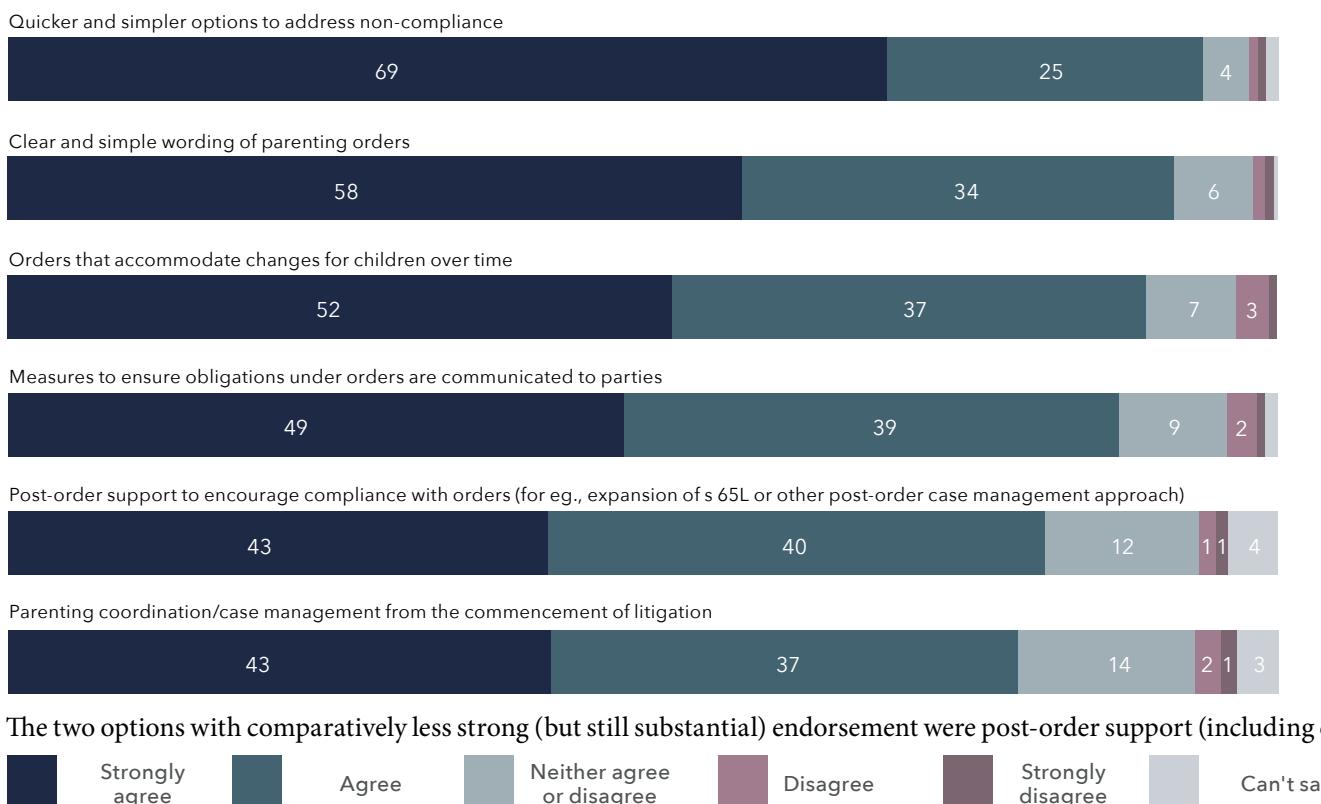
Ways of improving compliance with parenting orders were assessed in two sets of survey questions: one set of questions presented options that would support parties to comply with parenting orders; the other set of options canvassed systemic changes that would reduce non-compliance. Additional comments could be provided in open-ended text responses. There are two new developments in the system that are relevant in considering the discussion presented in this section. One is the implementation of a new National Contravention List. The other concerns legislative amendments to vexatious litigant provisions. An outline of each of these developments is presented at relevant points in the discussion in this section.

Support for compliance

In relation to options to support parents to improve compliance, the following options were set out, together with an open-ended text box inviting individual responses:

- clear and simple wording of parenting orders
- orders that accommodate changes for children over time
- measures to ensure obligations under orders are communicated to parties
- parenting coordination/case management from the commencement of litigation
- support after orders are made, such as case management
- quicker and simpler options to address non-compliance.

Majority support for all of these options was present in the responses of participants (Figure 11). The highest level of support was evident for quicker and simpler options to address non-compliance (94% including 69% strongly agree). Similarly, 92 per cent (including 58% strongly agree) endorsed clear and simple wording in parenting orders. Close to nine in ten endorsed orders that accommodate changes for children over time and measures to ensure that obligations under orders are communicated.

Figure 11: Agreement/disagreement that nominated options would support parties to comply with parenting orders

Note: Sample sizes across the items: $n = 305\text{--}308$.

management; 82% including 43% strongly) and parenting coordination and case management from the commencement of litigation (80% including 43% strongly).

Systemic factors

Responses to the set of questions that assessed professionals' views on broader strategies to address systemic factors that may lead to difficulties complying with parenting orders are set out in Figure 12. Of the nine issues examined, two were about approaches to therapeutic needs, four concerned better forensic approaches to identifying issues relevant to risk, one concerned the participation of children and young people, one concerned continuity of contact with professionals and one concerned more orders for no contact where risk issues were identified. Consistent with the responses reported in the preceding section, majorities of survey participants endorsed each of the strategies.

The two strategies referring to therapeutic support garnered the highest level of support and the least disagreement. Slightly more than nine tenths of the sample agreed (with 56% strongly agreeing) that educative therapeutic support for effective ongoing communication would assist. Similarly, facilitating access to therapeutic support in the early stages

of a dispute was supported by 91 per cent of the sample (56% strongly agreeing).

In relation to risk issues, 84 per cent (55% strongly agreeing) of the sample agreed with a broad statement referring to "better ways of addressing risk issues in the family law system". Three other statements were directed to evidence-gathering practices. One involved improved information sharing to inform judicial decision-making and was endorsed by 80 per cent of the sample, with responses evenly distributed across the two agreement responses. A second evidence-gathering practice, referring to an increased focus on risk issues in Family Reports, was endorsed by three quarters of the sample (44% strongly agreeing). A similar statement concerning independent children's lawyers received a slightly lower level of endorsement (67%, with 41% strongly agreeing). This statement also drew the highest level of ambivalence, at 23 per cent.

The statement referring to "orders for no contact to be made more often in cases involving risks to children" was the most contentious, although it still received majority endorsement (67%, 34% strongly agreeing). This was the statement with the highest level of disagreement, with 9 per cent of the sample disagreeing and 4 per cent strongly disagreeing.

Figure 12: Agreement/disagreement that nominated changes would reduce non-compliance with parenting orders

Educative and/or therapeutic support for parties to engage in effective ongoing communication



Facilitating therapeutic assistance to address family members' underlying issues in the early stages of the dispute resolution/legal process before final orders are made



Better ways of addressing risk issues in the family law system



Continuity in service provision/personnel for separating families



Processes to support the participation of children and young people in parenting order processes being more effective and more widely available



Improved information sharing to inform judicial decision-making



Increased focus on gathering/submitting evidence regarding underlying risk issues in Family Reports



Increased focus by ICL on gathering/submitting evidence regarding underlying risk issues



Orders for no contact to be made more often in cases involving risks to children



Legend:

- Strongly agree
- Agree
- Neither agree or disagree
- Disagree
- Strongly disagree
- Can't say

Note: Sample sizes across the items: $n = 305\text{--}306$.

The second most contentious statement referred to "processes to support the participation of children and young people in parenting order processes being more effective and more widely available". Although this statement received substantial endorsement (79%, 49% strongly agreeing), it was also the second most likely to receive disagreement, at 6 per cent (1% strongly disagreeing), with a similar pattern also evident to ICL evidence-gathering practices.

The statement referring to continuity in service provision/personnel was endorsed by 81 per cent of the sample, with limited disagreement (1%).

Extended survey responses relating to improvements

Consistent with the systemic factors and the provision of support to improve compliance, described above, professionals participating in the survey who provided open text responses nominated improvements that centred on the expansion of

post-order support, a better resourced family law system and the making of safer and more appropriate parenting orders.

Expansion of post-order support

Just under one third of professionals providing an open text response about options that should be available to address non-compliance nominated the provision of greater support to parties subsequent to the making of parenting orders ($n = 45$; 29%). Similarly, almost half of participants recommended the expansion of post-order support when asked for views on how compliance with parenting orders could be improved ($n = 88$; 46%). For these participants, post-order support included access to services that had an educative function and a therapeutic function. Specific suggestions included court information sessions or for parties to engage with a lawyer, judicial officer or family consultant to explain the orders and the parties' obligations. Consistent with the observations in the interviews with judicial officers, expansion of post-order support from their perspective also

included the supervision of orders with the option to access section 11F reports¹² and legal support and for matters to return to court if required. These professionals also reflected on the utility of appointing a parenting coordinator, ongoing case management and access to family dispute resolution as a means of supporting compliance.

Access to services ranging from family therapy, parenting courses and behaviour change programs through to psychological assessments were identified by professionals as options. Other participating professionals advocated better use of FRCs for the provision of a “one-stop shop” with flexible, wraparound services. Some participants indicated that these post-order supports should be mandated and/or provided on a reportable basis to inform future court intervention.

Some professionals reflected on the importance of addressing the underlying issues in response to non-compliance, referring to the need for trauma-informed education and support services that thoroughly assess and appropriately respond to the reasons for non-compliance ($n = 28$; 18%). Some of these professional participants raised the need for parenting courses and supports to be both trauma-informed and specifically tailored to meet the needs of parties in intractable disputes.

Implementing the contravention regime more effectively

For one quarter of professional participants providing an open text response, the timely application of the contravention regime and consequential penalties, and the making of costs orders and indemnity of costs orders, were all identified as options of a more punitive nature to address non-compliance ($n = 40$; 25%):

Court needs to treat breaches more seriously especially if repeat offenders. Often one party just has to provide make-up time with no real repercussions. They then become repeat offenders. (Solicitor, female, Vic)

Costs orders, particularly interim costs orders being made more readily in circumstances where contravening party has no reasonable excuse, still great reluctance to make

costs orders. Financial penalties are an important part of the system. (Solicitor, male, Qld)

These participants indicated there needed to be more serious consequences for breaches of court orders, with some suggesting the codification of responses for initial and subsequent breaches and others suggesting financial penalties that were commensurate with the income of contravening parties:

More serious consequences on first and second contraventions (requires multiple successful contraventions for a court to react appropriately – which is cost prohibitive). (Solicitor, female, NSW)

... tangible consequences for breaches that do not have a justifiable reason. (FDR practitioner, female, Qld)

Accountability and consequences. (Domestic and family violence professional, female, Qld)

Almost one quarter of professionals reflecting on measures to improve compliance emphasised the need for more punitive responses, with some calling for a “compliance police”, the Australian Federal Police or similar system, by which the court could enforce its own orders ($n = 46$; 24%). Some professionals envisaged a contravention regime whereby parenting orders were enforceable in a manner similar to intervention orders, with independent investigation and prosecution of breaches ($n = 7$; 4%).

About one in ten participating professionals identified the need for better resources for the court to hear contravention applications in a timely manner ($n = 17$; 11%) and for a greater willingness on the part of judicial officers to hear contravention applications ($n = 15$; 10%):

Judicial officers prepared to hear them in a timely fashion – so a better resourced court system. (Solicitor, female, NSW)

Other participating professionals reflected on the need for a quicker, simpler and less formal process to handle contravention applications, reducing the burden and standard of proof required ($n = 15$; 10%):

¹² At the time of writing, an FLA s 11F report is a memorandum prepared by a family consultant following appointments with the parties to proceedings and/or their child/children.

Specific contravention listing before a senior registrar to have the matter dealt with quickly or issues narrowed to go before a judge. (Solicitor, female, ACT)

More specifically, some professionals raised the need for a clearer pathway that could fast-track the resolution of contravention matters via a dedicated contravention court list or a cost-effective court-based program for dealing with contraventions, with some identifying an expanded role for the registrar to deal with these matters or for matters to be resolved within set time frames and with set repercussions or for access to support programs, family consultants or FDR ($n = 57$; 30%):

We need different streams, something like, minor non-compliance, persistent non-compliance, serious non-compliance, with only the last category to be a quasi-criminal offence. The first two need minimal documentation and can be heard by a registrar. Every contravention should have a conference with [a] registrar and family consultant if the matter involves children, before [a] court event other than for the serious category.
(Judicial officer, NSW)

Overall, nearly one quarter of participants who reflected on how compliance with parenting orders could be improved identified a better resourced family law system as a means of encouraging compliance. These resources were identified as required for the delivery of support services described earlier in this section, including the provision of early intervention and pre-order support to families engaging in the system. These resources were also identified as enabling the improvement of existing family law system services more broadly, such as the timely resolution of primary parenting proceedings, ready access to FDR and section 11F memoranda, updated risk assessments and the facilitation of access to legal representation for both parties and for children ($n = 45$; 23%). Improved information sharing mechanisms ($n = 2$; 1%) and increased supervision of parenting time and changeover ($n = 4$; 3%) were also identified as significant.

New development: National Contravention List

In the context of the discussion above, it is important to note that a National Contravention List will be introduced by the FCFCoA on 1 September 2021. Consistent with the reflections of some professionals noted above, the list will be administered by registrars who will triage and assess contravention matters and allocate them to senior judicial registrars or judges where necessary. The key objectives of the National Contravention List have been identified as follows (FCCoA, 2021, August 18):

- to efficiently deal with applications on a national basis in a timely, cost-effective and safe way for all litigants
- for applications to be given a first return date within 14 days of filing
- to ensure compliance with court orders by all parties
- to impose appropriate penalties or sanctions where a contravention has been proved and where a party has failed to demonstrate they had a reasonable excuse for non-compliance with court orders
- to proactively facilitate the resolution of underlying issues in disputes that lead to the filing of such applications
- to triage appropriate matters to dispute resolution
- to be responsive to a party's wishes to resolve matters without recourse to additional litigation.

Safer and more appropriate parenting orders

A number of professionals providing open text responses regarding options to address non-compliance and to encourage compliance indicated the need to make orders that were safe and appropriate in the first place ($n = 19$; 10%). Some participants wrote about the need to draft simpler orders that lay people could understand and implement, with sufficient detail to support compliance ($n = 17$; 9%). Other participants mentioned the need to build flexibility into the orders to reflect the changing needs of children and young people ($n = 9$; 6%). To this end, participants spoke of the need for judicial officers and lawyers to prioritise the consideration of domestic and family violence and child safety concerns, with better training in trauma-informed practice to enable professionals to consider these issues and their consequences. These issues and consequences included

the impact of domestic and family violence on women and children, the better identification of systems abuse ($n = 19$; 10%) and the need to address power imbalances between the parties ($n = 4$; 3%):

Adopting a trauma-informed approach in all family law matters (i.e. considering not what is wrong with a person but what may have happened to a person to make them the way they are). It is important to be aware of the impacts of overwhelming stress/emotions on a person. Also being aware that complex trauma is frequently undetected and can lead to difficulties regulating emotions and internal states. Problems with affect regulation can cause significant difficulties in one's relationships and also increase use of court and other services. "Difficult" behaviour may be the product of coping mechanisms and attempted self-protection in light of prior adverse experiences. Certain behaviour may also be the result of a trauma survivor being retraumatised. Adaption to trauma (especially early in life) can affect mind, brain and body and form the framework on which all subsequent experience is based. Trauma can also affect memory and often trauma survivors make poor witnesses. Poor memory can make survivors reluctant to commence court proceedings for fear of having to be cross-examined. Survivors of abuse involving authority figures may act aggressively and or be very suspicious of others in positions of authority. (Solicitor, female, Qld)

Impose obligations and educational requirements on the parties that actually address the power imbalance instead of pretending that both sides are operating from a level playing field. (Solicitor, female, NSW)

An openness to child-inclusive decision-making approaches to facilitate their input in contravention matters was also identified, with some suggesting the potential for child impact statements also in this context: ($n=30$; 16%): "... child-inclusive process to build parents' child focus. More flexible agreements to tailor to child and family changing needs. More comprehensive risk assessment. Application of information sharing ..." (Child consultant, female, Vic)

In relation to consent orders specifically, participating professionals indicated that these types of orders needed to be based on genuine and informed consent, and that a

preparedness was required on the part of judicial officers to order more sole parenting orders as appropriate ($n = 9$; 6%).

Vexatious litigation

Professionals expressed views about better ways to address vexatious litigation, an issue that was also discussed by a number of judicial officers in interviews. Their views are set out after an explanation of the present legislative framework and the changes that will take effect on 1 September 2021.

Legislative framework

At the time of writing, Part XIB of the FLA outlines the court's power to make orders in relation to vexatious litigation, including to stay or dismiss all or part of proceedings or to prohibit a person from instituting proceedings. Section 102QB provides for the court to exercise its jurisdiction in this regard if it is satisfied that a person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals, or if someone acts in concert with such a person or with another person who is subjected to a vexatious proceedings order. Vexatious proceedings are defined to include proceedings in a court or tribunal that are an abuse of process; that are instituted or conducted to harass or annoy, cause detriment, or for another wrongful purpose; or are instituted or pursued without reasonable ground.

Of note, amendments to the FLA introduced by the *Federal Circuit and Family Court of Australia Act 2021* (Cth) (FCFCAA), due to come into force on 1 September 2021 subsequent to the submission of this report, include provisions for the FCFCOA (Division 2) to make an order that prevents an applicant who is subject to a vexatious proceedings order from instituting a proceeding that is subject to the order without a grant of leave (FCFCAA s 242). The provisions are identified as

reasonable and necessary to protect the integrity of the court system, to protect applicants who may be adversely affected by vexatious litigants and accordingly improve access to justice for non-vexatious litigants and ensure that court resources are allocated usefully and efficiently. (Explanatory Memorandum, 2019, p. 11)

Views of professionals

Almost one quarter of professionals providing open text responses about options to address vexatious litigation emphasised the need for the court to apply the FLA provisions to facilitate the early identification of, and response to, vexatious litigants, including a readiness to make s 102QB vexatious proceedings orders ($n = 37$; 23%). Some of these participants also called for the stricter application of the *Rice v Asplund* (1978 6 FamLR 570) principle or threshold requirement of a change in circumstances before the court will consider granting variations to final parenting orders:

Recognise vexatious litigation as a form of family violence and encourage judicial recognition of vexatious litigation at an earlier stage in proceedings. (Domestic and family violence professional, female, ACT)

Guidelines for declaring a person vexatious, to be applied consistently by judicial officers. (Solicitor, female, Vic)

Name it and call it out early in the process.
(Family therapist)

More than one third of professionals called for accountability and consequences for vexatious litigants ($n = 57$; 36%). This included a greater willingness on the part of courts to make costs orders, indemnity of costs orders and security of costs orders against vexatious litigants, the imposition of fines, and consequences that included adverse findings with regard to their credibility, limited supervised contact or no contact orders as well as prohibitions on the issuing of further proceedings, as noted above:

Much harsher sanctions – hit them where it hurts – the WALLET!!! (Solicitor, female, NSW)

The remedies above don't address vexatious and malicious litigants. I am both a barrister and FDR practitioner and, in my experience, vexatious and malicious contravention applicants often act on their own account, are not able to pay fines or costs orders and, if they have the ability, they won't pay anyway and enforcement is costly and protracted and maintains involvement with their ex-partner. It's a form of abuse and children should be protected from it and the best way to do that is order listed supervised contact or no contact. (Barrister and FDR practitioner, Male, Tas)

Sole parental responsibility awarded to victim-survivors when there has been proven domestic and family violence. Therefore, the ongoing litigation would be limited as control would be limited. Also, harsher penalties and a rewording/better understanding of what vexatious litigation is, especially in the context of DFV. (Domestic and family violence professional, female, NSW)

While some participants focused on a better application of the existing legislative provisions, nearly one third of participating professionals described the need for a simpler and quicker process to declare vexatious litigants than is currently available ($n = 48$; 30%). Some professionals described Part XIB of the FLA as too clunky, time consuming and difficult to invoke, and identified the need for the introduction of a lower threshold for the declaration of vexatious litigants. Some professionals identified the need for additional safeguards against the issuing of proceedings. Suggested additional safeguards included a cap on the number of contravention applications, a prohibition against the issuing of proceedings within a specified time frame, and a requirement to seek leave or to provide evidence of the receipt of legal advice before issuing proceedings. One participant recommended that there should be an express power within Division 12 of Part VII to restrain a party from instituting further parenting or contravention proceedings without prior leave of the court:

Part XIB of the FLA 1975 is too clunky and time consuming and difficult to invoke. There should be an express power within Division 12 of Part VII to restrain a party from instituting further parenting or contravention proceedings without prior leave of the court if the court is satisfied that the order is in the best interests of a child. (Judicial officer, Vic)

It should be quicker to have people declared vexatious and the need to have them seek leave of the Court before filing and serving further applications. (Solicitor, female, NSW)

Easier options to prevent someone from bringing further litigation time and time again. It's so hard to get a vexatious litigant declaration. Perhaps a soft-vexatious-litigant declaration that requires applications to be looked at in chambers first without service on a parent, not sure, but it's definitely a problem that needs addressing. (Solicitor, female, Qld)

The bar for a vexatious litigant should be lowered. For example, five consecutive contravention applications over a seven-month period is excessive and thought should be given to changes in the Family Law Act to specifically address vexatious litigants where family violence is an issue. (Solicitor, female, Vic)

A number of professionals providing open text responses about options to address vexatious litigation emphasised that there was a need for more support and resources for courts to deal with vexatious litigants ($n = 17$; 11%), with some participants suggesting that vexatious litigants commonly have personality disorders. Others spoke of the need for parties to have increased access to legal representation for parties who are the subject of vexatious litigation ($n = 8$; 5%). Other professionals focused on the importance of early case management and triage of contravention matters, including the adoption of a registrar review of all contravention applications to ensure that only those with sufficient basis progress ($n = 22$; 14%). Information sharing between FDR services and courts was also identified as a means of informing responses to vexatious litigation ($n = 1$; 1%):

As with everything in the family law system at the moment, due to lack of resources, the delay in any action being taken and the seeming reluctance to order fines or bonds makes it easier for vexatious litigants to flourish. (Solicitor, female, NSW)

Probably these personality types should be identified much earlier in proceedings. It seems like often lawyers will say “this is one that will be in and out of court until the kids are adults” very early in proceedings, but the court does not seem to have the same ability to identify these difficult people. (Solicitor, female, Vic)

Early and strenuous case management by either the registrars or the judges would assist with this – really narrowing the issues and putting people on notice that applications without merit will be dealt with quickly and may attract a costs order. Many things in this system would work better if the resources allowed parties to be in and out of the court process in a reasonable time frame. (Solicitor, female, NSW)

Other changes suggested included less formality in proceedings, such as replacing hearings with registrar conferences where possible ($n = 5$; 3%), with less formal engagement with the court identified as a potential deterrent for vexatious litigants, and mandatory reporting of lawyers facilitating vexatious litigation:

Have a minimum threshold which must be crossed so people can't file vexatious contraventions about phone calls or minor contraventions. The s 60I certificates could require a minimum number of sessions for contraventions, so people don't get them to “tick a box” without genuinely engaging in FDR ... Can the court process be minimised, i.e. instead of the big “hearing style” events where people rock up with lawyers and barristers at enormous cost and anxiety, can there be more registrars' conferences in an informal setting, less scary and less punitive, and possibly less satisfying to vexatious litigants who seem to like the drama of court. (Solicitor, female, ACT)

Make it mandatory to report all issues regarding lawyers /family consultants conduct ... to appropriate regulatory bodies. (Post-order program professional, male, Vic)

Some professionals identified the importance of incorporating child-inclusive approaches and improvements in the engagement of independent children's lawyers with children and young people to inform family law decision-making ($n=6$; 4%). A small number of participants spoke of the need to revolutionise the adversarial family law system so that it is better positioned to accommodate the best interests of children ($n = 4$; 3%). Suggestions included a requirement for lawyers to prioritise the best interests of children ahead of their clients, enshrining the principle of litigation as a last resort in the FLA and for the family law system to be a not-for-profit sector to address the power imbalances between parties with varying financial means:

... requirement for family lawyers to put the interests of children above BOTH their clients' and their own interests. (FDR practitioner, female, Vic)

The definition of vexatious litigation needs to be amended in family law. Even one action can be vexatious. It should be enshrined into legislation that litigation is a last resort. (Solicitor, male, Qld)

Make the family law field a not-for-profit field so that litigants with money do not have the “upper hand” as they do currently/make family dispute resolution ONLY accessible through not-for-profit organisations to prevent private law firms capitalising on FDR in-house ... Legislate for ICLs to have a social science AND legal background with a mandatory child-consulting module in their training. Legislate for ICLs to speak to their clients and not rely on reports. Ensure all CCSs [children’s contact services] do not force children to see a parent when they state they do not want to see a parent so that a parent does not force their child to attend a CCS session out of fear that they will be seen as contravening a Court order. Make Court support more available to clients attending court. (FDR practitioner, female, Qld)

While two professionals spoke of a need for improved training among the legal profession in relation to “parental alienation” ($n = 2$; 1%), a greater proportion of professionals focused on the need for the family law system to deal with the underlying issues when making parenting orders in the first place ($n = 19$; 12%). For some professionals this meant that orders should progress through a trial phase or that they should reflect the majority parenting role. Once again, some professionals identified a need for better post-separation support for parties to avoid vexatious litigation similar to that envisaged in relation to non-compliance cases more generally, including access to or mandated receipt of educative parenting programs, post-order programs and post-order FDR and access to therapeutic support ($n = 15$; 9%):

I would like to see orders made early but not final and give the parties the opportunity to trial arrangements, receive reportable [sic] therapeutic support for at least six months before making final. (Post-order program professional, female, NSW)

Other professionals emphasised the need for training and support to better enable judicial officers to screen and assess domestic and family violence, the impact of power imbalances and the identification of vexatious litigation as a form of coercion and control ($n = 25$; 16%). One professional recommended greater diversity on the bench and among legal practitioners as a means of facilitating better identification of domestic and family violence:

Vexatious litigation should be seen for what it is, coercive control, abuse, and bullying. those engaging in such practices should be penalised as should those lawyers who encourage it. (FDR practitioner, female, Vic)

Better assessment and management of domestic and family violence within families, both from the perspective of perpetrators using litigation to further perpetrate violence and victims attempting to access litigation because the coercion and control within the relationship is continuing, unseen by courts and legal professionals. Training for legal professionals (including judges) around domestic and family violence and the impact it still has on children, even when they were not present at the time of the incidents (i.e., we see this a lot with sexual assaults where family report writers and lawyers tell courts that although that may have happened, the victims response is seen to be the problem or as parental alienation, rather than a normal response to the perpetrators behaviour) ... We expect women not to have a response to the abuse they experience and if they do then they are seen as incapable parents or causing parental alienation. (Post-order program professional, female, Qld)

Be preventative – take the time in the initial proceedings to hear the parties and understand the history. Have both parties engage with a social worker to support them in speaking with lawyers so that lawyers have the whole story and are able to take the whole story to the court. This will enable better decision-making at court. Educate lawyers and magistrates in the impact of domestic violence on the victims and why when disempowered they will be overly compliant or overly argumentative. (Integrated family support case manager, female, Vic)

Having a nuanced understanding of domestic and family violence so as not to mislabel proceedings as vexatious was also identified:

I am concerned who the court is identifying as vexatious litigants. Unrepresented mothers who are desperate to protect their children may be regarded as vexatious by the legal system, while manipulative perpetrators of violence with highly skilled legal representation are probably less likely to be identified in this manner. (Solicitor, female, NSW)

A party who brings repeat contravention applications because the other party continues to contravene should not be labelled "vexatious". Sometimes it's the only way to halt the behaviour of the contravening party. (Solicitor, female, Qld)

Judicial officer views

More than half of the judicial officers participating in the interviews reflected on the use of the legal system to continue the perpetration of family violence, with observations made about this form of systems abuse and the recognition of vexatious litigation in the context of family law proceedings:

... unfortunately, some of those who pursue contravention applications are simply seeking still to coerce their former partner through that process. So you'll get alleged contraventions, which are farcical. (JO)

I'm convinced that some parties to litigation use contravention proceedings as a way to intimidate or control their former partner and/or their children. (JO)

There's the vexatious litigant, and there's the vexatious respondent. The vexatious alger, alleging contraventions left, right and centre, and the vexatious non-complier ... They're part and parcel of the same personality, it just depends which end they're on. (JO)

Some judicial officers described a reluctance to make declarations pursuant to section 102QB of the FLA stemming from the priority accorded to procedural fairness:

But I think the bigger issue is that they are reluctant to declare someone as vexatious, because of the access to justice concept, that everyone should have the right to bring proceedings. And that feeds into it, but for some reason there's – I think there should be a lot more consideration of at what point does someone continuously, in the proceedings, become vexatious. And a judge can only determine that. But if only they were a little bit more confident in making that determination. I think that perhaps that systems abuse wouldn't happen so much. (JO)

Now, it might work intellectually but if you haven't got judges that recognise that they've got to declare proceedings to be vexatious even when they're not prepared to cut them

out and what I see is a whole lot of decisions saying "Oh, we want a declaration that the proceeding is – or they want to have them declared a vexatious litigant. No, I couldn't do that, there's only been one application." Well, they're not asking for someone to be made vexatious. The way to deal with it is to say then "I would not want them out now but I'm prepared to say that this particular application was vexatious" and that can be used later on if needs be. (JO)

In this context, one judicial officer spoke of the protection afforded by the FLA provisions prohibiting cross-examination in these circumstances where contravention proceedings are used as a form of systems abuse or vexatious litigation:

[Interviewer:] Have you observed contraventions used as a form of some systems abuse or vexatious litigation?
[JO:] Absolutely, absolutely.

[Interviewer:] Does the system deal with that issue well?
[JO:] No. You've got to look at them all and you've got to deal with them all, and give people air and a voice, and I am very conscious of not giving abusers an air and a voice; very conscious. That's why the glory of 102NA's so marvellous, and now we have it, you have what I would regard as a thug and a bully, and the contravention's on, of course, he wants to cross-examine mum. Well, I make a 102NA order and he can't. 102NA has been one of the most, from my point of view, excellent pieces of legislation in a long time to protect women from being, and it's usually women, re-traumatised. Marvellous.

Judicial officers reflected on the limitations and practical difficulties associated with the application of Part XIB of the FLA, which could in turn contribute to their reticence to deal with vexatious litigants. The following quotations raise a series of issues that judicial officers consider means the provisions do not provide adequate tools for them to address vexatious litigation. The first point concerns the historical context for the formulation of principles for declaring a litigant vexatious. In the context of striking a balance between denying access to justice and affording courts powers to stop vexatious litigation, this judge makes the point that the balance towards maintaining access to justice developed in courts not exercising jurisdiction under the FLA is inappropriate for the family law courts, where a

different set of interests is at play, and it should be easier to stop unwarranted litigation. The second quotation makes a similar point, in that it is arguing for greater powers to dismiss applications that are brought with a motivation to harass the other party. This judicial officer made a distinction between substantive applications for final orders in relation to parenting and property and other kinds of applications, including potentially contravention applications, that were brought for ulterior motives:

... the problem I think we suffer is that the vexatious litigation legislation was brought in mainly through problems at Supreme Courts ... where they had really a high bar. The Full Court of the Family Court adopted that high bar in terms of family law because they wanted to be consistent with the Supreme Court and the Federal Courts. However, it strikes me that particularly unrepresented litigants can sometimes use the systems to just keep on overwhelming another party with application after application. And often those people are in receipt of social security benefits, so they don't have any significant fees to pay, they just use the process. So ... in the Family Court it would seem to be we would need a much lower bar. (JO)

Other judicial officers made similar observations:

I do think we should be able to, in family law proceedings, far more readily and easily summarily dismiss applications which are simply outrageous ... But that would be one way to hose these matters out early on when they should be hosed out. Just because you file an application doesn't mean you get air. It doesn't mean it's got to be heard. Particularly, it's not a primary application, first instance where you're trying to see if you can get some property and spend time with your child. These are after these events have been done, these are the peripherals. There should be a difference between the application which is initially filed, to get your time with your child or division of your property, and enforcement of something. There should be a difference in what we, the judge, can do. That would reduce hugely the number of spurious matters we get filed, because we do, and people use it ... I think the judges should just have a bit more power, particularly these violent – they get abusive, and they're usually men, unfortunately, who are bringing the proceedings for an ulterior motive or purpose. That's what I try and

explore when I get these matters. They go on about the kids, it's not about the kids; it's about getting to the wife, making her life as difficult as possible, further control. They love it. (JO)

[JO:] I think that you could put some provision into 13A around vexatious proceedings, like somebody can't bring another application without leave ... Because, at the moment, the new suite of provisions just I don't think works.

[Interviewer:] Okay. So amending Division 13A to insert something about vexatious proceedings directly?

[JO:] Yeah, I think that there's a place for it there.

Views of judicial officers on improvements

As with the professionals' survey questions, judicial officers were asked about options for improving responses to and deterring non-compliance. Responses in these areas raised a range of possible strategies and tended to reflect participants' views about the causes and effects of contravention proceedings. One of the main themes in these responses is consistent with the earlier discussion in relation to the need for increasing the focus on children and young people in these processes. A varied range of other issues was raised, including more resources for managing contravention matters, triaging contravention, improvements to the quality of orders, greater use of punitive options, improving post-order support for parents and better ways of responding to vexatious litigants.

Hearing from children

One suggestion made by several judicial officers involved incorporating children's views into the hearing process. This proposal reflected judges' concerns about the impact of contravention disputes on children who, as one judicial officer put it, are "the meat who are caught in the conflict between their parents" (JO). Indeed, when asked about their views on how the contravention regime affects children and young people, judges' responses showed concern about children being drawn into the conflict by their parents, and the associated stress on the child of worrying about the potential outcome of the proceedings for a parent. As one participant described this:

We get these terrible ones where people will say, "Your mummy is going to jail, your mummy is going to go to jail, I'm going to take her to jail", you know. (JO)

Another judicial officer noted that one of the consequences for children caught in this situation is that they “might comply [with the orders] because they don’t want one parent to get in trouble”, even when the arrangements are not in the children’s best interests.

Reflecting this concern, several judicial officers suggested that a shortcoming of the present approach to non-compliance with parenting orders is the limited attention given to the interests of the child, and the inability to involve ICLs. To address these issues, one judicial officer proposed that children should be given a voice in contravention proceedings:

I think contravention applications are just one symptom of the fact that we say we have a jurisdiction which prioritises – gives paramount importance to – the best interests of the children, when it just doesn’t ... And we need to give the children, in contravention proceedings as well, probably in contravention proceedings, really importantly, a place at the table, a place in court to say what they actually think, without being exploited and manipulated. (JO)

Another judicial officer, who also supported the involvement of ICLs in contravention matters, suggested that knowing how the children are faring could assist decision-making in contravention matters, especially:

... if it’s a case of kids being at the point of being absolutely living in fear that if they don’t go and see Dad, Mum’s going to get put in jail. I think those threats are made. As I said, with the matter that I just finished, I have no doubt that those sorts of things have been said to the children. I would have been fascinated to get a perspective on how the children were responding in that matter. Would it make any difference to me? It probably would. (JO)

In addition to assisting decision-making, another judicial officer pointed to the potential dispute resolution benefits for the parents of hearing what their children have to say:

Contraventions ultimately, often – I won’t say “often” – but do, from time-to-time, really show that the only way to do it is to have the child they’ve really always wanted, tell them where [they] see this thing lie. And then you’ve got some chance it might settle down. (JO)

Other judicial officers, however, were of the view that it is not appropriate to involve children in contravention proceedings, given their quasi-criminal nature:

I think independent children’s lawyers have a very important role to play in the substantive parenting proceedings but at least in the process that we’ve got, the contravention proceedings are purely a prosecution. And although we can be flexible and we can try and work with parents, I think that would be a misuse of the contravention or an enforcement process. (JO)

Managing judicial resources

While judicial officers generally believed the options available to them in Division 13A are “sufficient for the task”, some indicated that the real problem for them lay in the lack of time and resources they have available to deal with contravention matters properly. Despite an obligation to deal with contravention matters quickly, the reality of crammed hearing lists creates pressures that mean insufficient attention can be given to them, as this participant explained:

Well, if you lodge a contravention application, the law is that it must be dealt with promptly. The difficulty is, in any judge’s docket or list, having the time to have that dealt with. So it will be listed, a contravention will be listed to an intake judge and it will be listed promptly ... On any given day, there’ll be between eight and 20 cases listed, on Monday, Tuesday, Wednesday, Thursday, and in there will be a contravention. They’re jockeying for time in the court room, and if they do get a hearing, the judge is under pressure to hear it very quickly. (JO)

Other respondents suggested that one way of managing the workload involved in contravention matters is to limit the number of counts of contravention an applicant may be permitted to run:

I think that they should be listed immediately. I think there should be a lack of ability in judicial officers not to deal with them ... [But] I think that we have to get on to things more quickly than we do, and the way to do that might be if you get an application that has 50 or 60 counts of contravention that have built up over the last two and a half years, you have to sit down and figure out

which ones they will be permitted to run ... you've got to make them manageable. You just can't keep on kicking a tin down the road, saying that you haven't got time to deal with it. (JO)

Noting recent reform proposals to delegate greater responsibility for contravention matters to registrars, one judicial officer suggested that a better solution might lie in leveraging the court's capacity for conducting electronic hearings:

I think maybe we need to ask what is the problem, why aren't people wanting to deal with contraventions or why are they in the system for a long time, is there a better way of doing them? ... One thing that occurs to me is one of the advantages of COVID is that we use electronic processes now really effectively in court. I can deal with the contravention application electronically and it doesn't really matter where the parties are. Would a better approach be to have each judicial officer in Australia having a national contravention week where they just do contravention matters one week a year from anywhere across Australia electronically? (JO)

Yet another suggestion for addressing the limited time available for judges to hear contravention matters was to place a time limit on the lodgement of applications:

Well, the first thing that I think should happen is that there should be a time limit on when you can bring a contravention. You shouldn't be allowed to bring contravention applications in relation to things that happened years and years and years ago ... I would say 12 months; if you haven't put your contravention application on within 12 months, it can't be that serious. The other problem is, of course, that if people are alleging contraventions that are historical, the other side can't remember; that "on the 25th of June 2018 the children didn't call me". The custodial parents can't remember what they were doing that day. So I really do think there should be a time limit ... I think 12 months is not unreasonable, but you couldn't file an application in respect of a breach that was more than 12 months ago. (JO)

Specialised triaged responses

A more common suggestion for improvement involved support for a triaged approach to contravention applications.

Several judicial officers reflected positively on the registrar-based triage system that currently operates in several Family Court and Federal Circuit Court registries, suggesting that this model holds significant potential benefits for better managing contravention matters. The use of a triaged approach was variously described as allowing registrars to "filter the contravention applications" (JO) and separate out those where the matter "isn't really appropriate for a contravention" (JO) from those that need a trial. One participant framed this in terms of distinguishing between "two tranches of enforcement":

It might be – and now I might be wanting to design something different – that we had in effect two tranches of enforcement, the prosecutorial one, but we might be able to refer some cases to what might be described, for the want of a better word, as a managerial process to assist parents. (JO)

Another judicial officer saw this approach as allowing the court to "hone in on what are genuine non-compliance issues as distinct from the strategic, or the tactical filing of these sorts of applications" (JO).

Judges who favoured this approach noted the importance of fast-tracking the entrenched matters that require a hearing in light of their impact on children:

To let it rot and continue for one, two, three or four years is destructive of the litigants. But more importantly is destructive of the children. They may be left exposed in seeing a violent or abusive or neglectful parent or prevented from seeing a loving parent. So, the same as any family law case, they need to be heard as soon as is reasonably practical. (JO)

A range of possible interventions were canvassed for dealing with applications in the "managerial" track. These included empowering registrars to "get [the parties] in and talk to them informally and see if they can't hose down some of those concerns" (JO), reality-testing the applicant's motivations (JO) and encouraging them to bring an application to vary the orders (two JOs) and referring parents "to appropriate courses and information sessions" (JO).

Several participants also proposed a more sophisticated triage system that involves a conferencing process with a registrar

and family consultant. One judicial officer envisaged this approach as a specialist unit within the courts:

I'd like to see a contravention [unit] within the courts, a contravention module or grouping where there were specialised family consultants and registrars who dealt with these matters, and if there were real issues of that non-compliance then we can have a re-hearing. But I think we should do it in a much more triaged way and targeted way, and have parties attending specific courses, all that money that's out in the outside world that we never could get much of our hands on. Get those people to have targeted courses for these parties who are being difficult and do it in that therapeutic way; that would be my preference ... I'd love to see a revamp of the whole thing and I'd like to see, as I said, a unit in each registry which dealt specifically with contravention of parenting orders and just leave what we've got now for property. (JO)

Improving the quality of orders

As discussed earlier, participants indicated that one of the key impediments to the workability of orders can be the poor quality of the order. Responses indicated that this can involve substantive issues, in the sense that the order does not adequately accommodate the needs of the children. More technical issues such as poor wording were also mentioned. They also indicated that some people simply did not understand the significance of complying with their obligations under the order:

Well look, again I think all roads – we're talking about enforcement of orders, we'll keep coming back to the same thing, the quality of the order. (JO)

To this end, a number of judicial officers suggested the best way to reduce non-compliance is to improve the comprehensibility of parenting orders. For some, this meant ensuring parents are able to obtain legal assistance:

Well, I think you've just to allow people to be able to, for example, access Legal Aid, for example. If they're self-represented people, they can't afford a lawyer or they choose not to have a lawyer, then I think they should be able to go to Legal Aid and get a free hour or two hours with two lawyers at Legal Aid who say whether the orders are proper, because people don't know. (JO)

Judicial officers particularly emphasised the importance of parents being advised that compliance with the orders is not optional. As one participant noted about their experience of contravention matters:

I find it very common that people truly do not understand that they can't choose whether or not to comply. (JO)

Stronger punitive responses to contraventions

Some judicial officers reflected on what they believed was poor messaging by the courts by failing to impose punitive enforcement measures for egregious breaches of orders. As one participant put this: "But the problem with enforcement is, in part, we never prosecute people for contempt ... So we don't punish the really contumelious ones as heavily as we should." (JO)

Describing a recent case in which a parent had abducted the child and gone "underground" for some time, this judicial officer pointed out:

There was no question it was done to evade the court order, and this was as clear a case of contempt as you can possibly get. But the court didn't do anything about it. And I thought, "Well, if that's the case, what are we supposed to do?" (JO)

Post-order support for parents

Some judicial officers identified the need for greater funding and emphasis on providing parents with post-order support services to enhance their capacity to implement the parenting arrangements and avoid further litigation. As one judicial officer described this approach: "I think post-order support is a fantastic thing to have in place." (JO)

Various options for this were raised as ways of giving effect to this idea, including judicial supervision of the orders (JO), use of the court's consultants to provide support after orders are made and explain the orders to children (two JOs), and the provision of counselling (JO) or family therapy by external service providers:

If you had someone assist that way, like a family consultant, that would be much better ... Explaining orders – family therapists do it in a way. It's essentially family therapy. If we had – because not everyone can afford it. But if

we had a way that even if we could refer out to private family therapists who could continue that relationship and work with them, I think some orders would be much more capable of being followed if they had that ongoing support. At least for a period; maybe six months, maybe a year. And that would need funding of some sort. It doesn't have to be internal. That could be external providers. But that could be a good way of supporting [parents]. (JO)

The benefits of post-separation support with an educative function that includes clarifying the content of, and obligations pursuant to, the parenting orders, through to therapeutic services and remedial support where issues arose with the implementation of the orders, were all features identified as having potential to head off non-compliance: ... we're talking about enforcement of orders, we'll keep coming back to the same thing, the quality of the order. And so when two parties who enter into an order at a certain stage of their post-separation journey, say, then any number of parenting courses or – that they go to, the sorts of community-based support that's out there, which is enormous these days. In the old days, of course, all roads led to the court, we had custody counselling, we had this, we had that. We don't have that anymore. (JO)

I think that when a contravention is filed there should be a compulsory conference – confidential, but nevertheless compulsory – with a family consultant and a registrar, to see if they can work out what, in fact, is the problem here, and can it be addressed by varying the orders? And in that, there could be an element of education, in that the registrar could explain to people that "compliance with court orders is not up to you, and it's not up to you to decide if you don't feel like sending them today, that they're going to a party and so you can't have them this week", that sort of thing. And also, in terms of access, parents [need] to understand that sometimes kids just can't come because they're not well, or that something has happened. It's not necessarily somebody being malicious. (JO)

One judicial officer described the potential for a "contravention unit" or "after-sales service unit" where parties would have access to a registrar and a family consultant to resolve issues arising in relation to the implementation of the orders in a timely fashion:

... when I've talked about the contravention unit, that could also be an after-sales service unit ... and they've got somewhere they can go and speak to a registrar and a family consultant, add that double whammy, which I think is crucial in these matters. They worked very well in the [City 2] Registry, having a registrar and family consultant, it's a very good system for the people ... and maybe they can work it out. They can vary an order, I don't have a problem. I got it wrong, that's fine, I want things to work for the children. So you could have that unit being both, deal with contraventions and what you called after-sales service, and staffed with the appropriate, properly trained registrars and family consultants. (JO)

Summary

This section examined participants' views on the effectiveness of the contravention regime and how it could be improved. The findings show that, overall, most survey participants did not agree that the system was "effective in encouraging compliance" (mean 2.25 out of 5). Nor did they agree that the system was "effective in discouraging non-compliance" (mean 2.37 out of 5).

In relation to existing options for addressing contraventions, there was most support for the variation of parenting orders with strong support also for post-order support programs and post-separation parenting programs. There was less support for punitive options, with around half the sample suggesting that fines and bonds were sufficient and appropriate and about one third saying this for prison. Nonetheless, in qualitative responses, some participants (including judges) indicated that greater application of punitive responses might improve the system and strengthen its deterrent effect.

The views of judges indicated that while the punitive aspects of the system were necessary to uphold the authority of the court, the range of different dynamics underlying non-compliance required a flexible options-based response. This involved several interrelated issues. First, the fact that parenting orders are made in the exercise of the best interest jurisdiction meant that punitive responses to parents would adversely affect children. Second, the drivers of non-compliance were seen as varied, ranging from perverse behaviour on the part

of parents that was not amenable to change through court intervention to unworkable orders produced as a result of systemic failures, including undetected safety concerns.

Notably, the responses of survey participants about the impediments to taking action in relation to contravention suggest that the legal character of contravention proceedings disincentivises action being taken. In particular, the cost of legal proceedings, reluctance to engage with a court process, the complexity of proceedings and uncertainty about the outcome are seen to deter clients. In addition to emphasising the cost of legal proceedings, the qualitative responses also point to delays in legal processes making action ineffective, and the exhaustion and trauma associated with litigation as underpinning reluctance to use the contravention regime.

An issue highlighted by judicial officers and survey participants concerns the implications of the quasi-criminal nature of the contravention provisions arising from the inclusion of responses such as imprisonment. From a technical perspective, the level of evidentiary specificity required to justify the exercise of jurisdiction is seen to impose barriers that are insurmountable for some litigants, especially self-represented litigants. The data suggest that this means a substantial proportion of contravention applications are struck out or dismissed.

Another area where the legislative provisions were seen to be unhelpful concerns vexatious litigation. Again, these provisions were seen as placing the bar for having a litigant recognised as vexatious too high, meaning that judges have insufficient powers to deal with systems abuse that does not occur within the strict parameters required by the provisions.

Additionally, the survey responses also indicate that reluctance to take action for non-compliance often arises from fear of the other party and concern about the impact of the potential outcome on children. Qualitative responses demonstrate concern about entrenching or worsening difficult dynamics, including those associated with family violence and systems abuse.

Three options for improving compliance with parenting orders attracted majority support from survey participants:

quicker and simpler options (69%), clear and simple wording in parenting orders (58%) and orders that accommodate changes for children over time (52%; Figure 11). Another option – measures to ensure obligations under orders are communicated (48%) to parents – drew support from almost half the sample. Two other options were viewed less favourably: post-order support such as supervision under FLA s 65L (43%) and parenting coordination or case management from the commencement of the litigation (43%). Notably, however, mechanisms for increased post-order support were raised by judges and some comments in open-ended text boxes as measures that could address contravention.

In terms of adjustments to the support provided to parents in the family law system, there was the strongest endorsement for better access to educative therapeutic support in relation to communication and therapeutic support in the early stages of a dispute.

Similarly, several strategies for better identifying and responding to risk issues, including thorough evidence-gathering practices, also received endorsement. Qualitative responses raised a need for systemic change to develop safe and appropriate parenting orders.

A majority (79%) of participants also endorsed better and more widely available processes to support the participation of children and young people.

Judicial officers offered a range of perspectives on how the system could be improved. Concern for better ways of considering the needs and interests of children was evident in several responses, along with concern for children about the implications of the punitive aspects of the system.

Other suggestions from judicial officers concerned better management of resources to ensure contravention matters were given the attention they deserve, and processes for triaging and encouraging settlement of contravention matters. Additionally, measures to improve the quality and comprehensibility of parenting orders were seen as important.

Discussion

The findings set out in this report indicate that, according to the views of many professionals who work in the family law system, the contravention regime is an ineffective mechanism for responding to non-compliance with court orders. In this context, three points warrant particular emphasis in considering the implications of these findings. First, separated parents who require court orders are a particularly complex subset of parents affected by issues such as family violence, safety concerns and other issues related to risk. Second, the contravention regime involves a long recognised conceptual tension in that the aims of legal enforcement mechanisms may conflict with the aims of decision-making in children's best interests. Third, the findings in this report demonstrate that non-compliance arises from a complex range of issues, with five overlapping themes emerging as particularly significant: family violence and safety concerns, child-related issues, circumstances where parents' behaviour is seen as particularly difficult, orders that are seen as unworkable for technical or substantive reasons and the existence of a contravention regime that is widely regarded as ineffective. In each of these areas, a potentially complex interaction between personal characteristics, systemic issues, and potentially, professional practices gives rise to the circumstances in which non-compliance occurs. These findings suggest that system-wide measures and adjustments are required to improve compliance and respond to contravention.

Family violence and safety concerns

In keeping with the findings of previous Australian (Rhoades, 2002) and international research (Halliday et al., 2017; Trinder et al., 2013) on enforcement matters, the findings in this report confirm dynamics arising from family violence and safety concerns are highly relevant in problematic compliance with parenting orders.

In light of the characteristics of the families who engage with lawyers and courts to make parenting arrangements, it is unsurprising that such dynamics stand out among those seeking advice in relation to contravention. Almost half of the professionals surveyed indicated that three quarters or more of clients seeking advice about contravention were affected by family violence, with almost one quarter saying safety concerns were relevant for three quarters or more.

Issues relating to risk were prominent in the circumstances of clients seeking advice on contravention. In particular, around 85 per cent of professionals indicated seeing clients who complied with orders despite having concerns for the safety of their child. Professionals also commonly indicated that risks had arisen or escalated since orders were made. Some judicial officers also demonstrated awareness that concerns about safety and family violence may not be revealed or adequately considered in negotiation or parenting order proceedings, leading to one of the areas where inappropriate orders may be made. These findings reinforce concerns that the family law system requires improvement in assessing, managing and responding to risk more widely (ALRC, 2019), with shortcomings in these areas leading to unsafe orders that may nonetheless be complied with.

In terms of the efficacy of the contravention regime for these kinds of cases, it is significant that 80 per cent of professionals agreed that one of the factors that was significant in deterring action from being taken in relation to compliance was fear of the other party. This suggests that the contravention regime may operate to maintain compliance in circumstances where safety is an issue, rather than encouraging action to seek safer outcomes. This is despite an emphasis in advice-giving practice on seeking legal advice and instigating court proceedings in matters where safety concerns are pertinent. These findings raise issues that are much broader than the contravention regime itself, as evidenced by high levels of support among professionals (84% agreeing, including 55% strongly agreeing) for better ways of addressing risk issues in the family law system as a way of reducing non-compliance with parenting orders.

Children and young people

The findings set out in this report indicate that issues relating to children and young people who are the subject of parenting orders are relevant to understanding compliance problems. Again, this is consistent with the findings of international research specifically on enforcement (Halliday et al., 2017; Trinder et al., 2013) and with local research on the experiences of children and young people with the family law system (Carson et al., 2018). The insights set out in this report indicate that a range of systemic issues contribute to difficulties with

compliance in this area, including limited opportunities for the participation of children and young people in parenting order processes (Carson et al., 2018) and the lack of flexibility in orders to accommodate change as the needs of children and young people change (ALRC, 2019, pp. 350–351; Carson et al., 2018; Chisholm, 2018). Moreover, with children and young people being the subject of, but not party to, parenting orders, the central conceptual tension in the enforcement of orders made in the exercise of a best interest jurisdiction places the focus on the limited workability of a punitive approach in this context.

One of the findings set out in this report that foregrounds the limited emphasis placed on fulfilling the participation rights of children and young people concerns the extent to which professionals report explaining orders to them. Only one fifth of professionals indicated that they almost always, often or sometimes explained orders to children and young people, in contrast with 96 per cent who indicated almost always explaining them to their own client.

Although issues concerning children with complex health or other needs were not as strongly evident as safety concerns in the range of circumstances applying to clients seeking advice about contravention, close to one third of professionals indicated these issues were relevant to more than half the clients they provided compliance advice to.

Circumstances in which orders did not cater for children's changing needs were identified as relevant by around 80 per cent of participants. Similarly, some judicial officers highlighted contravention issues arising from out-of-date orders that no longer suited the developmental stage of the children and young people.

More than eight in ten professionals identified a refusal on the part of children to comply with orders as a driver of non-compliance. In these circumstances, the advice most commonly provided was to attend mediation/FDR or counselling or to commence lawyer-led negotiation.

The judicial officer interviews were particularly informative in developing understanding of the implications of the contravention regime from a child-focused perspective. These participants highlighted the adverse consequences for children and young people of the application of punitive

responses such as jail and fines, with such measures being seen as depriving children of a parent and of financial resources. More broadly, some judicial officers spoke of the potential for the threat of contravention proceedings to inspire fear in children and young people and to secure compliance in unsafe or difficult circumstances.

These findings support understanding of the preference expressed by professionals for the variation of existing parenting orders (75% endorsing) as a response to compliance issues. Concern about the potential impact on children of the outcome of contravention proceedings was one of the top three issues seen as deterring parents from taking action in relation to non-compliance. A systemic adjustment to improve processes for facilitating the participation of children and young people in proceedings was seen as having potential to improve non-compliance by 79 per cent of participants. Similarly, some judges suggested greater focus on the views of children and young people, not only in parenting order processes but also in contravention matter processes, would be of value in informing decision-making, particularly if an ICL could be involved.

Difficult dynamics

Conceptually and empirically, this theme is the most difficult of the five to describe. It was examined in the research through questions concerning conflict and abusive, controlling and vindictive behaviour either on the part of parties alleging contravention or committing contravention. It was also evident in the qualitative data from judicial officers and professionals concerning behaviour on the part of litigants described as intractable, inflexible or otherwise perverse. There is overlap between this theme and the safety and family violence theme, to the extent that intractable and inflexible behaviour may also be a manifestation of a pattern of coercive control. Additionally, behaviour seen as intractable could be a response to the unresolved safety concerns or fears of the other parent. Similarly, dynamics perceived as "high conflict" may also involve family violence. The findings set out in this report suggest that identifying and responding to these dynamics pose particular challenges in the contravention context, since intractable behaviour is most likely to be seen as justifying a punitive response that may also adversely affect

the children and potentially compound the harm done to children as a result of exposure to difficult dynamics.

“Ongoing parental conflict” was the most frequently identified of the four sets of characteristics (the others being family violence, other safety concerns and children with complex health needs) by professionals. Close to eight in ten professionals identified these characteristics as applying to more than half of their contravention clients, including 66 per cent indicating they applied to three quarters or more.

In terms of the circumstances of clients, these dynamics were assessed through questions relevant to the misuse of litigation. Just over three in ten participants indicated providing advice to clients for whom misuse of court processes was relevant. Close to one quarter advised clients where contravention applications were being used in interim proceedings as a tactical manoeuvre. Overall, contravention applications being used tactically in relation to interim orders and as part of a pattern of misuse of litigation were not seen as commonly by professionals as other circumstances, such as circumstances related to family violence, safety and children’s needs and wishes. Nonetheless, qualitative insights from the judicial officer interviews and the open-ended text responses in the surveys demonstrate serious concerns about the use of contravention processes as systems abuse in the context of an ongoing dynamic of family violence. There is significant awareness among professionals of these dynamics and their negative impacts.

In relation to questions aimed at identifying views on the drivers of contraventions, four questions concerned negative motivations. Two concerned the contravening party and referred respectively to “difficult or vindictive” and “abusive or controlling” motivations. Two concerned the party alleging contravention and referred to “abusive or vindictive” and “abusive and controlling” motivations. Responses to these sets of questions indicate that professionals are more likely to consider malicious motivations apply to parties committing contraventions than alleging them (affirming proportions exceeding 70%). However, affirmation of malicious motivations on the part of parties alleging contravention were also common, with more than 60 per cent selecting these responses. In these circumstances, advice-giving practices prioritised mediation/FDR, counselling and legal advice.

Qualitative descriptions indicated varied dynamics in intractable cases. In some instances, controlling behaviour and vexatious litigation were explicitly referred to. There was also reference to mental health issues, including personality disorders, parents who were simply stubborn and not child-focused and self-represented litigants who had never intended to comply with orders. Although some situations were seen as meritng a punitive response, and examples were provided where this occurred, judicial officers and some professionals participating in the survey also acknowledged that such responses could adversely affect children and young people and were not often used.

Poorly formulated orders

The fourth theme highlighted concerns about orders that are poorly formulated in either a technical sense (e.g. being badly worded) or substantively (e.g. being unsafe). Both aspects of this theme were particularly prominent in the interviews with judicial officers.

Professionals also identified “misunderstanding about the meaning of the orders” as applying in just over 71 per cent of matters where advice was sought. In these matters, professionals most often indicated advising clients to attend mediation/FDR or commence negotiation with the other party, and that legal action was unlikely to be cost-effective. Significantly, 92 per cent of participants agreed that clear and simple wording in parenting orders would support better compliance.

Professional practices may contribute to poorly formulated orders, with the findings indicating that explaining obligations under orders and the consequences of contravening orders is a majority but not universal practice. Similarly, substantial reliance on precedent orders may mean that, in some cases, orders may not be sufficiently responsive to the needs of the children and young people in individual cases.

In relation to orders that are poorly formulated in a substantive sense, the points made above in relation to family violence and safety concerns and children and young people are relevant.

The effectiveness of the contravention regime

The preceding discussion has highlighted findings on the varied drivers and dynamics relevant to understanding the dynamics of non-compliance and contravention of parenting orders. In the context of a majority professional view that the contravention regime is not effective, some additional findings warrant further discussion.

First, it is significant that advice-giving practice generally prioritises FDR/mediation, counselling and lawyer-led negotiation, except in cases involving safety concerns, where court action is advised. These professional practices should be seen in the context of response patterns in relation to the questions about the issues that discourage clients from taking action in relation to non-compliance. The issues that figure prominently in this context are the financial cost associated with legal proceedings, reluctance to engage with court processes again (potentially due to trauma and exhaustion) and the level of complexity associated with legal proceedings (see also ALRC, 2019, pp. 354–355). These findings indicate that the legal and court-based framework for the contravention regime is out of step with some client needs, from the standpoint of some professionals who work in the system.

Additional support for this conclusion comes from responses in relation to options for improving compliance. Support for quicker and simpler options to address non-compliance was the most strongly endorsed strategy, with 94 per cent of the sample agreeing, including 69 per cent strongly agreeing. Similarly, a strategy that was not legal in nature was the most strongly endorsed of nine options for changes to reduce non-compliance. The need for educative and therapeutic support to improve ongoing communication was endorsed by 92 per cent of the sample, with 56 per cent strongly agreeing. Other suggested improvements included court-based measures such as triage and post-order support without further need for court hearings in some cases.

At the same time, there is acknowledgement in a subset of responses that there are some circumstances where a punitive response may be necessary. Indeed, it is clear that some professionals view the limited application of punitive responses as one of the reasons the system is ineffective.

New and emerging developments

In light of the issues raised in this discussion, it is appropriate to highlight some new and emerging developments that may influence the future policy and practice context particularly in relation to litigation. These developments are briefly outlined here and will be considered in more detail in the final report.

In relation to the management of litigation, the FCFCFAA introduces overarching purpose provisions for family law practice and procedure (s 67) that are binding on the court, parties and lawyers: s 67(3), s 68(2) and s 68(3), respectively. The provisions specify two aims for the just resolution of dispute according to law – sub-s 1(aa) – and as quickly, inexpensively and efficiently as possible: sub-s 1(b). In addition, and in support of the new court structure, the FCFCoA has issued a new Central Practice Direction to accompany the implementation of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021 (Cth). Management of risk and an expectation of compliance with court orders are among ten core principles set out in the Central Practice Direction (FCFCoA, 2021).

Moreover, the FCFCoA has received a significant injection of funds (including \$100 million over four years in the 2021–22 budget) supporting the implementation of new initiatives (see further below) and a 10 per cent increase in judicial capacity, a one third increase in judicial registrar capacity and ten additional family consultants (Commonwealth of Australia, 2021, p. 85). These resources support a strengthened capacity for active case management.

A further initiative underway is the Lighthouse Project, a pilot involving triaging and risk screening and a specialist list for family violence matters in the family law courts (Australian Government, 2021, p 8). In the early phases of its operation, some 64 per cent of parenting matters were being classified as high risk in the initial screening phase (Commonwealth of Australia, 2021, p. 86).

As noted at the beginning of this report, there is also a broader family law reform program underway. In relation to parenting arrangements, the government response to the ALRC *Family Law for the Future Report* has confirmed a simplification of the parenting provisions will occur (Australian Government, 2021, pp. 11 and 42–43). It has also committed to clarifying language relating to shared parental responsibility and

retaining the legislative link between orders for shared parental responsibility and the court's obligation to consider equal or substantial and significant time arrangements (pp. 13–15).

Conclusion

The findings presented in this report are based on one part of a four-part research program that examines compliance with and enforcement of family law parenting orders. Specifically, the report findings are based on the observations and experiences of professionals and may not be representative of the experience of the broader population of parties to parenting orders. Final conclusions on the basis of synthesised and triangulated evidence from the other elements of this project, together with a more extensive literature review, will be presented in the final report due in the first half of 2022.

The findings in this Stage One report indicate that the drivers of non-compliance with parenting orders are complex. Systemic issues contribute, including shortcomings in the responses to family violence and safety concerns and limitations in the way the system supports the participation of children and young people. At the same time, professional views suggest there is also a small subset of cases that for various reasons, including mental health issues and systems abuse, are intractable.

The operation of the existing contravention regime is seen as ineffective on a range of grounds. This includes the limited application of punitive responses, which are seen by some decision-makers and professionals to raise a conflict with child-focused decision-making. Further, professionals indicate parents are reluctant to use the system for various reasons, including cost, delay, trauma, uncertainty about the outcome and fear of the other party.

Overall, these preliminary findings suggest that the effect of the inclusion of punitive responses in the regime may have unintended consequences. Findings that indicate professionals commonly see clients who comply with orders considered to be unsafe, together with evidence on professionals' views on the reasons people do not take action in relation to compliance, suggest the format of the system is inconsistent with user needs. It appears that it is ineffective both for taking action for non-compliance and taking action to secure safer orders. Furthermore, the qualitative insights indicate that as a "quasi-criminal" jurisdiction (due to the inclusion of criminal penalties), the contravention regime

requires a level of evidentiary specificity that is difficult to satisfy. Along with the cost, complexity and stress associated with legal proceedings, this contributes to the inaccessibility of the current regime. At a broader level, there is also significant concern that the punitive aspects of the regime are incompatible with a child-focused response.

Implications for policy and practice

Policy

This report sets out the findings of one aspect of a four-part research program. As a consequence, the findings should be considered preliminary in nature. Further important insights on the research questions and the functioning of the parenting order contravention regime will be set out in the final report on the basis of synthesised evidence from all five elements of the research program, including, importantly, the court file analysis, the Survey of Parents and Carers and the desktop review of three international jurisdictions.

The implications for policy arising from this aspect of the research program are complex. First, non-compliance with parenting orders arises from a complex range of dynamics, with systemic factors including shortcomings in the identification, assessment and management of risk and measures for supporting the participation of children and young people including in terms of explaining court outcomes. This indicates that wider systemic adjustments in these areas are required to support the development of parenting orders that are sustainable and implementable.

Second, several aspects of the operation of the contravention regime are seen as inconsistent with client needs: it is seen as slow, costly, technical, potentially traumatic and potentially open to misuse. Further, professional views indicate that orders considered to be unsafe may nonetheless be complied with, for a range of reasons including fear of the other party and reluctance to engage with a court process again. This suggests that there should be greater emphasis on problem-solving and therapeutic approaches to non-compliance.

The findings reveal complexity in terms of any policy development to strengthen the regime's operation in a punitive sense. Although it is clear that some professionals view this as warranted and necessary for a subset of particularly difficult cases, the findings in this report indicate that it may be challenging to develop a scheme that targets the particular subset these responses are appropriate for and does not create unintended consequences. Such unintended consequences could include creating further deterrents for people with safety concerns from seeking safer outcomes and providing further opportunities for systems abuse. Moreover, the application of punitive responses may also

involve adverse outcomes for children and young people including pressure to comply with arrangements that are not safe or in their best interests.

Practice

There are several areas where these findings have significance for practice, particularly in responses to family violence and safety concerns and the engagement of children and young people in the development of parenting orders. Additionally, care needs to be taken to ensure that parenting orders are fit for purpose, technically and substantively.

For practitioners, these findings place focus on improving the identification and management of safety and risk issues. It is critical that practitioners ensure that safety and risk are adequately assessed and considered in the parenting arrangements. Where orders have resulted in parenting arrangements that are unsafe (either from the outset or because circumstances change), it is important that clients are supported to seek safe parenting arrangements, including through accessing legal advice or instigating legal action where necessary. For some parents, it may be appropriate to attempt to resolve issues through counselling or negotiation but this requires careful consideration and engagement with skilful practitioners to ensure that safety is maintained. Clients may need to be referred to specialist family and domestic violence services. The root causes of safety concerns should be addressed, including seeking personal protection orders and therapeutic assistance. Children that have been exposed to family violence or other harmful behaviour may also need to be included in personal protection orders and they may need therapeutic assistance.

In relation to children and young people, it is important that parenting orders are developed in a way that responds to their needs and supports their participation rights. Children and young people should be consulted on parenting arrangements, and their views, including on their own safety, should be taken into account. Outcomes should be explained to children and young people. Where the needs of children and young people change, parents should be encouraged to ensure that

parenting arrangements adapt to these changes, including through the use of mediation and counselling.

In developing parenting orders, professionals should take care when using templates and precedents. They should ensure that the orders that are drafted accommodate the needs of the particular children and young people involved. They should also ensure that the orders are clearly drafted and that the obligations imposed by them are clearly understood by their clients. In this case of FDRPs, this should entail explaining the obligations to both parties.

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APPENDIX A:

Matters involving compliance with parenting orders

Table A1: Proportion of client enquiries seeking advice about compliance with parenting orders or the contravention of parenting orders, by occupation

Proportion of client enquires	Legal/court professional (%)	FDR practitioner (%)	DFV professional (%)	Other professional (e.g. FRC) %	Total (%)
About three quarters or more of enquires	2.4	6.3	10.0	12.8	5.6
More than half but less than three quarters of enquires	8.8	5.1	6.7	10.6	8.0
About half of enquires	10.0	7.6	23.3	12.8	11.3
Less than one half of enquires	72.9	69.6	53.3	48.9	66.5
Cannot say	5.9	11.4	6.7	14.9	8.6
Total	100.0	100.0	100.0	100.0	100.0
n	168	79	30	46	334

APPENDIX B:

Circumstances in which a contravention was alleged and advice provided

Table B1: Proportion of professionals reporting "Almost always", "Often", "Sometimes" to nominated reasons for contravention of parenting orders in the pre-COVID period

Reason	Almost always (%)	Often (%)	Sometimes (%)	Rarely/ never (%)	Cannot say (%)	Not applicable (%)	Total (%)	n
There was a misunderstanding about the meaning of the orders?	5.3	18.9	47.4	19.2	5.6	3.7	100.0	323
The non-compliance was accidental?	0.9	4.0	36.0	48.1	6.5	4.3	100.0	322
The orders were not flexible enough to accommodate the changes in the child/children's activities	4.3	28.2	36.2	21.7	5.6	4.0	100.0	323
The child/children refused to comply	3.4	35.6	43.7	9.0	4.6	3.7	100.0	323
It was no longer safe for the contravening party to comply with the orders	5.3	20.3	39.7	25.0	5.3	4.4	100.0	320
It was no longer safe for the child/children to be required to comply	5.9	20.4	43.7	20.1	5.3	4.6	100.0	323
It was never safe to comply with the orders	3.7	5.3	21.2	48.9	15.3	5.6	100.0	321
The contravening party has not received therapeutic assistance with underlying issue/s	9.4	25.5	34.6	12.3	14.2	4.1	100.0	318
The party alleging the contravention has not received therapeutic assistance with the underlying issue/s	6.9	20.6	35.3	19.7	13.1	4.4	100.0	320
Another family member has not received therapeutic assistance with underlying issue/s	4.4	9.0	20.6	31.5	24.3	10.3	100.0	321
The contravening party was trying to be difficult or vindictive	12.4	32.5	38.1	8.0	5.0	4.0	100.0	323
The party alleging the contravention was trying to be abusive or vindictive	6.2	19.6	43.6	20.6	5.3	4.7	100.0	321
The contravening party was being abusive or controlling	12.3	30.9	37.3	9.3	6.2	4.0	100.0	324
The party alleging the contravention was being abusive or controlling	6.9	20.6	42.8	19.7	5.6	4.4	100.0	320

Table B2: Proportion of professionals reporting "Almost always", "Often", "Sometimes" to nominated reasons for contravention of parenting orders in the COVID period

Reason	Almost always (%)	Often (%)	Sometimes (%)	Rarely/ never (%)	Cannot say (%)	Not applicable (%)	Total (%)	n
There was a misunderstanding about the meaning of the orders?	1.6	14.0	44.3	30.3	5.7	4.1	100.0	314
The non-compliance was accidental?	0.6	7.0	37.4	41.9	7.0	6.1	100.0	313
The orders were not flexible enough to accommodate the changes in the child/children's activities	4.2	18.8	43.8	20.8	6.7	5.8	100.0	313
The child/children refused to comply	3.2	17.6	44.9	22.4	6.7	5.1	100.0	312
It was no longer safe for the contravening party to comply with the orders	5.8	18.6	42.3	21.8	5.1	6.4	100.0	312
It was no longer safe for the child/children to be required to comply	6.4	19.9	43.6	17.9	5.1	7.1	100.0	312
It was never safe to comply with the orders	3.0	5.9	21.3	46.6	12.5	10.8	100.0	305
The contravening party has not received therapeutic assistance with underlying issue/s	4.0	16.2	37.0	21.8	12.5	8.6	100.0	303
The party alleging the contravention has not received therapeutic assistance with the underlying issue/s	2.9	16.6	33.2	26.1	12.1	9.1	100.0	307
Another family member has not received therapeutic assistance with underlying issue/s	0.7	7.2	23.0	33.8	19.3	16.1	100.0	305
The contravening party was trying to be difficult or vindictive	9.8	27.0	40.0	11.4	5.4	6.3	100.0	315
The party alleging the contravention was trying to be abusive or vindictive	5.5	18.0	40.8	21.9	6.8	7.1	100.0	311
The contravening party was being abusive or controlling	9.9	26.0	39.7	12.8	5.8	5.8	100.0	312
The party alleging the contravention was being abusive or controlling	6.8	18.7	35.5	24.8	7.1	7.1	100.0	310

Table B3: Proportion of professionals who reported "Almost always", "Often", "Sometimes" to nominated reasons for contravention of parenting orders in the pre-COVID period who provided the nominated advice or assistance

Reason	There was a misunderstanding about the meaning of the orders? (%)	The non-compliance was accidental? (%)	The orders were not flexible enough to accommodate the changes in the child/ children's activities (%)	The child/ children refused to comply (%)	It was no longer safe for the contravening party to comply with the orders (%)	It was no longer safe for the child/ children to be required to comply (%)	It was never safe to comply with the orders (%)
Proportion of professionals reporting "Almost always"/"Often"/ "Sometimes" for each contravention issue (missing excluded)	71.6	40.9	68.7	82.7	65.3	70.0	30.2
n	231	132	222	267	209	226	97
I advised that the behaviour described did not constitute a breach of the orders	26.0	23.5	8.1	6.0	5.7	4.4	3.1
I advised that the contravention was not serious enough to warrant any action	32.9	34.9	13.1	4.5	1.0	0.9	1.0
I advised that the contravening party could establish a reasonable excuse	34.6	37.9	17.6	24.0	29.7	30.1	10.3
I advised the client that they should discuss the matter with the person contravening the orders	34.2	47.0	38.3	34.8	5.3	5.8	2.1
I advised that legal action was unlikely to be a cost-effective approach to addressing the contravention	48.5	51.5	30.6	28.5	7.2	6.2	6.2
I recommended that the parties attend counselling	29.0	20.5	25.7	51.7	18.2	19.5	15.5
I recommended that the person seek legal advice	47.6	39.4	47.3	46.1	63.2	58.4	75.3

Reason	There was a misunderstanding about the meaning of the orders? (%)	The non-compliance was accidental? (%)	The orders were not flexible enough to accommodate the changes in the child/children's activities (%)	The child/children refused to comply (%)	It was no longer safe for the contravening party to comply with the orders (%)	It was no longer safe for the child/children to be required to comply (%)	It was never safe to comply with the orders (%)
Proportion of professionals reporting "Almost always"/"Often"/ "Sometimes" for each contravention issue (missing excluded)	71.6	40.9	68.7	82.7	65.3	70.0	30.2
n	231	132	222	267	209	226	97
I recommended that the parties attend mediation/FDR	65.4	48.5	79.3	68.1	34.0	35.4	22.7
I recommended commencing negotiations with the other party or their lawyer	52.0	40.2	48.7	47.6	39.2	37.6	22.7
I recommended that the person issue legal proceedings	7.4	0.8	7.2	12.7	30.1	35.8	29.9

Note: Multiple responses could be selected so percentages do not sum to 100.

Table B3 (continued): Proportion of professionals who reported "Almost always", "Often", "Sometimes" to nominated reasons for contravention of parenting orders in the pre-COVID period who provided the nominated advice or assistance

Reason	The contravening party has not received therapeutic assistance with underlying issue/s (%)	The party alleging the contravention has not received therapeutic assistance with the underlying issue/s (%)	Another family member has not received therapeutic assistance with underlying issue/s (%)	The contravening party was trying to be difficult or vindictive (%)	The party alleging the contravention was trying to be abusive or vindictive (%)	The contravening party was being abusive or controlling (%)	The party alleging the contravention was being abusive or controlling (%)
Proportion of professionals reporting "Almost always"/"Often"/"Sometimes" for each contravention issue (missing excluded)	69.5	62.8	34.0	83.0	69.4	80.5	70.3
n	221	201	109	268	223	261	225
I advised that the behaviour described did not constitute a breach of the orders	4.1	7.0	9.2	7.1	16.1	5.0	9.3
I advised that the contravention was not serious enough to warrant any action	6.3	7.0	8.3	13.4	15.3	5.8	10.2
I advised that the contravening party could establish a reasonable excuse	7.2	12.0	4.6	5.2	15.3	5.0	13.3
I advised the client that they should discuss the matter with the person contravening the orders	11.8	9.0	6.4	13.8	12.1	4.6	6.2

Reason	The contravening party has not received therapeutic assistance with underlying issue/s (%)	The party alleging the contravention has not received therapeutic assistance with the underlying issue/s (%)	Another family member has not received therapeutic assistance with underlying issue/s (%)	The contravening party was trying to be difficult or vindictive (%)	The party alleging the contravention was trying to be abusive or vindictive (%)	The contravening party was being abusive or controlling (%)	The party alleging the contravention was being abusive or controlling (%)
Proportion of professionals reporting "Almost always"/"Often"/"Sometimes" for each contravention issue (missing excluded)	69.5	62.8	34.0	83.0	69.4	80.5	70.3
n	221	201	109	268	223	261	225
I advised that legal action was unlikely to be a cost-effective approach to addressing the contravention	21.3	21.9	14.7	26.9	26.0	18.0	20.9
I recommended that the parties attend counselling	53.9	59.7	52.3	34.0	40.8	31.8	36.9
I recommended that the person seek legal advice	44.3	44.3	37.6	48.9	50.2	51.8	50.2
I recommended that the parties attend mediation/FDR	55.2	48.8	36.7	57.8	53.4	43.3	41.3
I recommended commencing negotiations with the other party or their lawyer	31.7	24.9	22.0	45.2	35.4	39.9	30.7
I recommended that the person issue legal proceedings	12.7	5.5	2.8	27.2	11.2	34.9	20.0

Note: Multiple responses could be selected so percentages do not sum to 100.

Table B4: Proportion of professionals who reported "Almost always", "Often", "Sometimes" to nominated reasons for contravention of parenting orders in the COVID period who provided the nominated advice or assistance

Reason	There was a misunderstanding about the meaning of the orders? (%)	The non-compliance was accidental? (%)	The orders were not flexible enough to accommodate the changes in the child/children's activities (%)	The child/children refused to comply (%)	It was no longer safe for the contravening party to comply with the orders (%)	It was no longer safe for the child/children to be required to comply (%)	It was never safe to comply with the orders (%)
Proportion of professionals reporting "Almost always"/"Often"/"Sometimes" for each contravention issue (missing excluded)	59.9	45.0	66.8	65.7	66.7	69.9	30.2
n	188	141	209	205	208	218	92
I advised that the behaviour described did not constitute a breach of the orders	23.4	19.2	7.2	3.4	3.9	4.6	1.1
I advised that the contravention was not serious enough to warrant any action	28.7	31.2	12.0	4.9	2.9	2.3	1.1
I advised that the contravening party could establish a reasonable excuse	20.2	27.0	14.4	16.6	27.9	24.8	8.7
I advised the client that they should discuss the matter with the person contravening the orders	39.9	44.0	30.1	26.8	8.7	10.6	3.3

Reason	There was a misunderstanding about the meaning of the orders? (%)	The non-compliance was accidental? (%)	The orders were not flexible enough to accommodate the changes in the child/children's activities (%)	The child/children refused to comply (%)	It was no longer safe for the contravening party to comply with the orders (%)	It was no longer safe for the child/children to be required to comply (%)	It was never safe to comply with the orders (%)
Proportion of professionals reporting "Almost always"/"Often"/"Sometimes" for each contravention issue (missing excluded)	59.9	45.0	66.8	65.7	66.7	69.9	30.2
n	188	141	209	205	208	218	92
I advised that legal action was unlikely to be a cost-effective approach to addressing the contravention	36.7	30.5	22.5	22.4	11.1	10.6	6.5
I recommended that the parties attend counselling	17.6	18.4	25.4	46.8	23.6	23.4	22.8
I recommended that the person seek legal advice	42.0	36.9	48.8	50.7	56.7	56.9	77.2
I recommended that the parties attend mediation/FDR	53.7	52.5	71.8	60.5	32.7	35.3	20.7
I recommended commencing negotiations with the other party or their lawyer	42.0	34.0	42.1	38.5	33.7	33.9	16.3
I recommended that the person issue legal proceedings	2.1	2.8	5.7	11.7	27.4	27.1	18.5

Note: Multiple responses could be selected so percentages do not sum to 100.

Table B4 (continued): Proportion of professionals who reported "Almost always", "Often", "Sometimes" to nominated reasons for contravention of parenting orders in the COVID period who provided the nominated advice or assistance

Reason	The contravening party has not received therapeutic assistance with underlying issue/s (%)	The party alleging the contravention has not received therapeutic assistance with the underlying issue/s (%)	Another family member has not received therapeutic assistance with underlying issue/s (%)	The contravening party was trying to be difficult or vindictive (%)	The party alleging the contravention was trying to be abusive or vindictive (%)	The contravening party was being abusive or controlling (%)	The party alleging the contravention was being abusive or controlling (%)
Proportion of professionals reporting "Almost always"/"Often"/"Sometimes" for each contravention issues (missing excluded)	57.2	52.7	30.9	76.8	64.3	75.6	61.0
n							
I advised that the behaviour described did not constitute a breach of the orders	2.9	3.7	4.3	4.1	6.0	1.7	4.2
I advised that the contravention was not serious enough to warrant any action	4.6	4.9	5.3	7.4	9.0	5.1	5.8
I advised that the contravening party could establish a reasonable excuse	4.1	8.6	3.2	5.8	9.5	5.1	11.6
I advised the client that they should discuss the matter with the person contravening the orders	10.4	10.5	11.7	10.3	12.0	7.6	4.2
I advised that legal action was unlikely to be a cost-effective approach to addressing the contravention	20.8	17.9	18.1	26.0	20.0	17.8	18.0
I recommended that the parties attend counselling	60.7	62.4	53.2	35.5	39.5	32.2	35.5

Reason	The contravening party has not received therapeutic assistance with underlying issue/s (%)	The party alleging the contravention has not received therapeutic assistance with the underlying issue/s (%)	Another family member has not received therapeutic assistance with underlying issue/s (%)	The contravening party was trying to be difficult or vindictive (%)	The party alleging the contravention was trying to be abusive or vindictive (%)	The contravening party was being abusive or controlling (%)	The party alleging the contravention was being abusive or controlling (%)
Proportion of professionals reporting "Almost always"/"Often"/"Sometimes" for each contravention issues (missing excluded)	57.2	52.7	30.9	76.8	64.3	75.6	61.0
<i>n</i>							
I recommended that the person seek legal advice	43.4	45.7	46.8	47.1	51.5	55.1	54.0
I recommended that the parties attend mediation/FDR	48.6	40.7	35.1	50.8	51.5	35.2	38.6
I recommended commencing negotiations with the other party or their lawyer	26.0	25.9	22.3	39.3	32.0	40.3	30.2
I recommended that the person issue legal proceedings	15.0	8.6	5.3	23.6	10.0	28.4	16.4

Note: Multiple responses could be selected so percentages do not sum to 100.

Table B5: In the 12 months prior to the introduction of COVID-19 restrictions in March 2020, how frequently would you say that you:

Action	Almost always (%)	Often (%)	Sometimes (%)	Rarely/never (%)	Cannot say (%)	Not applicable (%)	Total (%)	n
See clients who comply with orders even though they are concerned about the safety of their child	9.9	39.0	38.7	6.7	1.0	4.8	100.0	313
See clients for whom the risks to child safety have arisen since the orders were made	3.2	24.1	53.4	12.9	1.9	4.5	100.0	311
See clients for whom the risks to child safety have escalated since the orders were made	3.9	20.9	53.7	13.2	4.2	4.2	100.0	311
See clients for whom risks to child safety have stayed the same since the order were made in the context of unresolved underlying risk issues	4.5	29.6	46.3	10.0	4.5	5.1	100.0	311
See clients for whom the orders did not adequately cater for children's changing needs and circumstances	6.4	35.3	41.3	10.6	2.2	4.2	100.0	312
Advise/represent clients in contravention matters that involved misuse of court processes	1.6	7.8	22.7	34.6	6.1	27.2	100.0	309
Advise/represent clients using the contravention application with respect to interim orders as a tactical manoeuvre	1.0	6.8	17.8	39.2	6.5	28.8	100.0	309

Table B6: In the period since March 2020 (when COVID-19 restrictions were introduced), how frequently would you say that you:

Action	Almost always (%)	Often (%)	Sometimes (%)	Rarely/never (%)	Cannot say (%)	Not applicable (%)	Total (%)	n
See clients who comply with orders even though they are concerned about the safety of their child	7.4	34.5	43.2	8.7	1.6	4.5	100.0	310
See clients for whom the risks to child safety have arisen since the orders were made	3.9	25.6	51.6	12.0	2.6	4.2	100.0	308
See clients for whom the risks to child safety have escalated since the orders were made	4.5	24.0	50.0	13.0	4.2	4.2	100.0	308
See clients for whom risks to child safety have stayed the same since the orders were made in the context of unresolved underlying risk issues	4.2	23.8	51.5	11.7	3.9	4.9	100.0	307
See clients for whom the orders did not adequately cater for children's changing needs and circumstances	6.2	29.0	46.3	11.1	2.6	4.9	100.0	307
Advise/represent clients in contravention matters that involved misuse of court processes	1.7	7.9	21.8	31.7	8.3	28.7	100.0	303
Advise/represent clients using the contravention application with respect to interim orders as a tactical manoeuvre	1.3	5.2	17.4	39.0	7.9	29.2	100.0	305

Table B7: Proportion of legal/court professionals reporting "Almost always", "Often", "Sometimes" to nominated reasons for contravention of parenting orders in the pre-COVID period, by whether family violence or child development training undertaken

	Family violence training?		Child development training?	
	No (%)	Yes (%)	No (%)	Yes (%)
There was a misunderstanding about the meaning of the orders?	71.4	83.4	77.2	81.4
The non-compliance was accidental?	37.6	52.1	43.4	53.5
The orders were not flexible enough to accommodate the changes in the child/children's activities	57.4	72.9	63.7	74.4
The child/children refused to comply	82.4	90.7	85.2	93.1
It was no longer safe for the contravening party to comply with the orders ^a	50.8	68.5	58	69.8
It was no longer safe for the child/children to be required to comply	60.3	75.1	66.9	74.5
It was never safe to comply with the orders ^{a,b}	10.5	21.8	14.1	26.2
The contravening party has not received therapeutic assistance with underlying issue/s ^b	59.7	73.4	62.4	82.9
The party alleging the contravention has not received therapeutic assistance with the underlying issue/s	51.4	62.4	53.7	70.0
Another family member has not received therapeutic assistance with underlying issue/s	26.9	29.2	29.5	24.3
The contravening party was trying to be difficult or vindictive	89.7	86.3	86.9	90.2
The party alleging the contravention was trying to be abusive or vindictive	67.7	69.8	69.7	66.6
The contravening party was being abusive or controlling ^b	82.3	83.1	81.1	87.7
The party alleging the contravention was being abusive or controlling	61.8	70.9	63.9	76.2
<i>n</i>	67-70	95-96	119-123	40-43

Notes: ^a Indicates difference between those who had attended family violence training and those who had not, statistically significant at $p < 0.05$ using Pearson chi square test.

^b Indicates difference between those who had attended child development training and those who had not, statistically significant at $p < 0.05$ using Pearson chi square test.

Table B8: Proportion who had received formal training in each of the following areas, by occupation

Training type	Legal court professionals (%)	FDR practitioners (%)	DFV professionals (%)	Other professionals (e.g., FRC) %
Mediation	43.3	82.5	13.3	12.2
Counselling	10.2	45.0	70.0	71.4
Child development	25.9	57.5	50.0	65.3
Psychology	22.3	36.3	33.3	53.0
Family violence	57.1	81.3	90.0	79.6
Child abuse and neglect	32.5	46.3	53.3	61.2
Cultural sensitivity and awareness	40.1	70.0	70.0	75.5
Trauma-informed practice	35.7	58.8	86.7	79.6
Child-inclusive practice	17.2	71.3	60.0	59.2
Family dispute resolution ^a		95.0	10.0	10.2
Total	100.0	100.0	100.0	100.0
<i>n</i>	170	80	30	49

Notes: ^a Non legal court professionals were asked an additional question if they had received formal training in family dispute resolution. Percentages can sum to more than 100.0% as multiple responses could be selected.

APPENDIX C:

Extract of Family Law Rules

Chapter 21: Applications

Chapter 21 of the *Family Law Rules* (at the time of writing) provides the following table outlining the relevant types of applications.

Item	Kind of application	Application form to be filed
1	Enforcement of parenting order	Application in a Case
1A	Contravention of subsection 67X(2) of the Act in relation to a recovery order	Application--Contravention
2	Contravention of an order (of a kind included in the definition of an order under this Act affecting children under section 4 of the Act) under Division 13A of Part VII of the Act affecting children, for example, a breach of a parenting order	Application--Contravention
3	Contravention of an order (of a kind included in the definition of an order under this Act under section 112AA of the Act) under Part XIII A of the Act not affecting children, for example, a breach of a property order	Application--Contravention
4	An order that another person be punished for contempt of court	Application--Contempt
5	Failure to comply with a bond entered into in accordance with the Act	Application--Contravention

Source: Family Law Rules, Chapter 21

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