CONTEMPT AND THE DISOBEYING SPOUSE

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I. INTRODUCTION

This article is an enlarged and revised version of a paper delivered by the first co-author to a meeting of the Family Law Council in June 1985. It discusses the findings of research conducted by the Australian Law Reform Commission into the use of civil contempt powers to enforce orders made by the Family Court against spouses engaged in matrimonial litigation.[1]

This research forms part of the Commission's current investigation of the laws of contempt of courts, commissions and tribunals, pursuant to a

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1 The following research was carried out by the Commission:

(a) Traditional legal research into the law and practice of civil contempt in the Family Court. The principal secondary source is *Australian Family Law and Practice Reporter* (CCH) (1982, with supplements) paras 56-000 ff.
(b) A survey administered to the judges of the Family Courts of Australia and Western Australia, which collected basic information on the contempt workload of the two Courts, and judicial views about the present law and reforms to it.
(c) A section devoted to family law in a general questionnaire on contempt administered to magistrates throughout Australia.
(d) A review of the Family Court's sentencing records kept at the Principal Registry. 147 sentences (which include a few sentences imposing a recognizance only) are recorded. The Commission and the Court itself are not confident that this respresents all prison sentences which have been imposed, although it probably includes most of them.
(e) Examination of the files of cases in the Sydney, Brisbane and Melbourne registries in which contempt applications were made during a period of three months during 1984.

reference given to it in April 1983 by the Commonwealth Attorney-General.[2] A Discussion Paper setting out provisional proposals on the issues dealt with in this article is scheduled for publication by the Commission in November or December 1985.[3]

The problems discussed in this article arise relatively frequently in practice because the losing spouse in contested matrimonial litigation is often a bitter and resentful person. The Family Court's order is experienced as a significant personal defeat. It requires the losing spouse to give up custody of a child, or to transfer property or pay maintenance to the other spouse, towards whom the affection of former times has often been transmuted into hatred and hostility. Predictably, a firm determination to disobey the order frequently develops. The available evidence establishes that the Family Court encounters many more breaches of its orders than any other court of civil jurisdiction. With a view to securing compliance with subsisting orders which are not yet obeyed, or punishing past disobedience, the Court has had on many occasions to resort to its civil contempt powers, supplemented (as outlined below) by statutory provisions in the Family Law Act 1975 (Cth).[4]

II. NATURE OF CIVIL CONTEMPT

Some preliminary remarks on the nature of civil contempt may be desirable, not least because the academic literature on it in Australia is negligible.[5] The broad phrase 'contempt of court' comprises any form of conduct which impairs, or threatens to impair, the proper administration of justice by the courts, and which therefore attracts punitive or coercive sanctions. This concept is broad enough to include intentional disobedience of a court order, though it also extends to such activities as disrupting court room proceedings, publicly denigrating judges, seeking improperly to influence participants in a case (for example, the judge, the jury or the witnesses), and publishing material which has a real and appreciable

(f) An extensive programme of interviewing throughout Australia. Three Commission officers spoke to over two hundred people, including judges, magistrates, lawyers, counsellors, community workers and present and former clients of the system.
The detailed findings of this research are set out in P. Waters, J. Fitzgerald and S. Wilson, *Contempt and Family Law*, Contempt Research Paper 6A, to be issued by the Commission in November or December 1985.

2 The scope of the reference and the questions raised by it are outlined in Issues Paper No. 4, *Reform of Contempt Law*, published by the Commission in January 1984.

3 The suggestions for reform in this article coincide substantially with those in the Discussion Paper. Where discrepancies exist, it is of course the version in the Discussion Paper that represents the official view of the Commission.

4 Similar powers are enjoyed by the Family Court of Western Australia and by magistrates' courts exercising jurisdiction under the Family Law Act. For reasons of convenience, this article is confined in terms to the Family Court of Australia. But many of the points made are applicable to these other courts.

5 There are however three substantial texts on contempt in England, all of which deal with civil as well as criminal contempt and pay due attention to Australian case law. These are N.V. Lowe (ed.), *Borrie and Lowe on Contempt* (2nd ed. 1983); A. Arlidge and D. Eady, *Law of Contempt* (1982); C.J. Miller, *Law of Contempt* (1976).

tendency to influence a jury in its deliberations. The branch of contempt law which relates to the enforcement of court orders is therefore only one aspect of contempt law as a whole. It is in fact distinguishable from other branches of contempt law in that its primary function is to promote the interests of the litigating party in whose favour the order is made, rather than to protect the authority of the court itself or the administration of justice in general terms. This difference is reflected in the fact that the name 'civil contempt' is given to those instances of contempt which arise from disobedience of a court order made in civil proceedings between two or more parties, whereas other forms of contempt, for example disruption of courtroom proceedings, are labelled 'criminal contempt'.

This is not to say, however, that the court's powers in cases of civil contempt exist only for the benefit of the successful party. From his or her point of view, the only important aim may appear to be coercion: all that matters is that whatever mode of use of contempt powers is undertaken by the court, the ultimate result should be that the order is obeyed. But the court cannot conceive its aim as being purely to coerce the disobeying party, with no hint of punishment, for four major reasons:

(a) In many cases, by the time the court is asked to exercise its contempt powers, coercion is no longer possible. This would be the case, for instance, if a husband who had been ordered to transfer money in a specific fund to his wife as part of a divorce settlement deliberately dissipated the whole fund, or if a custodial parent required to deliver a child for access on a specified date failed deliberately to do so. In such instances, the court is likely to feel compelled to inflict some sort of punishment on the disobeying party, rather than manifesting no reaction whatsoever to the past disobedience.

(b) Sometimes, an act done in defiance of a court order is also a criminal offence in its own right, irrespective of the existence of the order. This can be said, for instance, of an assault by a husband on a wife in breach of an injunction not to harass, assault or otherwise molest her.

(c) In some instances, the aim of inducing a recalcitrant party to obey court orders in the future may seem to be furthered by imposing punishment imposed for past disobedience. If, for instance, a spouse refuses access in breach of a court order, and without any good reason for so doing, any sanction imposed in exercise of the court's contempt powers may serve the twin aims of punishing the spouse for having flouted the order and inducing him or her to obey the same order in the future. It may also convey the message to the community at large that disobedience of orders will not be allowed to go unpunished.

(d) Even where a sanction for civil contempt appears to be wholly coercive in nature, it may be thought to be also justifiable on the basis that, where disobedience has reached such a stage that the exercise of contempt powers is deemed necessary, there should be some element of punishment imposed for defiance of the court's authority. In cases where a party stubbornly refuses to obey a subsisting order, the primary purpose of imprisonment is to

induce him or her to comply with it: once this occurs, the sentence can come to an end. In this sense, the contemnor 'carries the keys of his prison in his own pocket'.[6] But the imprisonment, implicitly if not explicitly, also contains a subsidiary element of punishment for defiance of the court's authority. The extent to which this element is justifiable depends upon the extent to which the court, invoking civil contempt powers, should act in its own interest as well as the interests of the other parties of the case.

A striking feature of contempt as a whole is that, under procedures which are unique within the law, criminal punishments, such as imprisonment or a fine, may be imposed by one or more judges of the court to which the alleged act of contempt is directed. This is in marked contrast to the normal criminal trial procedure, whereby offences are dealt with either by a magistrate, or by a judge sitting with the jury. This phenomenon of a court making a finding of liability for contempt relating to itself, and imposing a punishment for contempt, is sometimes justified on the grounds that a swift, summary mode of dealing with conduct which undermines judicial authority is the best means of upholding that authority. A familiar counter-argument, however, is that the court seems to be acting as 'the judge in its own cause'. Another unusual feature of contempt law is that the court's powers to pass a prison sentence on a person found guilty of contempt are not subject to any upper limit. In some instances, prison sentences are in fact expressed to last until some condition is fulfilled: for example, until the offender 'purges' the contempt by doing what he or she is required to do under a subsisting order. By contrast, the sentencing powers of courts in respect of most criminal offences nowadays are limited by express statutory provisions. This is not to say that the courts necessarily misuse their discretions in dealing with contempt of court: in fact, it is rare to encounter a gaol sentence by the Family Court greater than six months, except where kidnapping in breach of a custody order is involved.

III. THE FAMILY COURT'S DILEMMA

The Family Court was explicitly established as a 'helping court'. Both the legislation and the practices under which it operates adhere to the principle that the welfare of the families (in particular the children) with which it deals and the desirability of reconciliation between divorcing spouses (or, at least, improvement of their relationship) are paramount considerations.[7] Yet paradoxically, the potentially draconian procedures of civil contempt are distinctly more prominent in the Family Court than in any other court. The Family Law Act contains two sections specifically conferring contempt powers, and two more provisions, sometimes known as 'quasi-contempt'

6 *Re Nevitt* 117 F. 448, 461 (1902). In a recent well-publicised case, a defiant husband has been prepared to spend many months in gaol rather than obey a Family Court order. The background to the case is described in *Ascot Investments Pty Ltd* v. *Harper (No. 3)* (1982) FLC 91-253.

7 See especially Family Law Act 1975 (Cth) s. 43.

provisions, which confer powers which resemble civil contempt in the sense that the Court is authorised to impose criminal penalties for disobedience of its orders.

The two contempt sections are section 35 and section 108. Section 35 is as follows:

> Subject to this and any other Act, the Family Court has the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court.

Under section 24 of the Judiciary Act 1903 (Cth), the High Court has "the same power to punish contempts of its power and authority as is possessed . . . by the Supreme Court of Judicature in England". The two provisions, in combination, confer on the Family Court all the contempt powers attributable at common law to a superior court of record. Section 108 of the Family Law Act states:

> (1) Notwithstanding any other law, a court having jurisdiction under this Act may punish persons for contempt of that court.
> (2) The Rules of Court may provide for practice and procedure as to charging with contempt and the hearing of the charge.
> (3) Where a person in contempt is not a corporation, the court may punish the contempt by committal to prison or fine or both.
> (4) Where a corporation is in contempt, the court may punish the contempt by sequestration or fine or both.
> (5) The court may make an order for –
> (a) punishment on terms;
> (b) suspension of punishment; or
> (c) the giving of security for good behaviour.
> (6) Where a person is committed to prison for a term for contempt, the court may order his discharge before the expiry of that term.

The 'quasi-contempt' provisions are section 70(6) and section 114(4). Section 70(6) is as follows:

> If a court having jurisdiction under this Act is satisfied that a person has knowingly and without reasonable cause contravened or failed to comply with a provision of this section, that court may –
> (a) order that person to pay a fine not exceeding $1,000;
> (b) require that person to enter into a recognizance, with or without sureties, in such reasonable amount as the court thinks fit, that that person will comply with the relevant order, or order that person to be imprisoned until that person enters into such a recognizance or until the expiration of 3 months, whichever first occurs;
> (c) order that person to deliver up to the court that person's passport and such other documents as the court thinks fit; and
> (d) make such other orders as the court considers necessary to enforce compliance with this section.

The preceding sub-sections prohibit various forms of interference (whether by a spouse or by any other person) with custody and access orders, including removal of a child from the possession of the person entitled to custody by virtue of an order under the Act, and hindering or preventing access under the terms of an order. Section 114(4) establishes equivalent penalties for non-compliance with an order or injunction under section 114. The types of injunctions which may be granted include injunctions for the

personal protection of a spouse or a child of the marriage, injunctions restraining spouses from entering specified premises (for example, the matrimonial home or a spouse's place of work) and injunctions relating to the property of a spouse or to the use or occupancy of the matrimonial home.[8]

This is a substantial array of powers to impose penalties for disobedience of orders. But not only are civil contempt powers (or powers akin thereto) prominent in this sense in the Family Law Act: they are also invoked comparatively frequently. In questionnaires sent to all Australian judges, including Family Court judges, the Australian Law Reform Commission asked whether they had dealt with proceedings for contempt (or quasi-contempt, in the case of the Family Court) for breaches of orders and injunctions. Their responses were as follows:

	Supreme Courts	District and County Courts	Other State	Family Courts	Other Federal
Yes	34	7	4	31	5
No	33	62	2	0	10

This table shows that nearly half of the judges in other courts had never dealt with a proceeding in the nature of civil contempt, whereas all judges of the Family Court who responded had. The figures may mask a greater disparity because many of the judges in other jurisdictions who said they had dealt with civil contempt matters would appear to have dealt only with a handful. By contrast, as the next set of figures shows, Family Court judges have to deal with a larger flow. The Commission asked the judges of the Family Court to indicate the frequency with which contempt matters came before them in relation to the different types of orders. The following tabulates their responses:

	Quite Often	From Time to Time	Rarely	Never
Custody	2 (5.9%)	18 (52.9%)	14 (41.2%)	–
Access	16 (47.1%)	15 (44.1%)	2 (5.9%)	1 (2.9%)
Maintenance	1 (2.9%)	13 (38.2%)	19 (55.9%)	1 (2.9%)
Property	1 (2.9%)	15 (44.1%)	18 (52.9%)	–
Non-Molestation	17 (50%)	14 (41.2%)	3 (8.8%)	–
Procedural	–	8 (23.5%)	21 (61.8%)	4 (11.8%)

The contrast between the Family Court's image as a helping court and the comparatively high frequency of contempt and quasi-contempt applications can in part be explained by the simple perception that, due to the intensity of feeling that characterises matrimonial disputes, aggrieved spouses are more likely than other unsuccessful litigants to refuse to defer to court

8 See s.114(1).

orders. But this perception does not fully explain why contempt in particular should have such a high profile in family law in Australia. What seems to have occurred in establishing the Family Court is that, due to optimistic expectations as to the success of conciliatory methods, enforcement powers other than contempt (for example powers to order garnishment of wages or eviction at the hands of a sheriff) were not conferred on the Court as comprehensively as they might have been and contempt powers themselves were envisaged as weapons which would only have to be deployed in isolated instances. The following comment of the then Commonwealth Attorney-General, Mr R.J. Ellicott, Q.C., in 1976 is highly revealing.

> At present 25 judges have been appointed for life. The trend in family law is away from the judicial and in about 20 or 30 years the number of judges in family law will probably have reduced proportionately. Family law will have come up through counselling facilities, and judges will be at the end of the road. I do not wish to pass on to the future a number of judges who will be useless in the Federal area.[9]

In fact, the number of judges has grown to forty-four, who have a very substantial workload, and due to the high rate of non-compliance, the supposedly 'last resort' contempt powers have become front-line weapons.

These contradictions are compounded by the fact that a significantly high proportion of contempt and quasi-contempt applications do not proceed to a final determination. In the Commission's questionnaire, Family Court judges were asked to indicate on a four-point scale how often contempt and quasi-contempt matters which came before them proceeded to a determination. The following is a tabulation of their responses:

	All or Most	Some	Few	None	No Response
Access	2 (5.8%)	16 (47%)	13 (38.2%)	3 (8.8%)	–
Custody	1 (2.9%)	11 (32.3%)	15 (44.1%)	6 (17.6%)	1 (2.9%)
Maintenance	2 (5.8%)	4 (11.8%)	20 (58.8%)	6 (17.6%)	2 (5.8%)
Property	3 (8.8%)	5 (14.7%)	19 (55.8%)	6 (17.6%	1 (2.9%)
Non-Molestation	2 (5.8%)	20 (58.8%)	10 (29.4%)	1 (2.9%)	1 (2.9%)
Procedural	1 (2.9%)	3 (8.8%)	14 (41.1%)	15 (44.1%)	1 (2.9%)

The responses to a similar question put to magistrates displayed a similar pattern. In many cases, the failure of a contempt or quasi-contempt application to reach the stage of final determination is attributable to discontinuance of the proceedings by the applicant, which may or may not follow a negotiated settlement of the dispute between the spouses. A large majority (82%) of the Family Court judges responding to the Commission's questionnaire said that applicants should be readily allowed to withdraw contempt applications in this way. The Court should not feel bound to proceed to punish the respondent when this was no longer desired.[10] But

9 *Proceedings of Australian Constitutional Convention*, Hobart 1976, 64.

10 This more or less accords with the decision of the Full Court of the Family Court in *McJarrow and McJarrow (No. 2)* (1980) FLC 90-913.

many applications are left to lie on the file, or are stood over generally to be restored on the application of either party or at the Registrar's direction. A number of judges suggest that this was unsatisfactory: it was unfair and prejudicial to an alleged contemnor to have contempt charges left hanging over his or her head, and a build-up of more than one contempt application on a file could put the Court in a difficult and embarrassing position when it came to hear the substantive issues between the parties.

The most important aspect of this phenomenon of undetermined contempt applications is however that it is attributable in significant measure to pressures exerted by judges or magistrates dealing with the case. Frequently the parties are actively encouraged to postpone the hearing of the contempt or quasi-contempt proceedings and to attempt to resolve their dispute through some alternative means, usually involving counselling and negotiation. The justifications for this process of discouraging determination of contempt and quasi-contempt, which is labelled 'shunting' in this article, are that conciliation rather than compulsion is more in line with the spirit of the Family Court: that the question whether the alleged contemnor committed the alleged breach is usually only one aspect (often not the central aspect) of the real dispute between the parties; and that allocation of blame, such as may be required in determining whether contempt or quasi-contempt has occurred, is at odds with the insistence in other areas of family law that fault is irrelevant in disputes relating to the breakdown of a marriage. But to the extent that 'shunting' does occur in this way, it produces what would seem to be a unique result within contempt law and practice: a court is deliberately shying away from imposing punitive sanctions on those who deliberately refuse or fail to obey its orders. A further finding in the Commission's research is that even when a final determination of guilt is made, the punitive sanction imposed is often not very heavy. The average annual number of prison sentences disclosed in the Family Court records, for instance, is only about eighteen.

The overall result is an impression amongst the general populace which was frequently relayed to the Commission in interviews, namely, that 'Family Court orders are not worth the paper they are written on'. There is also criticism from lawyers practising in the Family Court. Some of them maintain that angry clients who have suffered from non-compliance with court orders on the part of their spouses are unable to understand why, when the Court has made an order, it appears reluctant to follow it up with enforcement measures.

The Court is thus confronted with a dilemma. Its contempt and quasi-contempt powers are prominent within the Act, frequently invoked by spouses and capable, if used to the full, of resulting in harsh punishment. But such punishment is not in accordance with the spirit of the Court and, in any event, will not necessarily resolve the deeper problems within the relationship between the spouses. For good reasons, therefore, the Court tries to 'hold its hand' in many cases. In other cases, delays in enforcement proceedings blunt the impact of the Court's powers. The impression is

therefore given that the Court is a 'soft' institution, which will not take firm steps to enforce its authority. This may be enough of itself to increase the incidence of non-compliance, thereby providing further opportunities for the Court to appear to be 'soft' and producing a vicious circle.

The primary source of the dilemma is a conflict of three interests – that of the applicant, that of the alleged contemnor and that of the Court – which confronts the judge hearing a contempt or quasi-contempt application. Often the situation is even further complicated, because the interests of children are involved as well. Situations can arise where the merits of the case between the spouses and the Court's own interest to preserve its authority point towards the imposition of a severe sentence for non-compliance, but concern for the welfare of the children of the marriage suggests a much more lenient approach. There is no simple way out.

IV. THE APPROPRIATE ROLE FOR CONTEMPT LAW

The broad message suggested by the Law Reform Commission's research and consultation is not that contempt law and practice in the Family Court is clearly too strict or clearly too lenient. It is rather that the provisions in the Family Law Act, and the way that they are interpreted and applied, need to be more discriminating. In order to achieve this, one must first make some attempt to identify the role of contempt law in enforcing Family Court orders and the aims to be pursued in applying penal sanctions, in particular, gaol sentences and fines, to deal with conduct which constitutes non-compliance with a court order. The following propositions are put forward as a summary of the proper role and aims of penal sanctions in this context:

(1) Because orders in family law operate within a personal relationship which frequently must continue for many years after the order is made (in particular, where there are one or more children whose custody must be provided for), the mechanical application of penal sanctions for non-compliance is inappropriate. There is instead an overriding need for the Court to consider the implications of such sanctions for the relationship as a whole, bearing particularly in mind the welfare of any children, the nature of other issues at stake between the spouses and the prospects of reconciliation between them. It is even necessary to consider the potentially damaging effect of proceeding to a determination, seeing it normally calls for hurtful allegations to be committed to affidavit and probed in cross-examination. Furthermore, there is always the possibility that changes in the circumstances and the relationship of the spouses may render an order inappropriate by the time that proceedings for contempt as a means of enforcing it have come on for hearing. In these matters, the unique character of family law must be acknowledged. In no other jurisdiction must a court attribute such importance to considerations of this nature when exercising its contempt powers.

(2) In theory at least, the purpose of applying punitive sanctions in the exercise of contempt powers is to deal only with the fact that the conduct of

the alleged contemnor constitutes disobedience, not with any other criminal element in this conduct. If the conduct in question constitutes a criminal offence in its own right, irrespective of whether it also amounts to disobedience of a court order, there is, prima facie at least, a role for the ordinary criminal law. Where, for instance, a husband assaults his wife, this is a criminal act irrespective of whether it is done in breach of a court order. It is at least arguable that the same is true when a spouse kidnaps a child in breach of a custody order and keeps him or her in hiding. While it is not always possible in practice to separate out punishment for the criminal element in the conduct from punishment for the fact of disobedience, the theoretical distinction is of primary importance in identifying the proper role of contempt law.

(3) A leading purpose to be pursued in applying penal sanctions in cases of non-compliance is to ensure, to the extent that this is possible in the given case, that the contemnor changes his or her mind and complies with the order. (This aim is of course not relevant when the order in question is a prohibitory one which has already been breached, and there is nothing which can be done to redress the breach. A past failure to comply with a mandatory order which was subject to a time-limit for compliance is in a similar category.) But it does not follow that in every case where a punitive sanction might ensure such compliance, it is legitimate for the court to impose it. Other non-penal modes of enforcement, for example garnishment of wages, are preferable, both on general principles applying to the law of civil contempt as a whole and because of the special need in family law jurisdiction, outlined above, to consider the implications of penal sanctions on any future proceedings between the spouses, on the relationship between them and on any children of the marriage. In this sense, the use of penal sanctions as a mode of coercing obedience is a weapon of last resort, and every effort should be made to circumscribe their operations by strengthening other modes of enforcement. So far as the Family Court is concerned, this observation is of particular importance in the context of enforcement of property orders.[11]

(4) As an extension of the previous point, the Court should always ask whether a situation involving non-compliance might be best dealt with by measures which are not directly aimed at enforcement at all. There may still, for instance, be a potential role for counselling and other conciliatory techniques.

(5) A concurrent aim of applying criminal sanctions in cases of non-compliance is to deter the contemnor from disobeying any court orders made against him or her in the future and to deter other present and future parties in proceedings before the Court from acting in contravention of its orders. There needs to be some evidence before the community at large that Family Court orders *are* worth the paper that they are written on. In this

11 See *e.g. Helliar and Helliar* (1980) FLC 90-805; *Danchevsky* v. *Danchevsky* [1974] 3 All ER 934.

specific sense, the Court is justified in using contempt powers for the purpose of upholding its authority. This does not mean, however, that the shoring-up of some concept of judicial 'dignity' is warranted. Although the common law of contempt has traditionally regarded judicial authority and dignity as closely linked, if not inseparable from each other, this way of approaching the matter is unsuitable in modern times for the Family Court, if not for other courts as well.

(6) Contempt law and practice must not operate in an undiscriminating fashion as between different types of order. The enforcement of an order for the transfer of property, for instance, raises very different considerations from the enforcement of an order for access. While it does not necessarily follow that each type of order made in the Family Court should have its own separate 'code' of enforcement provisions, including powers in the nature of contempt, the need to draw distinctions between the different types of order when formulating substantive and procedural rules, and when applying these rules in practice, must always be borne in mind.

(7) In cases where it is desirable to impose penal sanctions for non-compliance, it is important that the procedures employed are as quick and efficient as possible. Half-hearted or long-drawn-out attempts at punishment achieve little in the proceedings at hand and may seriously impair the Court's reputation as an effective institution.

V. PRESENT LAW AND PRACTICE OUTLINED AND ASSESSED

When the present law, judge-made and statutory, and the practice relating to contempt in the family law area are assessed in the light of these principles, a number of general points emerge.

1. Overriding Concerns

The need to take account of the relationship between the spouses, and of the interests of their children, when exercising contempt powers should be more clearly spelt out in the Family Law Act, and more clearly reflected in procedural rules. This is not to say that the Act ignores this need, but that it does not establish it clearly enough. The judicial duty in section 43 of the Family Law Act to consider the welfare of children, the integrity of the family and the prospects of reconciliation between the spouses, for instance, applies to contempt and quasi-contempt proceedings, but is not explicitly linked with them. The provision in section 66 that a spouse's failure to comply with a subsisting order does not debar him or her from conducting proceedings relating to a child shows a recognition that proper custody, access and financial arrangements relating to children are a more important aim than securing compliance with an order, in cases when these two objectives conflict with each other. But this is a rule of limited scope. Similarly, under section 70(6) and section 114(4), the defence of "reasonable

cause"[12] and the Court's limited power to make an order modifying the original one which was disobeyed[13] suggest to a limited extent that a change of circumstances within the relationship, or a new view of them formed by the court on re-assessment, may provide sufficient basis for a decision not to assert the Court's authority by punishing the relevant non-compliance. The rule that sanctions should not be applied if the applicant has discontinued the contempt or quasi-contempt proceedings[14] – a rule which, as has been pointed out above, is concurred in by many of the judges of the Court – constitutes a further element of flexibility: the Court does not want to stir up trouble by imposing sanctions if there is evidence of improvement in the relationship of the parties.

There is, however, no explicit principle that concern for the future relationship of the parties and/or the welfare of children is an overriding factor which may justify the court in imposing little or nothing in the way of punishment for non-compliance. A clear statement to this effect may be of use in helping lawyers to explain to their aggrieved clients that non-compliance by the other parties of the case does not, and should not, automatically lead to punishment so long as the appropriate contempt proceedings are instigated. To state this as a general principle is *not* to say that Family Court orders will never be enforced and that the Family Court will be a 'soft' institution. It merely makes explicit the feelings that appear to impel many judges in difficult cases (notably access ones) to indulge in the practice of 'shunting'.

At the procedural level, there is similarly nothing to indicate that reconciliation of the parties and furtherance of the best interests of their children (coupled perhaps with some adjustment of the order which has been disobeyed) constitute a more desirable aim than punishment for the contempt. This is not to say that the Court should always be ordering compulsory counselling, or modifying the terms of contravened orders in favour of the contravening party. Yet the Family Law Act and the rules thereunder do not even concede that in one category of orders where the interests of children are particularly prominent and where enforcement mechanisms are particularly likely to be counter-productive, namely access

12 In *Cavanough and Cavanough* (1980) FLC 90-851, it was held in the Family Court of Western Australia that a father who failed to furnish access in terms of a court order because his children refused to visit their mother at the times stipulated did have "just cause or excuse" under s. 70(3). The basis of Judge Connor's decision was that the husband was not disputing the appropriateness of the original order but had formed an honest and reasonable belief that it no longer suited their best interests, by virtue of events occurring since the making of the order. This decision may be of doubtful authority in the light of the earlier Full Court decision in *Gaunt and Gaunt* (1978) FLC 90-468, but it shows some deference to a concept of "overriding considerations" and it has been followed (so the Commission understands) in some later decisions.

13 *Gaunt and Gaunt* (1978) FLC 90-468.

14 Two exceptions are (a) where the conduct of the alleged contemnor "may be described as a public injury or as so contumacious or defiant as to amount to a criminal as well as a civil contempt" (*McJarrow and McJarrow (No. 2)* (1980) FLC 90-913, 75,786 *per* Emery S.J.) or (b) where issues wider than those between the parties, in particular, the welfare of a child, are at stake (*id.*, 75,785 *per* Evatt C.J.).

orders, special procedural measures along these lines might be useful and beneficial.

2. Interaction of Contempt and Criminal Law

The law and practice, as they stand, contain little clarification of the respective roles of contempt law and criminal law. It is recognised that the same conduct may constitute both non-compliance amounting to contempt and a criminal offence under the general criminal law, in which event punishment under both branches of the law is possible.[15] In addition, it has been laid down that, where an act of non-compliance also constitutes a criminal offence, but the offence is of a comparatively minor nature and properly belongs within the jurisdiction of the Family Court (having regard to its special facilities) the Family Court should deal with the matter as a contempt or quasi-contempt if the applicant undertakes not to institute a prosecution. Conversely, if the criminal offence is of a more serious kind (for example maliciously inflicting grievous bodily harm, as opposed to merely molesting), it is more appropriate that the criminal law should deal with the matter and that the Family Court should hold its hand. In intermediate cases, it is a matter for the discretion of the Court in each case. These principles were stated and applied in *Sahari and Sahari*.[16] In Family Court proceedings against a husband for contempt constituted by conduct amounting to breach of an injunction not to molest his wife, it appeared that criminal charges for assault were pending against him in respect of the same conduct. He was alleged to have threatened his wife with a pistol (which turned out to be a toy) and to have tried to take his children away from her in breach of a custody order. The Full Court of the Family Court held that the judge at first instance should not have proceeded to impose a prison sentence (it was of twenty-eight days) on the basis of the contempt, but should have made enquiries regarding the criminal proceedings with a view to deferring the contempt hearing until these had been disposed of.[17]

These principles are, however, general guidelines only: they do not single out particular types of breaches of order and state specifically whether or not the matter is one for the criminal law. Furthermore, where the case is dealt with by the Family Court as a contempt, there is no express stipulation that the criminality of the conduct in question should be a prominent factor in determining the sentence. The Commission's research on domestic violence, in particular, indicates that the fact that violent conduct in breach of an injunction under section 114 is an offence against the general criminal law, irrespective of the element of disobedience, does not seem to be fully taken

15 *Russell and Russell* (1983) FLC 91-356. On the other hand, s.70(7) and s.114(8) make it clear that a prior criminal punishment puts a stop to proceedings for 'quasi-contempt' in the Family Court.

16 (1976) FLC 90-086.

17 In England, the Court of Appeal has recently taken a different view, stressing that it is important for the contempt charges in such a situation to be dealt with quickly: *Szczepanski* v. *Szczepanski* (1985) 15 Fam Law 120.

into account by all Family Court judges when passing sentence in proceedings relating to the breach. Even allowing for the broad discretionary element in all forms of sentencing, and for the particular need to consider the continuing relationship of the spouses and the welfare of the children, it should never be the case that acts which could be prosecuted as a criminal offence are consistently treated more lightly simply because they are dealt with in the Family Court as instances of civil contempt.

3. Distinction Between Contempt and Quasi-Contempt

Instead of making some attempt to separate out the coercive from the deterrent functions of criminal sanctions for disobedience, the statutory provisions in the Family Law Act, as interpreted in the case-law,[18] create a hierarchy of 'seriousness'. 'Lesser' contempts are punishable under section 70(6) or section 114(4) – the 'quasi-contempt' provisions – whereas more serious or 'true' contempts are punishable under section 35 or section 108. Before amendments to section 108 in 1983,[19] the word "wilful", which appeared in that section, encouraged this approach to interpretation. It seemed that 'contumacious' acts of disobedience (that is, acts that were defiant or obstinate) constituted 'true' contempt falling within section 108, whereas 'mere' disobedience was more properly treated as a quasi-contempt. However, the trend in recent cases dealing with contempt, both at common-law and under the Family Law Act, is to suggest that a 'contumacious' attitude of mind is *not* an essential ingredient in the legal concept of 'true' contempt. It may be enough if the disobedience is found to be deliberate: that is, neither casual nor accidental nor unintentional.[20] Indeed, it has been held in England in the context of restrictive trade practices legislation that disobedience may constitute contempt even though the disobeying party has acted bona fide on legal advice to the effect that his or her conduct does not amount to disobedience.[21] In similar contexts, a breach resulting from negligent failure to ensure compliance may be contempt.[22]

The outcome is that the theoretical distinction between the two levels in the 'hierarchy' of contempt and quasi-contempt has become blurred. It is recognised that the former category comprises the more 'serious' instances of non-compliance, potentially warranting a reasonably stiff sentence, but little else in the way of guidance is available. It is clear from the Commission's research that the response of practitioners to this problem is to 'play it safe' by opting for contempt rather than quasi-contempt proceedings. With quasi-contempt, there is always the risk that the Court's sentencing powers may

18 The leading authority is *Sahari and Sahari*, note 16 *supra*.

19 See Family Law Amendment Act 1983 (Cth) s. 58.

20 See *e.g. Sandilands and Sandilands* (1980) FLC 90-827; *Stancomb* v. *Trowbridge Urban District Council* [1910] 2 Ch 190; *cf. Sterling and Sterling* (1978) FLC 90-463; *In the Marriage of Kitchener* (1978) 4 Fam L R 157, 161-162.

21 *Re Agreement of the Mileage Conference Group of the Tyre Manufacturers' Conference Ltd* [1966] 1 WLR 1137; approved in *Knight* v. *Clifton* [1971] Ch 700.

22 *Flamingo Park Pty Ltd* v. *Dolly Dolly Creation Pty Ltd* (1985) 59 ALR 247, 261; *Steiner Products Ltd* v. *Willy Steiner Ltd* [1966] 1 WLR 986.

prove inadequate to the occasion. It should be added that the Full Court of the Family Court has stated that practitioners should not ignore the hierarchy in this way,[23] but it has left open a form of 'escape route' by adding that if the contempt procedure is wrongly chosen in the first instance, it will of its own accord consider the case as if it had been instigated under the appropriate quasi-contempt provision.

4. Coercive and Deterrent Sanctions

A further important defect in the 'hierarchy' of contempt and quasi-contempt is that the separate (though sometimes concurrent) aims of coercion and punishment[24] are not spelt out.

There are for instance isolated cases in which the predominant purpose of applying a penal sanction is unequivocally one of coercing obedience to an order which is still capable of being obeyed. No doubt, an element of deterrence is present in the sentence imposed, but it is swallowed up in the primary purpose of coercing compliance. Yet cases such as these do not fall clearly into either the contempt provisions or the quasi-contempt provisions. The latter provisions are clearly addressed in part to securing compliance with orders: so much is clear from section 70(6)(d) and section 114(4)(d). But in each of these sub-sections, paragraph (b) makes it clear that the ultimate sanction of imprisonment for a substantial period cannot be imposed. The Court must instead fall back on its 'true' contempt powers conferred by section 35 and section 108.

As this example suggests, a single provision dealing specifically with the situation, fortunately not too common, where a contemnor resolutely refuses to obey an outstanding order of the Court, would be preferable. It could indicate whether there should be an upper limit to the sentence that could be imposed for coercive reasons.[25] Provision could also be made for periodical applications for release to be made on behalf of the contemnor and for the Court to be informed as soon as possible of any move on his or her part to comply with the order. The lesser sanctions set out in section 70(6) and section 114(4) could also be included. This is a clear-cut way of dealing with the particular phenomenon of the individual who is prepared to make a martyr of himself or herself rather than complying with a subsisting order of the Court.

In the more common situations where compliance with an existing order is not being sought, the immediate aim of penal sanctions is to deter this contemnor and other potential contemnors from future acts of non-compliance. Where there is overt and public defiance of the Court, this shades into the broader aim of maintaining the Court's authority, and its reputation within the community as a body which, in the last resort, is determined to enforce its orders. But once again, the present 'hierarchy'

23 *Cummings and Cummings* (1976) FLC 90-100.
24 See pp.107-109 *supra.*
25 On this topic, see further pp.134-135 *infra.*

poses problems. In some cases, the appropriate punishment may be within the limited range contemplated by the quasi-contempt provisions, even though when the application was first made the case looked too serious to be dealt with under these provisions. Conversely, an application may be filed for an order under section 70(6) or section 114(4), but on closer examination it may be clear that the penalties specified in these sections are inadequate and that the application should have been made under section 35 or section 108. The applicant's legal adviser thus has to pre-judge the court's response to the act or acts of non-compliance.

Side by side with the suggested provision authorising sanctions for coercive purposes, a provision authorising deterrent punishment for non-compliance with the Court's orders therefore seems desirable. The two provisions need not, however, be wholly separate. They should be linked by a common 'complaints' procedure: that is to say, an aggrieved spouse wishing to invoke the Court's power to impose sanctions in respect of disobedience should be invited to file a complaint alleging the relevant facts and asking the Court to impose such sanctions, whether for coercive purposes, deterrent purposes or both, as were appropriate to the occasion.

5. The Term 'Contempt'

Closely bound up with the issue just discussed is the appropriateness of labels such as 'contempt' for the Court's powers to impose penal sanctions in cases of disobedience. So long as the starting point in imposing sanctions is the contempt power developed at common law and conferred on the Family Court and all courts exercising jurisdiction under the Family Law Act by section 35 and section 108 respectively, the question of the mental element required to enable disobedience to be characterised as 'contempt' will inevitably be a prominent one. The hierarchy of provisions based on the 'seriousness' of the alleged disobedience will be virtually inevitable, and the different aims to be pursued in sentencing for acts of disobedience will be blurred. It has in fact been suggested to the Commission from a number of quarters that the label 'contempt' is unsatisfactory in the context of sanctions for disobedience to court orders. It carries heavy ideological overtones, suggesting in particular that the authority, dignity and status of the Court have been flouted and that stern retaliatory measures are essential. On this reasoning, the criminal contempt powers conferred by section 35 and section 108 should be maintained, but sanctions for disobedience should not be imposed under either of these sections. The separate statutory provisions, as just outlined, should apply instead, and should not employ the word 'contempt'.

It may be asked whether this measure is possible under the Commonwealth Constitution, given that contempt is an aspect of judicial power and that the "judicial power of the Commonwealth", which is vested in "courts" created by or under Chapter III, cannot be taken away by Commonwealth legislation. An analogous approach to non-compliance was, however, taken by the Commonwealth Parliament with the Commonwealth

Court of Conciliation and Arbitration prior to its dissolution. This was created as a superior court of record, which implied that it should have all the contempt powers (including powers relating to acts of non-compliance) possessed by superior courts of record at common law. Its powers in the nature of civil contempt were however replaced by a statutory code of sanctions for non-compliance with the Court's orders. The constitutional validity of this was directly challenged in the High Court in *R.* v. *Metal Trades Employers' Association; ex parte Amalgamated Engineering Union, Australian Section.*[26] The High Court held that the Commonwealth did in fact have power to supersede the common law of civil contempt and replace it by a statutory code in any court exercising federal jurisdiction, which it had created under Chapter III.

The ideological implications of presenting the Family Court to the public as a court without powers called 'civil contempt' would need careful consideration. On one view, it is in line with its image as a 'helping court'; yet it may be treated by some as further evidence of the notion that the Family Court is 'soft' in enforcing its orders. But the removal of some of the constraints imposed by maintaining the link between penal sanctions for disobedience and the notion of contempt would undoubtedly allow for greater flexibility in restructuring the provisions dealing with disobedience and would pave the way for the aims of such sanctions to be more clearly reflected in legislation.

VI. SPECIFIC TYPES OF ORDER

The two provisions of the Family Law Act dealing with 'true' contempt, section 35 and section 108, make no distinction between different types of court orders that may be disobeyed. Even the quasi-contempt provisions, section 70(6) and section 114(4), while referring in their terms to particular types of order (for example as to custody or as to the personal protection of a spouse), establish a more-or-less uniform regime of enforcement. The possibility that particular categories of order may need special treatment is thus not reflected in the legislation at all. In fact, as the ensuing discussing shows, the relevant considerations may differ markedly.

1. Access

According to the Commission's questionnaire sent to Family Court judges, access orders are the category most productive of applications for contempt.[27] A significant proportion of these are 'shunted' (though not as high a proportion as orders in some of the other categories) and, in those cases where a final determination of liability is made, such penalties as are imposed are usually of a suspended nature, such as a bond or suspended prison sentence. Many judges feel strongly that they should not even fine, let

26 (1951) 82 CLR 587.
27 See p.111 *supra.*

alone imprison, a custodial parent who has breached the access order, because there is a substantial risk of harming the interests of the child or children involved. To ignore these interests would be to breach the duty imposed upon judges by section 43 of the Family Law Act to consider the integrity of the family and the welfare of children at all times. However, the substantive provisions regarding enforcement and the procedural rules do not specifically reflect this aspect of enforcement of access orders. Breaches of an access order, even when repeated many times, give rise to a situation where, unlike most other instances of non-compliance, counselling may be of benefit. It would seem that an order for compulsory counselling should be at least the normal procedure, if not mandatory in all cases, when applications are made for criminal sanctions to be imposed for breach of an access order. Also worthy of serious consideration is "post-order" counselling, explaining the terms and the effects of the order for access.[28] Ultimately, the Court may have to accept that the enforcement of a particular access order in accordance with its literal terms is a practical impossibility.

2. Custody

The chief problem here is the approach to be adopted in cases of kidnapping by one parent in breach of an order awarding custody to the other parent. Depending on the circumstances, kidnapping or child stealing may constitute an offence under the existing criminal law:

(a) Offences created by the Family Law Act deal with the situation when a child is abducted and taken abroad. These are defined in terms of taking, sending or attempting to take or send a child out of Australia in breach of a custody, guardianship or access order (section 70A) and failing to comply with a notice served on the master, owner or charterer of a ship or aircraft (or agent of such owner) requiring him or her not to take a specified child out of Australia in breach of an order (section 70B). The former offence is indictable, though it may be tried summarily with the consent of the court, the prosecutor and the defendant. It carries a penalty of $10,000 or three years' imprisonment, or both.[29] The latter offence carries a penalty of $5,000.[30] An appropriate State or Territory court of criminal jurisdiction hears the change.

(b) If the child is under a prescribed age[31], and is taken away from the custodial parent by fraud or force, this may constitute the statutory offence of child-snatching under a State or Territory law.[32] Provisions giving the abducting parent a defence if he or she has a 'claim of right' to possession of the child would seem to be inapplicable where the other parent has sole custody under a court order.[33]

28 This recommendation is made in the Family Law Council's recent report, *Administration of Family Law in Australia* (1985) 96-102.
29 S. 70A(2), (3).
30 S. 70B(1).
31 It varies between 12 (*e.g.* in New South Wales) and 14 (*e.g.* in Tasmania).
32 See *e.g.* Criminal Code (Qld) s. 363; Crimes Act 1900 (N.S.W.) s. 91.
33 See *R.* v. *Austin* [1981] 1 All ER 374.

(c) Except in Queensland, Tasmania and Western Australia, where the criminal law is codified, the common law misdemeanour of kidnapping may be committed. The ingredients of this offence, as recently defined in the House of Lords case of *R.* v. *D.*, are: "(1) the taking or carrying away of one person by another; (2) by force or by fraud; (3) without the consent of the person so taken or carried away; and (4) without lawful excuse".[34] A non-custodial parent can be guilty of this offence,[35] as indeed can a husband who kidnaps his wife even if they are still cohabiting.[36] If the abducted child is of a sufficient age to grant consent, his or her consent is a defence; otherwise, absence of consent is inferred.[37]

It has however been recently urged by the House of Lords that cases such as these should normally be dealt with under contempt law in preference to the criminal law.[38]

Within the Family Court, some judges, according to the Commission's survey, regard it as their duty to impose an immediate sentence (as much as two-and-a-half years in one case) on the first offence of kidnapping, while others argue that harsh sanctions may be damaging to the child or children concerned and that a suspended prison sentence or a bond should be imposed in the first instance. In their view, the second offence should however attract a stiff sentence, to be served immediately. The Commission encountered some evidence that within the community at large, the Family Court was thought to be 'soft' on child snatching.

A more comprehensive role for the criminal law seems appropriate. The present law goes some way towards covering the various possible circumstances of kidnapping by a parent in breach of a custody order, but there is a significant gap. The offences under State and Territory laws described above do not focus on concealment of the child, or on other means adopted by the abductor to ensure that the rights of the custodial parent under the order are defeated by the abduction.[39] Yet concealment may inflict damage not only on the parent but also on the child, who must live in an environment often heavily circumscribed by the endeavour to stay in hiding. Section 70A of the Family Law Act is undoubtedly directed to the element of defeat of the custody order, but only where taking the child abroad is the means adopted. It seems illogical for the criminal law to punish the frustration of a custody order where the child is taken abroad but not where it is concealed in Australia. As things stand, the abduction and concealment (even long-term) of a child in Australia by a parent acting in violation of a custody order is punishable only in contempt or quasi-

34 [1984] AC 778, 800 *per* Lord Brandon of Oakbrook.
35 *Ibid.*
36 *R.* v. *Reid* [1973] QB 299.
37 *R.* v. *D.* [1984] AC 778.
38 *Ibid.*
39 In *R.* v. *Reid*, note 36 *supra*, 302, it was specifically said that concealment is not a necessary element in the offence of kidnapping.

contempt proceedings and not under the criminal law at all, unless (i) force or fraud has been used and (ii) *either* the child is young enough to fall within 'child-stealing', *or* (in the jurisdictions without criminal codes) there is an absence of consent by the child.

The best way to deal with this gap in the law's coverage would seem to be to create a new offence in the Family Law Act, constituted by the removal of a child from, or failure to return a child to, the custody of a parent contrary to an order granting custody to that parent, and the concealment of the whereabouts of the child, both with the intention of depriving the parent of custodial rights. Like offences under section 70A or section 70B, it should be triable in an appropriate State or Territory criminal court. An important by-product of this proposal is that the police, having traced the kidnapped child, would have power not only to take possession of the child[40] but also to arrest the kidnapping parent. It would be sufficient that the police officer suspected on reasonable grounds that the parent had removed or kept the child contrary to the custody order with the intention of depriving the custodial parent of custodial rights under the order.

It should be noted that this proposed new offence would not extend to abduction by the custodial parent. This distinction may be difficult to justify, but the significant difference is that a custodial parent who effects a total denial of access by concealing the child does not infringe the basic ruling of the Court as to who should have primary care and control of the child. A further reason for eschewing the criminal law is that, as already argued, it is often virtually impossible to impose a sentence on a custodial parent. This is not to say that such abductions are not serious matters. They will usually be extremely distressing for the access parent, and often also for the child. Even if they are not treated as criminal offences, they should not be easily condoned by the Court in the exercise of its contempt jurisdiction.

3. Transfer of Property and Surrender of Possession of Property

In these areas, the most important task is to ensure that methods of enforcement which do not entail punitive sanctions are as effective as possible, and that they are adopted, wherever possible, in preference to punitive sanctions. Recent amendments to the Family Court Rules, operative since 2 January 1985, have gone a long way towards achieving this aim.[41] Matters would, however, be further improved if (a) the Family Court had its own sheriffs to act on its behalf in the enforcement of property orders and (b) the sheriff had power, on order from the Family Court, to remove a spouse from premises and deliver possession of the premises to the other spouse. This mode of enforcement is preferable to punitive sanctions under a section such as section 114(4) for failure to comply with an injunction relating to the use or occupancy of the matrimonial home. These instances represent applications of a general principle that the Family Court should be

40 This is presently conferred by the Family Law Act s. 64.
41 See in particular Order 33 Rules 4-7.

equipped with the full range of procedures and personnel for enforcing orders relating to property. It should be, so far as possible, in the same position as the Supreme Court of a State or Territory.

4. Maintenance

The same general principle applies to this category of order. Once again, the matter has been dealt with in recent amendments to the Family Law Rules[42] and it was discussed exhaustively in the recent Report of the National Maintenance Inquiry.[43] The most difficult and controversial issue here is whether imprisonment should ever be possible for failure to pay maintenance. In interpreting section 107 of the Family Law Act, which prohibits imprisonment on the basis of maintenance default alone but expressly preserves contempt and quasi-contempt powers,[44] the Family Court has made it clear that imprisonment on the ground of contempt should only occur in exceptional circumstances.[45] The National Maintenance Inquiry recommended, however, that this approach should be discarded and that the use of contempt powers to impose prison sentences should be more common, though imprisonment should not be threatened unless the court intended to make good its threat.[46] In fact, imprisonment for failure to pay maintenance has been infrequent. Of the 136 cases involving prison sentences and recognizances for contempt in which the nature of the original proceedings was recorded, the Commission's researches disclosed only seven relating to failure to pay maintenance. There was a sentence of six months, one recognisance of $2000 and five sentences of between two and six months which were suspended pending payment of the arrears. Payment appeared to happen in each of these cases.

The arguments against imprisonment include the following: that it does not in fact act as a deterrent; that usually the persons imprisoned are not those who, having the capacity to pay, wilfully refuse to do so, but rather those who are incapable of managing their own financial affairs sufficiently well to meet the payments; that it is highly expensive for the state; and that imprisonment is counter-productive, because it deprives the defaulter of any capacity to earn. The counter-arguments are to the effect that a spouse's or parent's responsibility for maintenance is one of a special nature, more important than the responsibility to meet other debts; that failure to pay maintenance exposes the intended recipient (particularly where it is a single parent supporting a number of children) to extreme financial hardship; and that the actual use of imprisonment would be extremely infrequent because normally the threat of imprisonment, when it becomes real and imminent, is enough to frighten the defaulter into paying.

42 See Order 33 Rule 2.
43 *A Maintenance Agency for Australia* (1984) para. 15.36-15.61.
44 The overriding status of these powers was put beyond doubt by an amendment to s. 107(3) in 1983: see Family Law Amendment Act 1983 (Cth) s. 57.
45 See *e.g. Helliar*, note 11 *supra*.
46 Note 43 *supra*, para. 3.61.

Outside the particular realm of maintenance debts, the general trend in recent times has been to abolish all forms of imprisonment for debt. But it is hard to deny a residual role for some form of custodial sanction – perhaps a suspended prison sentence or weekend detention[47] – where a maintenance defaulter deliberately refuses to pay despite having the necessary means and efforts to enforce the order by other methods have proved unsuccessful. This may occur, for example, when the defaulter is self-employed, receives earnings entirely on a cash basis and owns no property against which execution can be levied. Where these conditions can be satisfied by the original spouse, the use of contempt powers to impose a custodial sentence should be permitted as a weapon of last resort.

5. Assault and Harassment

Assessment of the appropriate role for sanctions based on non-compliance in this area is fraught with difficulties. The research which the Commission has carried out, along with numerous other studies of the specific topic of domestic violence, reveals numerous problems. The inherently criminal element in assaults upon a spouse is acknowledged, yet both in the law and in practice – particularly, the practice of judges, magistrates and police – it is frequently recognised as a 'special' form of assault calling for special treatment. The reluctance of many people concerned, particularly police, to become involved in the 'dirty linen' of a marriage or de facto relationship makes it particularly difficult to ensure enforcement of any form of prohibitive law, whether it be based on the criminal law or on a notion such as contempt. Further complications are by the fact that some jurisdictions in Australia (but not all) have special criminal legislation dealing with apprehended violence (including apprehended domestic violence),[48] that under a significant provision of the Family Law Act, section 114AB, the injunctive proceedings under section 114 of the Act are required, as it were, to 'defer' to restraining order proceedings in certain cases of overlap,[49] and that State police are often explicitly reluctant to become involved in matters which fall within the domain of the Family Court. The Commission's researches, however, and the studies of domestic violence carried out in recent times are unanimous on one point: although a number of procedures are available for dealing with domestic violence, they are certainly not effective to prevent it, nor can they be relied upon to produce effective punishment when serious violence has undoubtedly occurred.

47 See p.135 *infra.*

48 See Crimes (Domestic Violence) Amendment Acts 1982 and 1983 (N.S.W.); Peace and Good Behaviour Act 1982 (Qld); Justices Amendment Act (No. 2) 1982 (S.A.); Justices Amendment Act 1985 (Tas.); Justices Amendment Act (No. 2) 1982 (W.A.).

49 Section 114AB provides that the existence of proceedings for a restraining order under prescribed State or Territory legislation is a bar to the instigation of proceedings under s. 114 for an injunction in respect of the same matter. The legislation presently prescribed (see Family Law Regulations, Reg. 19) is that of New South Wales, Queensland, South Australia and Western Australia. The recent Tasmanian legislation will presumably be added to the list in due course.

A detailed examination of the appropriate legal responses to domestic violence has been carried out in the Australian Law Reform Commission in its Reference on Domestic Violence within the Australian Capital Territory. This Reference forms part of the Community Law Reform programme within the Territory. The Report on that Reference will be published shortly. Much of the background material already set out in the Commission's Discussion Paper in the Domestic Violence Reference[50] is endorsed in this article: in particular, that the problem is almost exclusively one of violence by men against women, that the causes are manifold and deep-rooted, that there has been a long-established tendency within our society to try to sweep the problem under the carpet, that legal responses taking such forms as restraining orders and criminal sanctions constitute only one weapon (a crude one at that) and that if the problem is to be effectively attacked, accompanying measures such as institutional support for battered women, counselling or therapy (where appropriate) and provision of emergency housing are essential.

The Commission's research reveals widespread dissatisfaction with the operation of injunctions for the personal protection of a spouse (under section 114(1)(a) of the Family Law Act) and with the procedures for imposing criminal penalties (under section 114(4) or under the 'true' contempt provision in section 35 and section 108) when an injunction is breached. Injunctions are not difficult to obtain, though where State legislation exists it may be quicker and cheaper to invoke this legislation. The problems chiefly arise when it comes to enforcement. In the first place, although it is now possible under section 114AA of the Act to have a power of arrest without warrant attached to an injunction restraining assault, harassment or entering specified premises,[51] it appears that orders to this effect are rarely made. Practitioners told the Commission that judges scarcely ever grant them; some judges said that in some cases they would have attached a power of arrest, but counsel did not ask for one. If the injunction is not reinforced by this power, a wife who has been beaten in breach of the order and who cannot persuade the police to proceed under State or Territory law has no alternative but to ask her lawyer to file an application for committal for contempt or for sanctions under section 114(4). In the meantime, she is at the mercy of her husband: nothing has been done to provide immediate protection. Moreover, even when she does ask her lawyer to take out contempt or quasi-contempt proceedings, she encounters delay,

50 Australian Capital Territory Law Reform 4, *Domestic Violence,* Discussion Paper (1984).

51 The Court has a power (not a duty) to attach a warrant if it is satisfied of one or other of the following matters:

- that the respondent spouse has already caused bodily harm to the applicant or to a child of the marriage, and is likely to cause further harm, and has received notice of the applicant's intention to seek attachment of the power of arrest (unless in the circumstances the Court is prepared to dispense with this last requirement); or
- the respondent has threatened to cause bodily harm to the applicant or to a child of the marriage, and is likely to cause such bodily harm, and has received notice of the applicant's intention to seek attachment of the power of arrest.

adjournments, referrals to counselling, and at the end of a long road, sometimes no more than a warning to her husband not to assault her again. This is a small reward for a long and arduous process. Seeing that the basis for the original injunction is often an assault, and that the breach will often have taken the form of a second assault, it is not surprising that women are highly critical of the procedure when the sentence is no more than a warning. Furthermore, the husband is encouraged to believe that he can continue to assault his wife with relative impunity. The outcome is not that these procedures in the Family Court do not ever work, but that in many of the more serious cases they appear weak and ineffective.

Furthermore, there is some evidence that the existence of an injunction, or even the possibility of obtaining an injunction, can be used by the police as an excuse for indulging a natural reluctance to intervene.

> Ironically, many women complained that when they called the police to the scene of domestic violence, the police would say that they could not do anything unless the women obtained a Family Court injunction. Once the woman obtained an injunction and called the police to another incident she would be told that the police could not do anything *because* the woman had a Family Court injunction.[52]

No doubt, the obstructiveness described here would be an extreme example of police manipulation. But it illustrates the dangers of allowing uncooperative police to rely on the existence of a civil procedure within the Family Court to avoid their responsibilities to enforce the criminal law. No doubt, when all that the husband has done has been to harass or abuse his wife, it is appropriate that an injunctive procedure should be the first step. But if the first form of conduct which induces the wife to have resort to the law is an assault of a reasonably serious kind, it is important that the existence of the civil procedure does not blind those concerned with enforcement of the law to the fact that a criminal offence has already been committed.

By virtue of considerations such as these, there is a strong case for recommending that, where an assault which should be punished under the criminal law has already occurred, neither the Family Court nor a magistrates court exercising jurisdiction under the Family Law Act should have jurisdiction to grant injunctive relief at all.[53] Instead, the police should be persuaded by all possible means that it is their duty to prosecute the matter as a criminal offence. In addition, the right of the wife to institute her own private prosecution should be recognised and strengthened by, amongst other things, easier access to legal aid.[54] Immediate resort to the criminal law,

52 P. Stratmann, "Domestic Violence: The Legal Responses" in C. O'Donnell and J. Craney (eds), *Family Violence in Australia* (1982) 121, 126.

53 This argument is developed at length in P. Waters, J. Fitzgerald and S. Wilson, note 1 *supra*, Ch. 8.

54 In this connection, it is noteworthy that the New South Wales Legal Services Commission announced in 1982 that it would, as a matter of standard practice, grant legal aid for private prosecutions for domestic assaults. However, only 44 grants were made in the ensuing 18 months (information on the period thereafter is not yet available). There is no evidence that other legal aid authorities in Australia are similarly inclined to publicise the availability of legal aid.

rather than the injunctive process, has three clear advantages. First, it brings home to the husband, and to all others concerned, that a punishable offence has already been committed and will be dealt with as such. By contrast, the injunctive process involves the court solemnly telling the husband that he is hereby forbidden to do what the law has forbidden him to do all along. No such 'second chance' is given to most other types of offender. Secondly, in formal terms at least, sanctions imposed for the breach of an injunction constitute punishment for the fact of disobedience, not for the inherently criminal quality of an assault. Of course, the reality is that the judge imposing the sentence is conscious of the criminality involved and takes it into account when imposing sentence. Nevertheless, there is always the risk that underlying attitudes as to the appropriate policy of the Family Court in dealing with disobedience – and, as is suggested above, these attitudes are sometimes distinctly lenient, in view of the Family Court's concern not too seem too authoritarian – may consciously or unconsciously affect the approach to sentencing for what is primarily the criminal offence of assault causing bodily harm. Thirdly, abandonment of the injunctive procedure where an assault had already occurred would also answer fully the complaints of wives and their lawyers that it was too difficult to obtain an order attaching a power of arrest to an injunction and that, in any event, the procedures for obtaining criminal sanctions under the contempt or quasi-contempt provisions were slow and ineffective.

This approach to the matter would leave untouched the role of injunctive proceedings where harassment short of assault had occurred. It would still be open to spouses to obtain injunctions in these circumstances. In the event of breach falling short of assault, existing procedures for enforcement would apply or the breach could be treated as an offence;[55] if the breach amounted to an assault, a criminal prosecution would be the appropriate procedure.

This approach, however, is probably unduly rigid. Its chief drawback would be that, in those States and Territories which do not have legislation dealing with apprehended violence, a wife who had been assaulted would have to choose between invoking the full machinery of the criminal law and refraining completely from any legal action. Although, for the reasons just outlined, the criminal law, used effectively, may well be more appropriate for her, it is extremely difficult for wives in this situation to summon up the resources and the courage to institute a prosecution. It is frequently too drastic a step for her to contemplate. On the other hand, a wife may well be prepared to adopt the more moderate expedient of claiming a Family Court injunction or a restraining order under State or Territory legislation. The profound emotional implications of invoking the criminal law against one's spouse are thereby averted. A further crucial point is that an injunction or restraining order may be granted on comparatively limited evidence, whereas a criminal prosecution calls for proof beyond reasonable doubt.[56]

55 See p.131 *infra.*

56 In relation to both these points, see *e.g.* R. Lansdowne, "Domestic Violence Legislation in New South Wales", published in this issue, at p.80 *supra.*

This does not imply that reform of the injunctive process under the Family Law Act is not needed. The following proposals deserve careful consideration:

(1) Injunctions should always be coupled with a power of arrest without warrant if the conditions presently stipulated in section 114AA of the Family Law Act[57] are satisfied. Undoubtedly, police powers of arrest without warrant must for civil liberties reasons be kept within strict limits. But there is probably no other situation within the criminal law where it is so important that an alleged victim of a crime should receive immediate protection against further similar crimes being committed. The power of arrest is, moreover, only a power. A police officer, in his or her discretion, may still decline to exercise it. Automatic attachment of a power of arrest is a feature of the State legislation dealing with apprehended violence.[58]

(2) So far as may be feasible, spouses seeking an injunction based on an alleged assault should be notified of the existence of a right to prosecute the assault privately or with the help of the police, and of the availability of legal aid. This advice is of course of particular importance when the applicant is unrepresented. A brochure or a notice in the court office may be sufficient for this purpose.

(3) Breach of an injunction restraining assault, harassment or entering specified premises should itself be a criminal offence. There are precedents for this approach in apprehended violence legislation in the States, and in recommendations being developed within the Law Reform Commission for the Australian Capital Territory. It helps to reinforce the message that the conduct being indulged in is not merely a matter of civil process between the spouses. It is most likely to be of use where it is desired by the wife to have a breach dealt with as a criminal matter and where the conduct amounting to breach is wholly or substantially harassment rather than out-and-out assault. Without such an offence, the wife has to choose between invoking the contempt or quasi-contempt procedures, which do not focus on the criminal aspect of the husband's conduct, and instituting a prosecution for assault, which may only be a subsidiary aspect of her complaint. One assumption underlying this recommendation is that, while harassment short of physical violence may not be criminal in the absence of an injunction or restraining order, it should be seen as such when it has been specifically forbidden by court order. A recurrent theme in the Commission's interviews of people in contact with harassment and domestic violence was in fact that 'mere' harassment may be just as cruel and harmful to a wife as a series of physical blows. It is more long drawn out and may be even more effective in rendering her life intolerable.

The creation of this offence should not debar the aggrieved spouse from

57 See note 51 *supra*.

58 See *e.g.* Crimes Act 1900 (N.S.W.) s. 547AA(8), inserted by Crimes (Domestic Violence) Amendment Act 1982 (N.S.W.).

instigating a contempt or quasi-contempt application, as an alternative means of dealing with the breach. Where this is done, however, the court should be specifically required, when passing sentence, to take into account the extent of any injury sustained by the spouse. There is little doubt that in many such cases the judge does in fact take this consideration into account. But it seems beneficial to make specific reference to it in the Family Law Act, so that the parties involved in the application, particularly the respondent, are aware that the use of the civil procedure for obtaining punitive sanctions for non-compliance does not detract from the criminal nature of the conduct involved.

(4) In line with legislation already operating in New South Wales,[59] and being considered by the Commission in its Reference on Domestic Violence in the Australian Capital Territory, a spouse should be compellable as a witness in any prosecution brought by the police for breach of an injunction against harassment or violence. A spouse should only be exempted if the court is prepared to grant exemption on the ground that the harm caused by the giving of the evidence outweighs the desirability of obtaining it.[60]

(5) Legal aid should be available for private prosecutions for breaches of injunctions, and its availability should be publicised.

VII. PROCEDURE AND SENTENCING

1. The Appropriate Court

Implicit in the foregoing recommendations is the principle that the Family Court is generally the appropriate forum to deal with breaches of its orders. In other areas of contempt law, notably contempt within the courtroom and contempt by scandalising, doubts may be raised about this approach, because where the court is the primary target of an alleged act of contempt, it appears to be 'judging in its own cause' if it proceeds to determine liability and impose punishment. Most acts of non-compliance with Family Court orders are however aimed primarily at the other party to the proceedings, with the Court itself as a secondary target, at most. The dangers of real or apparent bias are not as strong. One significant exception to the existing procedure should, however, be considered. Where it appears to a judge of the Family Court (or, indeed, any court) that a spouse's disobedience of its orders amounts to overt public defiance of its authority – the stress here should be on the word 'public' – and that for this reason it would be inappropriate and unfair for the Court itself to impose punishment, the Court should have the power to direct its Registrar to institute proceedings on indictment in a district or county court for an appropriately-drawn offence. It would seem that an offence of this nature would be scarcely, if ever, invoked. The governing criterion would be, not that the alleged

59 Crimes Act 1900 (N.S.W.) s. 407AA(4), inserted by the Crimes (Domestic Violence) Amendment Act 1982 (N.S.W.).

60 *Cf.* Australian Law Reform Commission, Report No. 26 (Interim), *Evidence* (1985) para. 529; Draft Bill, clause 18.

disobedience was persistent or serious or particularly injurious to the interests of the other spouse, but that the element of public defiance of the authority of the Family Court was so prominent that the Court would be embarrassed at having to try the matter itself. In other cases, the Court would continue to deal on its own accord with acts of disobedience which contained an element of challenge to its authority.

2. The Appropriate Judge

A related issue is whether applications for penal sanctions for non-compliance with an order should be heard by the same judge as made the order in the first place. Once again, the danger of apparent bias does not appear excessive. There are often positive advantages in referring the case to the same judge. He or she is better acquainted than anyone else with the background of the case and, particularly in cases involving refusal of access, will be well placed to determine the interests of the children involved and to assess whether the imposition of significant sanctions is likely to do more harm than good by irreparably damaging the possibility of reconciliation of the spouses. But this principle of adhering to the same judge should not be inflexible, for a number of reasons. First, it is suggested below that there should be a special 'enforcement list', whereby applications for sanctions against non-compliance should be dealt with as expeditiously as possible. The principle that the judge who made the original order should hear the application relating to breach of it may conflict with this need for urgency. Secondly, the judge himself or herself may feel embarrassed at having to hear the application for sanctions for non-compliance; these wishes should be respected. Thirdly, it should be open to either party, particularly the applicant, to argue that in the particular circumstances it is appropriate to refer the case to another judge. This consideration should not weigh too strongly when the application is made by the alleged contemnor, as clearly it could be little more than a delaying tactic. Nevertheless, it does seem appropriate to allow the point to be raised by the contemnor.

3. Safeguards for Alleged Contemnor

The present law of civil contempt in the Family Court requires that, although in form an application for committal or attachment for civil contempt is a species of civil process, the alleged contemnor should have the benefit of some basic safeguards associated with criminal trials. In the first place, a contempt or quasi-contempt application must, among other things, identify precisely the order which has allegedly been contravened and give particulars of the alleged breach.[61] It must be personally served on the respondent, unless the Court is satisfied that failure to do this will not cause injustice.[62] The Court must also be satisfied that the respondent had adequate

61 See generally Family Court Rules, 0rder 34 Rules 2, 6.
62 *Angelis and Angelis* (1978) FLC 90-503.

notice of the order allegedly breached before it can make a finding of guilt.[63] At the hearing, the respondent has the right to remain silent and to refuse to answer incriminating questions. Finally, the standard of proof of civil contempt is proof beyond reasonable doubt.[64] This principle regarding standard of proof has been held applicable to proceedings for quasi-contempt as well as for 'true' contempt[65] and even the lack of "reasonable cause" contemplated in section 70(6) and section 114(4) as the basis of a defence must be established by the applicant beyond reasonable doubt.[66] All these safeguards appear thoroughly desirable because the court is contemplating the imposition of penal sanctions, which may involve deprivation of liberty. In addition, despite dicta to the contrary in an English case[67], it seems appropriate that an alleged civil contemnor should have the right to make an unsworn statement.[68]

4. An 'Enforcement List'

A persistent concern among people interviewed by the Commission was that contempt and quasi-contempt proceedings were delayed unduly. The need for quick disposal of the case was said to be particularly strong where matters of access, violence or harassment were in issue. In the Family Law jurisdiction, perhaps more than in any other jurisdiction, delay is fatal to the success of enforcement mechanisms. The appropriate course would be for each registry to establish an 'enforcement list' of cases, which should be heard in priority to other proceedings. Spouses seeking punitive sanctions should not be compelled to put their cases in this list, but should have the option of doing so. The interaction of this principle with the principle that, as far as possible, the judge who made the order should hear the application for enforcement is undoubtedly a difficult one. As already suggested, urgency should in general take priority over the choice of judge, particularly where violence or the welfare of children are in issue.

5. Sentencing

The principal conclusions of this article as to sentencing flow from the suggestions made above as to the inappropriateness of the existing sub-division of contempt and quasi-contempt, the need to treat purely coercive sanctions within a separate category and the desirability of ensuring that where an act of non-compliance is dealt with as such even though it is also

63 *Ibid.*
64 *Re Bramblevale Ltd* [1970] 1 Ch 128; *Sahari*, note 16 *supra.*
65 *Ibid.*
66 *Attreed and Attreed* (1980) FLC 90-907.
67 *Comet Products U.K. Ltd* v. *Hawkex Plastics Ltd* [1971] 2 QB 67.
68 The right of an accused person in criminal proceedings to make an unsworn statement has been abolished in some Australian jurisdictions (*e.g.* Queensland and the Northern Territory), but its retention is recommended in the Law Reform Commission's Interim Report on *Evidence*, note 60 *supra*, paras 584-589; Draft Bill, clause 21. It has recently been confirmed for an accused person in summary proceedings for contempt in the face of the court: *Fraser v R* [1984] 3 NSWLR 212.

inherently criminal, the sentence appropriate to its criminality is taken into account. The following proposals are offered:
(1) In lieu of the existing rule that contempt sentences may be unlimited, there should be a separate upper limit on any prison sentence imposed to compel compliance with an outstanding order. As recommended in the Phillimore Report in England,[69] a limit of two years may be appropriate. This is an issue on which the judicial respondents to the Law Reform Commission's questionnaires (both Family Court judges and judges in other courts) split almost evenly. The primary reason for opting for an upper limit is primarily that, when a period as long as two years has elapsed and a contemnor is still intransigent, it cannot be said that the sentence is coercive any more, because the likelihood of compliance has been shown to be extremely remote.
(2) There should also be a fixed upper limit of penalties, so far as gaol sentences and fines are concerned, by way of punishment for past non-compliance. An upper limit of the order of two year's imprisonment may again be sufficient.
(3) In relation to non-compliance which is also inherently criminal (notably, child snatching and domestic violence), provisions drawing the Family Court's attention to the need to consider the extent of the injury or other detriment inflicted on the aggrieved spouse appear to fit reasonably well with the broad pattern just outlined.
(4) A wider range of sanctions should be available to the Family Court. In particular, it should have the option to impose such sentences as community service orders, attendance centre orders and weekend detention. This result could be achieved by implementation of the Crimes Amendment Act 1982 (Cth), coupled with an amendment establishing beyond doubt that this Act applies to civil contempt proceedings (by whatever name called) in the Family Court. A similar amendment of the Commonwealth Prisoners Act 1967 (Cth) would make parole available for persons sentenced to prison for civil contempt of the Family Court.

VIII. CONCLUSION

It would be futile to pretend that changes such as are suggested in this article would solve all the problems posed by contraventions of Family Court orders. These problems are particularly intractable, arising as they do from conduct which is often motivated by deep feelings of hostility and resentment. The use of civil contempt powers by the Family Court appears at times to jeopardise all the efforts that have been made to set it apart from the strict positivism and the heavily adversarial character of other courts, and to make divorce less painful for the spouses and children involved, by procedures such as counselling and mediation. But it would seem that in a minority of cases there will always be deliberate contraventions of one or

69 *Report of Committee on Contempt of Court* (1974) paras 172, 199-201.

more of the Court's orders and that the community's faith in the operations of the Court depends upon it making some sort of authoritarian response. Such is the clear impression conveyed to the Law Reform Commission by its research in this field. The foregoing discussion represents an attempt to isolate the circumstances in which the Court, however reluctantly, must assume the responsibility of imposing penal sanctions in response to disobedience, while recognising that such sanctions are measures of last resort, and that where the ultimate welfare of the spouses and children can be better served by a more conciliatory response, the contempt weapon should be left where it normally belongs – in a backroom cupboard.