



Court enforcement of child contact orders: a review of evidence in international jurisdictions



CRIME AND JUSTICE

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1. Summary of Key Points

- Across jurisdictions, relative to all cases involving child contact orders, a low number of cases return to family court for the purpose of enforcement of child contact orders. The research suggests that the cases that do return to court tend to involve high conflict/intractable disputes.
- In a number of international jurisdictions, children’s views are taken into account in contact and enforcement cases where it is deemed appropriate. Some literature suggests alternative approaches from professionals are required to ensure children’s views are heard and that they are kept safe from harm.
- The majority of courts across international jurisdictions are empowered to impose a variety of different interventions and sanctions in response to breach of contact orders, however in practice courts defer to a limited range of options, depending on the reasons behind the breach of order. These options can be categorised as taking either a problem-solving or a punitive approach.
- Problem-solving responses to breaches of child contact orders can involve parenting support, amendment of the existing order (referred to as settlement), protective measures, and/or child-led approaches, whereby the views of the child are considered in judicial decision-making.

- Problem-solving interventions are used in the majority of child contact enforcement cases across international jurisdictions.
- Punitive responses to breaches of child contact order can involve financial penalties, community service, and/or imprisonment.
- Punitive responses are less common in enforcement of child contact order cases. Imprisonment is used in a very small minority of cases in Scotland and international jurisdictions.
- None of the jurisdictions reviewed had a *specific* offence for non-compliance with a contact order. Rather, courts rely on existing legislation that allows enforcement of *all* court orders, related to child contact and other judicial provisions.
- The evidence base on enforcement of child contact orders within Scotland, the UK and in other jurisdictions is limited.

2. Introduction: background to the review

2.1 This paper presents the findings from a rapid review of evidence prepared by the Scottish Government’s Justice Analytical Services (JAS) on the ways in which international jurisdictions enforce child contact orders.

2.2 This paper was prepared to support the work of the Children’s (Scotland) Bill and the Family Justice Modernisation Strategy. The Children (Scotland) Act 1995 (“the 1995 Act”) is centred on the needs of children and their families. It defines parental responsibilities and rights (PRRs) in relation to children. It also sets out the duties and powers available to public authorities to support children and their families and to intervene when the child’s welfare requires it. Part 1 of the 1995 Act covers PRRs and contact and residence cases relating to children when parents are no longer together. In 2018, The Scottish Government consulted on Part 1 of the Children (Scotland) Act 1995 and the Children’s (Scotland) Bill was introduced into the Scottish Parliament on 2 September 2019.¹

2.3 The key policy aims of the Bill are to:

- Ensure the best interests of the child are at the centre of any contact and residence case or Children’s Hearing;
- Ensure that the views of the child are heard in contact and residence cases;

¹ The Bill is available at the link below:
<https://www.parliament.scot/parliamentarybusiness/Bills/112632.aspx>

- In cases involving domestic abuse, to ensure that victims are protected appropriately during the family court process; and
- Further compliance with the UN Convention on the Rights of the Child.

2.4 The Bill is an important step in improving the family courts. However this is only part of a wider programme of work to improve the court process and the operation of family justice. A Family Justice Modernisation Strategy was published alongside the Bill.² This sets out:

- Work that is ongoing by the Scottish Government and others;
- Work that can be done through secondary legislation or by improved guidance;
- Areas covered by the Bill; and
- Areas that are for longer-term work.

2.5 The consultation on the Review of the Children (Scotland) Act 1995 sought views on whether there should be changes to the procedure in relation to enforcement of contact orders. The Scottish Government does not consider the option of making a breach of a contact order a criminal offence to be a useful option as this could mean more family cases would be dealt with in the criminal court. In addition, it may be disproportionate to introduce criminal offences in this area given that the person would receive a criminal record.

2.6 The Scottish Government also considered whether to create a new enforcement route apart from contempt of court. This could allow the court to order an individual to attend a parenting class, mediation or unpaid work. The Scottish Government recognises that mediation and other forms of dispute resolution outside of court can play a valuable role in helping to resolve family disputes. However, the Scottish Government fully recognises concerns that mediation should not be used when there has been domestic abuse, sexual violence or gender based violence. There are also concerns that requiring a person to attend a parenting class or do unpaid work may take a parent away from a child, and could have a negative impact on the child. Therefore, the Scottish Government has not amended the contempt of court route, but has included in section 16 of the Bill a provision that places a duty on the court to investigate the reasons for non-compliance with an order. This can be done either by the court itself or by the court appointing a Child Welfare Reporter. This option was supported by consultation responses.

2.7 Currently, if someone believes an order under section 11 of the Children (Scotland) Act 1995 has been breached, the person can go back to court and seek a further order (such as a variation of the order or a switch in residence), and/or ask the court to hold the person breaching the contact order in contempt of court.

² The Strategy is available at: <https://www.gov.scot/publications/family-justice-modernisation-strategy/>

2.8 This paper identifies and collates published evidence on enforcement of child contact orders. It sought to address the research question: *'How are child contact orders enforced by family courts in other jurisdictions?'*

2.9 From a review of the available evidence it is concluded that the majority of courts across international jurisdictions are empowered to impose a variety of different interventions and sanctions in response to breach of contact orders, however in practice courts defer to a limited range of options, depending on the reasons behind the breach of order. Responses to breached child contact orders can be divided into two distinct categories: punitive and problem-solving.³ These will be described in more detail below, but it is clear from the available evidence that courts prefer to use one of the selection of problem-solving approaches to enforcement of child contact orders over punitive measures.

3. Sources and the evidence base

3.1 There is a very limited evidence base on the enforcement of child contact orders across the UK and in international jurisdictions.⁴ Trinder and colleagues, writing in 2013, found there to be a very limited evidence base on enforcement and that despite reforms in 2006 in England and Wales, no research had been done to explore or evaluate these until their own 2013 report, used to inform this paper.⁵ There is also a lack of exploration of specific issues within enforcement. As Scottish Government research from 2007 on dealing with child contact issues found: *'Remarkably lacking in the literature surveyed are any practical measures to address the failure to meet the parental responsibility of maintaining contact by the sizeable minority of nonresidential parents who lose contact altogether, even where the child concerned positively desires contact and this would be in the child's best interests'*.⁶

3.2 This review has therefore had to rely on a small number of sources. One key source is the review mentioned above by Trinder and colleagues. This research on enforcement of contact orders in England was carried out on behalf of the Nuffield Foundation⁷ in 2013. The research was based on a sample of 215 enforcement applications made in England between November 2011 and October 2012.⁸ A further key source for understanding enforcement (also mentioned above) was Scottish Government research from 2007, examining and reviewing mechanisms to deal with child contact issues in international jurisdictions.⁹ It is worth noting at the outset that

³ Trinder, L., McLeod, A. Pearce, J. Woodward, H. and Hunt, J. (2013a) *Enforcing Contact Order: Problem solving or punishment?* Nuffield Foundation report. Available at [http://www.nuffieldfoundation.org/sites/default/files/files/Enforcement report final Dec 2013.pdf](http://www.nuffieldfoundation.org/sites/default/files/files/Enforcement%20report%20final%20Dec%202013.pdf) [Accessed: 22nd November 2019], p. 2

⁴ Waller, M, Emory A. (2018) Visitation Orders, Family Courts, and Fragile Families. *Journal of Marriage and Family*. 80 (3): 653-670

⁵ Trinder *et al.* 2013a: 1

⁶ Scottish Government (2007) *Dealing With Child Contact Issues: A Literature Review of Mechanisms in Different Jurisdictions: 2*. Available at <https://www.webarchive.org.uk/wayback/archive/20170706154647/http://www.gov.scot/Publications/2007/10/25160036/0> [Accessed: 22nd November 2019]

⁷ Trinder *et al.* 2013a

⁸ Trinder is a key name in this small area of research and a number of her publications have been used in this review.

⁹ Scottish Government 2007

there is very little data on cases of child contact enforcement in the Scottish courts. Other evidence is based on international law and law reform reports and other academic publications.

3.3 However, there are a number of current research projects, focussing on issues surrounding family courts' response to child contact issues, which will add to the existing evidence base once completed. A key project for the Scottish context is:

Improving justice in child contact: a partnership project being conducted across five European jurisdictions (Bulgaria, Cyprus, Portugal, Romania and Scotland) between November 2018 and November 2020.¹⁰

The outputs from this project should be monitored, to add to the existing evidence base.

3.4 In early 2016, policy colleagues within the Scottish Government contacted civil servants across the European Union about responses to enforcement of child contact orders in other jurisdictions. The responses, considered alongside information from the 2007 Scottish Government report,¹¹ are summarised in Appendix 1.

4. Prevalence of enforcement of child contact orders

4.1 Internationally, the majority of child contact arrangements are decided privately between parents, without the involvement of civil or criminal court.¹² Every jurisdiction explored in this review encouraged 'out of court' agreements in the first instance.

4.2 The reasons for enforcement cases can be categorised into four main groupings, in order of frequency, as follows:

- High conflict between parents that prevents them from cooperating, meaning contact orders are not practicable or reliable;
- Parents' safety concerns for the child during contact with the other parent;
- Older children choosing to stop contact with one parent;
- Implacably hostile parents who wilfully breach court order(s) to prevent contact.¹³

4.3 Trinder and colleagues found that these cases may have risk attached to them – histories of violence, for example – but that they may also include other issues such as parents not agreeing on their respective roles and highly negative

¹⁰ Improving Justice in Child Contact research project <https://www.ed.ac.uk/education/rke/centres-groups/childhood-and-youth-studies-research-group/research/ijcc>

¹¹ Scottish Government 2007

¹² Scottish Government 2007: 1; Waller *et al.* 2018

¹³ Trinder *et al.* 2013a

feelings towards one another as people and in terms of their parenting ability.¹⁴ They also note that cases where child protection issues had been recognised and addressed by the courts could require far less court involvement to enforce agreements than these more intractable cases, where multiple issues were involved that were not being appropriately.¹⁵

4.4 Research suggests the child contact cases that return to court for the purposes of enforcement tend to involve a relatively low number of high conflict/intractable family cases, although it is also recognised that these cases can be highly emotional and stressful for the parties involved.¹⁶ Research from England found about 10% of separated parents involve the court to decide parenting arrangements, and a very small proportion of this number return to court to seek enforcement.¹⁷ Approximately 1400 cases per year are returned to court in England.¹⁸ In approximately a third of the cases examined in research from England, the reason for non-compliance was allegations by one parent about neglect, child abuse, and/or domestic abuse.¹⁹ The Ministry of Justice produces a quarterly publication on Family Court Statistics. Child contact proceedings are categorised as 'Private Law' matters, and while this can include a variety of arrangements for a child, it is noted that "The vast majority of private law applications are for Section 8 orders, which include a child arrangements order determining who the child should live with and when and who a child should have contact with or spend time with."²⁰

4.5 A review from Australia found similar rates of enforcement. The study assessed 100 court files and found nine cases resulted in the court concluding that a breach of order had occurred.²¹

4.6 It is worth noting that there is less comprehensive data on these issues for Scotland. There is limited data on the number of child contact orders that are breached because, where conviction data is available at all, it does not specify the type of order breached. There is also limited data on the number of requests made to vary orders, some of which could be in response to perceived breaches.

¹⁴ Trinder L., Beek M. and Connolly J. 2002. *Making contact: How parents and children negotiate and experience contact after divorce*. Joseph Rowntree Foundation report. Available: <https://www.jrf.org.uk/sites/default/files/jrf/migrated/files/1842630938.pdf> [Accessed: 20th November 2019]

¹⁵ *ibid.*: 14-23

¹⁶ Waller *et al.* 2018

¹⁷ Ministry of Justice (2013) *Co-operative parenting following family separation: proposals on enforcing court-ordered child arrangements. Summary of consultation responses and the Government's response*. London: Ministry of Justice.

¹⁸ Trinder *et al.* 2013a: 2; Trinder, L, McLeod, A., Pearce, J., Woodward, H. and Hunt, J. (2013b) Children and Families Bill Memorandum 'The enforcement of court orders for child contact: interim research findings' available at:

<https://publications.parliament.uk/pa/cm201213/cmpublic/childrenandfamilies/memo/cf40.htm>

¹⁹ Trinder *et al.* 2013a: 2

²⁰ Ministry of Justice (2019) 'Guide to Family Court Statistics' p. 6, available at: <https://www.gov.uk/government/publications/a-guide-to-family-court-statistics>

²¹ Rhoades, H. (2004) Contact Enforcement and Parenting Programmes – Policy Aims in Confusion? *Child and Family Law Quarterly* 16, p. 3

Generally it is believed that a low number of child contact breaches are brought to court.

4.7 Data from the Scottish Legal Aid Board suggests that over the past three years there have been 361 applications granted for Legal Aid to seek to hold a person breaching a contact order in contempt of court.

4.8 Civil imprisonment statistics show that there are very low numbers of civil imprisonment per year in Scotland. Between 2011 and 2018, there have been between 0 and 3 people civilly imprisoned per year for cases which include breaches of child contact. Unfortunately, contact cases are included within a wider data category that includes other types of civil imprisonment, so it is not possible to identify the exact number. Nevertheless, it is possible to conclude that cases of civil imprisonment for child contact breaches are very low in Scotland.

5. Court enforcement of child contact orders: problem-solving responses

5.1 None of the jurisdictions reviewed in this paper had a *specific* legal response to enforcement of child contact orders. Rather, jurisdictions rely on existing legislation that allows enforcement of *all* court orders, related not only to child contact but also other judicial provisions.

5.2 The majority of court responses to enforcing contact orders in the international jurisdictions surveyed can be categorised as problem-solving interventions (sometimes referred to as remedial responses). Courts have increasingly recognised the nuanced nature of child contact conflicts and developed measures to address this appropriately. The Court of Session recently commented on sentences for contempt of court in contact cases:

“It is not uncommon for disputes between former partners involving contact with children to be both acrimonious and emotional. A failure on the part of one parent to comply with court orders for contact, even where deliberate, may be an instinctive shying away from the immediate prospect of contact rather than some calculated or pre-planned refusal to comply with the order of the court. Ultimately, the court must enforce its orders, but in many cases the contempt proceedings themselves will provide a salutary reminder to the defaulting party of the need to comply.”²²

5.3 The available international literature suggests there are four subcategories of problem-solving responses, as follows:

- **Parenting support** for one or both parents to address the reasons/conflict preventing them from adhering to the court order;
- **Settlement**, whereby the court amended the existing order to revise contact arrangements;

²² *SM v CM* [judgment on 5 January 2017]; paragraph 62

- **Safeguarding/protective measures**, in cases where risk was identified, risk assessment and risk management were utilised to decide on enforcement measures;
- **Child-led approaches**, whereby the wishes of older children are considered and addressed by the court.²³

The interventions tend to be used in response to specific issues:

- **Parenting support** and **settlement** are used most in response to cases involving parental conflict;
- **Protective measures** tend to be used most in cases where there was alleged risk to the child;
- **Child-led approaches** were used most in responses to cases where there was child refusal.²⁴

6. Parenting support

6.1 Across a number of jurisdictions, changes in legislation have empowered the courts to impose parenting support programmes as a response to breached child contact orders.²⁵

6.2 In a number of cases in England, parents are referred by the court to the Separated Parents Information Programme' (SPIP), run by CAFCASS, which is a group work programme, lasting 4 hours and involving parents and children experiencing various different contact arrangements. SPIP's objective is for:

“Parents and family members [to] learn the fundamental principles of how to manage conflict and difficulties between themselves and their ex-partners and how to apply these principles by planning and imagining positive management behaviours. They also become clear on what their children need most from them and are able to move forward with the reduced need for court intervention.”²⁶

6.3 There is some evidence to suggest that parenting support programmes may be more effective for non-resident parents, particularly those who have been heavily

²³ Rhoades 2004: 3; Trinder *et al.* 2013a: 3

²⁴ Australia Family Law Council (1998) 'Child Contact Orders: Enforcement And Penalties A report to the Attorney-General by the Family Law Council' Family Law Council: Canberra; Trinder *et al.* 2013a: 3

²⁵ In England and Wales, section 11C of the Children Act 1989 allows the courts to impose activity conditions (e.g. attending parenting classes or anger management classes) in relation to a child arrangements order; in Australia the passage of the Family Law Amendment Act 2000 (Cth), allowed this; in England

²⁶ See <https://www.corechildrenservices.co.uk/project/cafcass-separated-parents-information-programme/>

involved and/or co-habited with their children until the separation.²⁷ In Australia, where child contact orders have been breached due to concerns regarding the non-resident parent's capacity to ensure the welfare of the child, parenting programmes have been recommended to improve their parenting skills and develop their support network.²⁸ The evidence notes the importance of programme staff being adequately skilled and resourced to receive court referrals, and that judges should be knowledgeable in recognising who needs such support and in what programme type, in order to direct clients appropriately.²⁹

6.4 In England and Wales, an order to attend a parenting programme may be part of a 'co-parenting' approach, where the court aims to encourage parents to work together and not see contact issues as the fault of one obstructive party. This approach can include orders giving instruction on how parents should behave towards one another, how contact should be conducted, and how handovers should be managed.³⁰

7. Settlement

7.1 An amended order may be required to encourage or enforce compliance. Instead of taking a punitive approach to enforcement, courts encourage this approach to the issue of contact, intended to move past the current difficulties. Amended orders can also be requested when children grow older and need different contact arrangements or if family circumstances change. In England and Wales, amendment of a contact order as a means to restart contact is a very common response.³¹ Similarly, a review of 100 child contact cases in Australia found a large majority of orders required to be amended due to a material change in circumstances, rather than punitively enforced due to wilful non-compliance by one parent.³²

7.2 Courts are also able to use amendment of orders in a more punitive way – such as transferring the residence of a child – but, as child welfare principles are intended to be at the heart of most systems of contact, this is rare. The Family Law Council of Australia, for example, recommends this intervention only when necessary for strongly uncooperative parents and when suitable alternatives are possible – which may be with a grandparent or other extended family and not the contact parent.³³ They also note this could be for a designated time, to allow parents to consider their position.

8. Protective measures

²⁷ Rhoades, H. (2002) 'The "No-Contact Mother": Reconstructions of Motherhood in the Era of the "New Father"' *International Journal of Law, Policy and the Family* 71.

²⁸ Australia Family Law Council 1998

²⁹ Rhoades 2004

³⁰ Trinder *et al.* 2013a: 39

³¹ Trinder *et al.* 2013a: 37

³² Rhoades 2004

³³ Australia Family Law Council 1998: section 8.23

8.1 In some cases, non-compliance with a child contact order is due to one parent's safety concerns for the child during contact with the other parent. In such cases, courts employ a number of evidence gathering processes to establish the veracity of the concerns. Across jurisdictions, in cases where risk is identified, courts often use contact centres to enforce child contact orders. The available evidence suggests this intervention allows contact to continue, but under a level of supervision that can keep the child – and potentially also the vulnerable parent – safe. In these kinds of circumstances, the evidence suggests contact centres can be valuable in maintaining contact and addressing child protection concerns.³⁴ The literature highlights that, in some cases, contact centres may be seen as a temporary measure pending resolution of the family conflict, but in cases where there are ongoing child protection concerns, centres may be required as a longer-term or permanent measure to allow compliance with a court order.³⁵

8.2 The evidence base suggests that, across international jurisdictions, courts are at an early stage of developing the skills and resources to recognise and address cases where one parent appears obstructive but is in fact refusing contact on the grounds of child protection concerns.³⁶ Some research highlights cases in which inappropriate child contact arrangements have been ordered, due to the court's non-recognition of legitimate concerns, leading to families' sustained contact with the legal system and increased risk(s) to the child and parent.³⁷

9. Child-led approaches: the voices of children in decision-making

9.1 Section 16 of the Children (Scotland) Bill introduces a requirement on the court to investigate non-compliance with an order. The Scottish Government would expect, as part of the investigation into why an order has not been complied with the court would need to obtain the views of the child.

9.2 In European and North American jurisdictions, children's views are sought, where appropriate, in family court cases. In child contact cases, older children's views may be more actively sought by the court, particularly when the young person has expressed a view that contact should reduce, be only indirect, or cease.

9.3 One exception to this trend is in cases where parental alienation is substantiated by the court. Research suggests that giving children decision-making rights in cases of parental alienation is not always be in their best interests, as they may feel undue stress, guilt and pressure regarding the decision.³⁸ Where the court concludes evidence of parental alienation, research suggests the views of the child have to be carefully considered. In some cases, the courts have not considered the

³⁴ Trinder *et al.* 2002: 47

³⁵ Trinder *et al.* 2002: 47

³⁶ Rhoades 2004

³⁷ Trinder *et al.* 2002: 46-47

³⁸ Interview with Jennifer McIntosh July 14, 2010 cf. Fidler, B.J. Bala, N. and Saini M. A. (2012) Hearing the voices of children in Alienation cases in *Children Who Resist Postseparation Parental Contact: A Differential Approach for Legal and Mental Health Professionals*. Oxford University Press. Accessed 1 Nov. 2019, from <https://www-oxfordscholarship-com.ezproxy.st-andrews.ac.uk/view/10.1093/acprof:oso/9780199895496.001.0001/acprof-9780199895496-bibliography-1> pp.150-1

child's wishes in the same way as in other family court cases, or have balanced their views alongside other evidence.³⁹ However some literature⁴⁰ notes that legal and child welfare professionals are increasingly knowledgeable about the distinctions between children who are alleged to be alienated from a parent and those with justifiable reasons for wishing to change their contact arrangements.

9.4 Children's involvement in court varies widely across the jurisdictions studied here, and even in England alone research notes that children's participation varied between courts.⁴¹ Overall, children tend not to be involved in the court's decision-making because they are either deemed too young or are not consulted.⁴²

9.5 In some child-led approaches to breaches of contact order, where older children were consulted, their views were then not considered in the court's decision, and in the majority of cases where children were involved, courts did not take any action to address the child's trauma or upset due to the court experience.⁴³

10. Court enforcement of child contact orders: punitive responses

10.1 Punitive responses involve community service, such as unpaid work; fines; and imprisonment. Financial penalties are imposed in some cases, generally to provide financial compensation to one parent if they have incurred expenses due to the other's non-compliance. In England and Wales, the Children and Adoption Act (2006) gave new powers to the court to impose financial penalties and/or community service. These options are, however, rarely used by the courts. The Ministry of Justice considered introducing further more punitive responses to enforce child contact orders in 2013, such as the use of curfew orders and the withholding of individuals' passports and driving licenses, but after consultation decided against these measures.⁴⁴

10.2 Across international jurisdictions, punitive responses to breaches of child contact orders are used rarely and tend not to be considered in the best interests of the child.⁴⁵ Cases where 'implacable hostility' was identified were most likely to be dealt with by a punitive approach,⁴⁶ however these cases are in the minority.

10.3 The available evidence draws consistent conclusions on the low prevalence of punitive responses to enforcement of child contact. The Nuffield Foundation research noted that punitive responses are used very infrequently (in less than 1 in

³⁹ Fidler *et al* 2012b: 153; [2007] O.J. 530 (S.C.J.); 2007 Carswell Ontario 773 (Ont. S.C.J.), at para. 3 cf. Fidler *et al* 2012b: 155-6; Quebec. Supreme Court, case of *P.S.-M. v. A.J.-L.C.*, cf. Fidler 2012: 154

⁴⁰ Kelly J.B. and Johnson J. (2001) The Alienated Child: a reformulation of parental alienation syndrome. *Family Court Review*. 39 (3): 249-265; Trinder *et al*. 2013a: 41-42

⁴¹ Trinder *et al*. 2013a: 3

⁴² Trinder *et al*. 2013a: 3

⁴³ Trinder *et al*. 2013a: 3

⁴⁴ Ministry of Justice 2013: 6; Trinder *et al*. 2013b

⁴⁵ Australia Family Law Council 1998

⁴⁶ Trinder *et al*. 2013a: 3

10 cases) in response to breached child contact orders in family courts in England.⁴⁷ Research from Australia found fines or imprisonment were used in approximately 15% of responses to breached orders.⁴⁸ Another Australian study found that 9% of applications for enforcement to the court concluded a breach of order had occurred, with 3% resulting in a punitive measure.⁴⁹

10.4 In England, the courts have *warned* that they may use the sanction of unpaid work in a relative number of cases (as part of an assessment or suspended order) and this did appear to have the desired effect on the relevant parent.⁵⁰ It is unclear that unpaid work actually works in these circumstances – only one active order reviewed in the Nuffield report encouraged compliance – but having the sanction there as a threat has been useful in some cases.⁵¹ An amendment was added to stage two of the Family Law Bill which became the Family Law (Scotland) Act 2006. This required the court when making or varying a contact order to attach a notice warning of the consequences of failing to comply with the contact order. This was aimed as a deterrent for non-compliance. This amendment was removed at stage 3 of the Bill as it was seen as possibly being unduly intimidating to warn parents, before either of them had done anything wrong, of the consequences of non-compliance.

11. Preventative interventions

11.1 Some jurisdictions offer preventative interventions to reduce the number of child contact cases that reach or return to family court. Preventative measures can include educating parents about the court process and court orders so that they fully understand how child contact orders operate, their responsibilities and the consequence of breaching an order.⁵² These interventions may also include information on alternatives to using court interventions, and how to improve communication mechanisms between separated parents.⁵³

11.2 Post-order counselling is used in some jurisdictions. This involves separated parents being referred to a counsellor, who explains the application of the order, each parent's responsibility, the consequences of breach and highlights routes to access additional support and information.⁵⁴ Evidence from Australia recommended that in cases where a high level of conflict over child contact was anticipated, the court could recommend or order post-order counselling in an attempt to pre-empt the conflict.⁵⁵

⁴⁷ Trinder *et al.* 2013a: 1

⁴⁸ Australia Family Law Council 1998

⁴⁹ Rhoades 2004

⁵⁰ Trinder *et al.* 2013a

⁵¹ *ibid.*: 4

⁵² Australia's Family Law Act 1975 (Cth), s 65DA, for example, empowers judges to warn parent(s) of the consequences of non-compliance; Rhoades 2004: 2

⁵³ Australia Family Law Council 1998

⁵⁴ *ibid.*

⁵⁵ *ibid.*

12. Conclusions

12.1 This rapid review of evidence has outlined the different approaches taken by courts to enforcement of child contact orders. The available empirical evidence suggests problem-solving responses to enforcement issues are the most widely used and the most effective.⁵⁶ Courts increasingly recognise the nuanced and often complex nature of child contact cases and have developed measures to intervene appropriately. Settlement and amendment of orders is most common, as many parents have a material change in circumstances meaning the interests of the child can be most easily maintained by a amendment to the existing order.

12.2 The evidence suggests that punitive sanctions are rarely used, though they can be important to ensuring compliance in some cases and generally they are adequate as they stand.⁵⁷ Even the ability of the courts to 'threaten' certain sanctions can be useful in enforcing some cases.

12.3 It is difficult to know the prevalence of child contact order breaches and enforcement in Scotland, as available civil imprisonment data is not specific enough with regards to contact cases.

12.4 More widely, the evidence base on enforcement of child contact orders is fairly limited. There is some information on how other jurisdictions respond to enforcement of child contact, however a number of publications describe only the legal provisions available and do not assess their effectiveness. There are very few studies on, specifically, the longitudinal outcomes for families who have experienced child contact enforcement in court, or that include quantitative data on prevalence, types of outcomes and effectiveness. The 2007 review by the Scottish Government notes the limited evidence base in this area, and this remains the case.⁵⁸ Enforcement appears to be an under-researched area of contact and hence this review relies on a small number of sources.

12.5 The findings of this review reinforce some of the policies in the Children (Scotland) Bill on non-compliance (e.g. investigating/problem-solving, taking child's views, varying orders, training of Child Welfare Reporters, and regulating contact centres), and support measures that there is not provision on (e.g. use of mediation and parenting classes, as these may not be appropriate in high-conflict cases).

⁵⁶ Trinder *et al.* 2013b

⁵⁷ Trinder *et al.* 2013a: 4

⁵⁸ Scottish Government 2007: 5

13. Appendix 1: An overview of international jurisdictions

In early 2016, policy colleagues within the Scottish Government contacted civil servants across the European Union about responses to enforcement of child contact orders in other jurisdictions. This has been supplemented, where relevant, with the research from the 2007 Scottish Government report on dealing with child contact issues.

Information provided by other jurisdictions is detailed below, however it should be noted this information is based on a brief research, much of which has not been triangulated, and should therefore be treated with caution.

In Australia the current system for enforcing compliance with contact orders is based on the Family Law Amendment Act, 2000. This reform supplemented the previous system, to provide the court with a number of new strategies. These had a strongly problem-solving approach, with a focus on ordering parents who breach orders to attend parenting support programmes. As discussed above, there are some concerns with the implementation of these new approaches, but this reform signalled a move away from more punitive approaches in Australian family law.⁵⁹

In Croatia, fines or imprisonment are possible responses to breach of contract. The vast majority of enforcement proceedings are suspended, in the interests of the child.

The Civil Code in the Czech Republic provides that “if a parent having the care of the child permanently or repeatedly prevents the other parent from having contact with the child for no reason, such behaviour constitutes grounds for a new court decision on which of the parents should have care of the child.”

Denmark has three measures in place to support parents and children around contact. It takes a more administrative approach to divorce and child custody. These measures are: free, professional, voluntary, and confidential counselling for parents who are in dispute over contact of custody. This is something offered by regional governments (who also make custody and contact decision). Also offered is free mediation for parents who disagree about contact or custody, which parents must both agree to attend. It will always be co-mediation (two mediators), one of which will be a lawyer and another will have experience of child cases. Finally, meetings for children with other children whose parents live apart are provided. Children have the chance to meet other children of a similar age going through similar things, with counsellors there for support.⁶⁰

England and Wales now have “child arrangements orders” rather than residence and contact orders. In England and Wales, if one of these orders is breached the court may treat the breach as contempt of court (as in Scotland); refer the parent to a parenting programme; vary the order (as in Scotland); require the breaching parent to undertake unpaid work (where there is no reasonable excuse for breaching the

⁵⁹ Scottish Government 2007

⁶⁰ *ibid.*

order) and require the parent to pay compensation for financial loss. In practice, unpaid work and financial compensation are little used and committal to prison and fines are rarely used.

The Ministry of Justice has responsibility for child contact and tries to provide information and advice to parents. They encourage the use of alternative dispute resolution, such as in-court conciliation, mediation, and flexible powers to the court in contact cases.⁶¹ Parents now have to attend a mediation information session before they can proceed to court.

In France there are criminal sanctions for non-compliance, but these are only used when a parent is seen to be repeatedly and wilfully refusing to respect the court decision. We understand the French Government is considering reforms to improve the enforcement of decisions and this might involve the introduction of civil penalties to sanction the non-compliant parent.

France has developed a system of mediation for reaching agreements and encourages family members to use mediation to resolve disputes. It also uses contact centres extensively, where there are concerns or high conflict disputes. Overall, the aim is to encourage parents to reach informal agreements and a civil judge will meet separately with each parent in a divorce hearing to discuss the importance of this with them, encouraging agreement and compliance.⁶²

In Germany, the courts can impose administrative fines or administrative detentions as enforcement mechanisms.

In Ireland, the court can impose a penalty (fine/imprisonment) and the injured parent can also bring a motion to find the offending parent in contempt. In practice, the courts rarely fine or imprison the offending parent; the injured parent is often reluctant to have a penalty imposed; and a warning is usually sufficient. Sometimes the injured parent is given additional contact. New provisions have also been passed recently empowering the courts to order the offending parent to compensate the other for any expense incurred as a result of the breach and to order the offending parent to attend a parenting course or family counselling.

Malta appears to have a broadly similar process to that which operates in Scotland.

New Zealand now uses the terminology of 'parenting orders' instead of custody or access orders, to try to shift the focus away from rights of parents to responsibilities of parents to cooperate with each other to care for their child after separation. Parents must try to agree informally initially, but if they cannot then the Family Court will intervene using mediation, counselling, and formal court hearing. Parenting orders are considered a last resort after these measures have been tried.⁶³

Procedures in Northern Ireland are very similar to Scotland in that if a contact order is breached the court may be asked to vary the order or to hold the person who breached it in contempt of court. A person held in contempt of court may be sent to

⁶¹ *ibid.*

⁶² *ibid.*

⁶³ *ibid.*

prison or fined or both. The Department of Finance and Personnel in Northern Ireland has invited views on whether any additional penalties should be made available and will be further exploring the issues in relation to enforcement.

In Poland, the court may order the offending parent to provide financial compensation to the injured parent.

In Portugal, the court can impose fines and compensation if the injured parent can show economic loss (e.g. paid for a holiday). In addition, the repeated and unjustified non-delivery of a child to the other parent is a criminal offence which can be investigated by the Police.

In Slovenia, one party may file an application to vary the order. There is also provision to impose fines and in exceptional cases to ensure protection of the interests of the child to send in an enforcement officer [a bailiff or a sheriff officer] in the presence of a professionally qualified worker appointed by the court. In some circumstances (e.g. when one parent detains a child), the bailiff may request the assistance of the police in carrying out the enforcement.

There is no specific family court in Sweden. Instead social services are trained to work with parents in the first instance to resolve conflict, and the courts will only be resorted to after this stage. There is an expectation of shared care in Sweden, unless circumstances prove this is not appropriate.⁶⁴

Federal nations such as Australia, Canada, and the USA allow some level of state/territory/province discretion in making family law, but the extent of this varies. Australia has a guiding set of principles largely adopted across the states/territories. Canada takes child contact cases on a case by case basis and encourages informal agreements wherever possible, using mediation, arbitration, and counselling for access enforcement. Courts also have a range of options to enforce contact, which vary by area. These include civil contempt, fines, imprisonment, and compensatory access. The USA has highly varied provision across states. Education programmes have been introduced as an initial stage of enforcement, with mediation used also. There are also a number of other options: *'parenting plans, parenting education programmes, parenting coordinators who help parents to contain conflict and make joint decisions, mandatory and voluntary mediation, and programmes to address non-compliance with contact orders.'*⁶⁵

⁶⁴ *ibid.*

⁶⁵ *ibid.*: 3



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