

1989

THE PARLIAMENT OF THE COMMONWEALTH OF
AUSTRALIA

SENATE

FAMILY LAW AMENDMENT BILL 1989

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Hon Lionel Bowen MP)

FAMILY LAW AMENDMENT BILL 1989

OUTLINE

This Bill amends the Family Law Act 1975 -

- (a) to implement a recommendation of the Australian Law Reform Commission to unify those provisions of the Family Law Act dealing with the enforcement within Australia of orders made under the Act;
- (b) to enable the making of arrangements with the States and Territories for the provision of facilities related to additional sentencing alternatives;
- (c) to permit courts to order the arrest of a person who has contravened an access or custody order, and attaches a power of arrest to injunctions made for the personal safety of a child, a person with whom such a child is, or a party to a marriage;
- (d) to provide specific power for a court to order that certain access shall occur to replace access which did not occur as a result of the contravention of an order;
- (e) to make it clear that Judicial Registrars and Registrars of the Family Court are bound by the same obligation as Judges and magistrates to consider the possibility of the parties to proceedings under the Act reconciling and to refer those parties to counselling where appropriate;

- (f) to provide for the registration in a court of an agreement concerning maintenance for a child who is not a child of a marriage; and
- (g) to vary the conditions on which information held by individuals or by Commonwealth Departments concerning the whereabouts of a child, or the person in whose custody the child is, may be required to be provided to the Family Court or to another court having jurisdiction under the Act;
- (h) to make minor technical changes to provisions of the Act concerning the Family Law Council;
- (i) to enable a change of administrative arrangements in relation to the Australian Institute of Family Studies.

2. Unification of the enforcement provisions of the Act was one of the recommendations made by the Australian Law Reform Commission in its "Contempt" report (ALRC 35). Unification will have the effect of creating a single source of power to impose sanctions for failure to comply with an order made under the Act. The provision will replace a range of provisions dealing with -

- . non-compliance with custody or access orders;
- . non-compliance with injunctions; and
- . contempt constituted by a failure to comply with an order of a court, including an undertaking given to a court.

3. The amendments also implement an ALRC recommendation to broaden the range of penalties that a court may impose when a person has been found to have contravened a court order. The significant addition to the current range of penalties is the inclusion of community-based sentencing alternatives. Subject

to agreements being made with the States and Territories, which will supply facilities and staff, courts will be empowered to make an order generally known as an additional sentencing alternative order. The range of orders includes such sanctions as community service orders, weekend detention orders or attendance centre orders. The major effect of the availability of the sanctions is that 'last resort' nature of imprisonment is highlighted.

4. Breach of orders for access to children is addressed by the amendments. Before a court imposes a sanction in relation to such a breach it must consider whether the parties should be required to attend counselling. A specialist program for counselling families in which there is a history of repeated breach of an access orders is to be established in the Family Court Counselling Service.

5. Where a court has ordered that a warrant be issued for the search of a vehicle or place, in order that possession may be taken of a child and the child delivered to a person entitled to the custody of the child or to access to the child, the court may also order that any person having information as to the whereabouts of the child, or a person in whose company the child may be, shall provide that information to that court. A power exists in subsection 64(11B) of the Act to require Commonwealth Departments to provide information held by them even though a secrecy provision would normally apply to that information. Amendments to the Act will streamline the procedures for obtaining information and reduce the possibility of the search power being abused or used in an inefficient manner.

6. Where the parties to a marriage have agreed on matters concerning custody, guardianship, access or maintenance they may register a maintenance agreement in a court under section 86 of the Act. Once registered the agreement may be enforced as if it were an order of the court. Following amendments made to the Act by the Family Law Amendment Act 1987, if the parents of a child, including an ex-nuptial child, have agreed on matters other than maintenance they may register a child

agreement which may deal with custody, guardianship and access matters, but not maintenance matters. At present the Act makes no provision for the registration of agreements concerning the maintenance of children who are not children of a marriage for the purposes of the Act. That defect is remedied by the amendments made by this Bill which provide a procedure for the registration of child agreements which include provision for maintenance of a child who is not a child of a marriage and which will operate in similar manner to maintenance agreements registered under section 86.

FINANCIAL IMPACT STATEMENT

Establishment of a specialist program in the Family Court Counselling Service will require the creation of 10 ASL positions at a cost of \$0.4m. each year.

Payments to the States and Territories for the provision of facilities associated with additional sentencing options is anticipated to cost approximately \$0.5m. in each year.

NOTES ON CLAUSES

Clause 1 Short Title:

1. This clause states that the Act may be cited as the Family Law Amendment Act 1989 and provides, in subclause (2), that the 'Principal Act', which is amended by this Act, is the Family Law Act 1975. In this explanatory memorandum the Principal Act is referred to as 'the Act'.

Commencement:

2. This Bill does not have a commencement clause. By operation of subsection 5(1A) of the Acts Interpretation Act 1901 the Act will commence 28 days after Assent by the Governor-General. The delay of 28 days will allow notice of commencement to be publicised to those affected by the amendments.

Clause 2 Interpretation

3. This clause amends the definition of 'Commonwealth instrumentality' in subsection 4(1) of the Act by removing the words "or of the Australian Capital Territory". Those words are to be removed to reflect the self governing status of the Australian Capital Territory. The words 'Commonwealth instrumentality' are now used in subsection 64(11B) and in section 117A. They are to be used in new section 64A, with subsection 64(11B) being repealed, and will remain in section 117A.

Clause 3 Conciliation

4. This clause amends section 14 of the Act in two ways. The first is to make drafting changes as a consequence of the insertion of new subsection (6). The second inserts new subsection (6), which defines "Judge" for the purpose of the section to extend to magistrates, Judicial Registrars and Registrars. It clarifies the obligation of those officers to consider whether there is any possibility of reconciliation of the parties to proceedings under the Act and to direct the parties to counselling in appropriate cases. That obligation is currently expressed as applying to Judges and magistrates. Judicial Registrars and Registrars exercise powers delegated to them by the Judges of the Family Court in a range of proceedings under the Act. The matters in respect of which a delegation may be made are stated in section 26B in relation to Judicial Registrars and section 37A in relation to Registrars. The Judges have made delegations to Judicial Registrars and Registrars by Rules of Court.

Clause 4 Interpretation

5. This clause amends paragraph (c) of the definition of "child agreement" in section 60 of the Act. The amendment is made to allow a child agreement to include provision for the maintenance of a child. Such agreements cannot now deal with child maintenance. This clause is related to clauses 7 and 8 which make amendments to section 66ZD and insert a new section 66ZDA respectively.

Clause 5 Powers of court in custodial proceedings:

6. This clause amends section 64 of the Act in two ways. First, it inserts new subsections (10D), (10E) and (10F) into section 64. Secondly, the clause amends provisions of the Act which permit a court to make orders that a person provide information, concerning the address of a child in respect of whom a warrant under section 64 has been issued, which the person may have or obtain.

7. Subclause (a) has three parts. The first inserts a new subsection (10D) in subsection 64. A provision equivalent to new subsection (10D) is now found in subsection 70(5) of the Act. The purpose of the subsection is to create the offence of preventing or hindering the execution of a warrant issued under section 64 to give effect to a custody or access order by taking possession of a child and delivering the child to the person entitled to custody or to access.

8. The second part of subclause (a) inserts new subsection (10E) which provides that a court may impose as a penalty for an intentional breach, without reasonable excuse, of subsection (10D) a fine of \$1000 or the court may require the person to enter into a recognizance, or imprison the person for no more than 3 months if the person does not enter into a recognizance.

9. Under new subsection (10F) the court may also make such further or other orders as it considers appropriate to ensure that a person does not again prevent or hinder the execution of a warrant. The new subsections (10E) and (10F) are in substantially similar terms as existing subsection 70(6).

10. Subclause (b) omits subsections (11A) and (11B) of section 64 of the Act which are re-enacted with some modification in new section 64A.

11. The subsection also inserts new subsection (11A) which requires the person who is entitled to the custody of or access to a child, and who has obtained a court order that a warrant be issued for the child to be taken into custody and delivered to him or her, to notify the court which issued the warrant and any Department which has been required to supply information from its records if the child is recovered by any means including pursuant to the warrant. The purpose of this amendment is to ensure that authorities are advised that a warrant, or information which may be held by a Department, is no longer required to assist in the enforcement of a court order. Notification is to be made as soon as practicable after the child has been recovered.

Clause 6 64A Power of Court to require provision of information

12. This clause inserts new section 64A empowering the court to make orders requiring the provision of information. The new provisions are modelled on existing subsections 64(11A) and (11B) and are designed to ensure the efficacy of those subsections as a means of obtaining information.

13. New subsection 64A(1) provides that where a warrant has been issued under either of subsections 64(9) or (10) in relation to a child and a court is satisfied that a person is likely to have, or to obtain, information relating to the whereabouts of the child or of a person who it is likely that the child is with, the court may order the person to provide that information to a senior officer of the court.

14. New subsection 64A(2) provides that an order directed to a person under new subsection 64A(1) does not apply to any information that the person may have or obtain because he or she holds an office in a Commonwealth Department or instrumentality.

15. New subsection 64A(3) provides that an order made under new subsection 64A(1) will continue to operate for 12 months and obliges a person to provide information as soon as practicable after the order is served or as soon as is practicable after information is subsequently obtained.

16. New subsection 64A(4) allows a court to make an order in similar terms to the type of order which may be made under new subsection 64A(1) but is directed to information held, or which may be held, by a Commonwealth Department or instrumentality. This provision imposes a special obligation on Commonwealth bodies to provide information which may assist in the recovery of a child and also provides a simple and clear mechanism for obtaining the co-operation of such bodies. That mechanism is described in following subsections (5)-(8).

15. New subsection 64A(5) provides that a court shall not order a Department or instrumentality to provide information unless the Department or instrumentality has been advised of the application for such an order. The purpose of this provision is to require applicants to make reasonable enquiries as to whether a Commonwealth body is likely to have relevant information which is readily accessible. Discussions with a Department or instrumentality can assist both the applicant and the Department by focussing the attention of each on the most effective way to ensure that appropriate information is made available to the person who must execute a warrant for possession.

16. New subsection 64A(6) provides that the Court should not make an order under new subsection (4) that is directed to more than one Department or instrumentality except in exceptional circumstances. Where it is possible that more than one Department or instrumentality has information the court should, in most cases, make an order directed to the Commonwealth body most likely to have or obtain relevant information. If a Commonwealth body against which an order is directed does not have relevant or useful information an order can be sought against another Commonwealth body in a subsequent application.

17. New subsection 64A(7) provides that an order under subsection (4) may state that it applies only to records of a particular kind. The court may make such an order where it considers that information is likely to be held only in particular records, and that an unreasonable burden would be placed on the resources of the Department or instrumentality if the order were to apply generally.

18. New subsection 64A(8) provides that the obligation of a person to provide information pursuant to an order made under new subsection 64A(4) shall continue for 12 months starting on the date of the order, and although the obligation of a Commonwealth body to provide information continues for that time a Department or instrumentality shall not be obliged to search its records in order to provide information more

frequently than once every 3 months. This provision is designed to ensure that a person does not have an open-ended obligation to search records and provide reports. Of course, if after 12 months it appears that a further order will be of value, by producing information as to the whereabouts of a child, an order may be made by the court. Any information held or obtained by a Commonwealth body must be provided to the court as soon as is practicable after the order is served or the information is subsequently obtained.

19. New subsection 64A(9) provides that an order under section 64A is to be complied with notwithstanding any requirement under another law not to divulge information. This provision overrides secrecy provisions in any other legislation.

20. New subsection 64A(10) provides that any information provided to a senior court officer under new subsections (1) or (4) shall not be passed on by the court officer or any other person to whom the information is properly provided to another person who is not entitled to receive the information. The only people who may receive such information are -

- . another senior court officer,
- . a police officer or other person who is to execute a section 64 warrant, or,
- . a person who has been permitted by the court to have access to the information.

21. New subsection 64A(11) is definitional. For the purposes of the section definitions are provided, as follows:

- . "appropriate authority" - in relation to a Commonwealth instrumentality is a person, within the administration of the instrumentality, who may supply the information.
- . "Commonwealth body" means either a Commonwealth Department of State or a Commonwealth instrumentality.
- . "Department" means a Commonwealth Department of State.

- . "Registrar" is defined, for the purposes of new section 64A, to mean a Registrar or a Deputy Registrar of the Family Court of Australia or of the Family Court of Western Australia or, in the case of any other court, the principal officer of that court. The term has a narrower meaning than elsewhere in the Act where the definition of Registrar in subsection 4(1) applies. This definition has the purpose of limiting access to information which may be privileged or subject to a secrecy provision but for the operation of an order made under new section 64A.

Clause 7 Child welfare provisions of registered child agreements

22. This clause makes drafting changes to section 66ZD of the Act consequent upon the inclusion of child maintenance provisions in the range of matters which may be included in a child agreement.

Clause 8 66ZDA Child maintenance provisions of registered child agreements - where not enforceable as maintenance agreement

23. This clause inserts a new section 66ZDA after section 66ZD in Division 10 of Part VII of the Act. New section 66ZDA applies to a child agreement which has been registered and, in accordance with the extended scope of child agreements as a result of clause 4, makes provision for the maintenance of a child who is not a child of a marriage. Such an agreement is not a "maintenance agreement" in relation to a child. The term "maintenance agreement" has a particular meaning, see section 4(1) of the Act, which renders such agreements only applicable in relation to the maintenance of a child of a marriage. New section 66ZDA will permit the parents of any children in respect of whom a "maintenance agreement" may not be registered and who have agreed on provisions for the maintenance of the child to register their agreement, rather than having to issue an application and

obtain consent orders in the terms of their agreement. This will make it easier, and less costly, for parents to obtain the benefits of the enforcement and variation provisions of the Act where they have been able to reach initial agreement on the appropriate level of maintenance for an ex-nuptial child. Parents of a child of a marriage can already register a similar agreement in relation to such a child under section 86 of the Act.

24. New subsection 66ZDA(1) provides that section 66ZDA applies to a child agreement where

- . the agreement is registered under section 66ZC,
- . the agreement is an agreement that makes provision in relation to the maintenance of a child, and
- . either -
 - the agreement is not a maintenance agreement (as defined in s.4(1) of the Act), or
 - if it is a maintenance agreement, the child is not a child of a marriage between the parents of the child.

25. New subsection 66ZDA(2) provides that where such a child agreement has been registered it may be varied under section 66N of the Act as if its provisions in relation to maintenance were an order made by consent under Part VII of the Act.

26. New subsections 66ZDA(3) and (4) make provision in relation to the operation of child maintenance provisions of a child agreement to which section 66ZDA applies where a party to the agreement or a person entitled to maintenance payments dies. They are in similar terms to existing subsection 86(3A) which applies to the maintenance provisions of a registered maintenance agreement. New subsection (3) deals with provisions regarding capital payments and new subsection (4) deals with provisions regarding periodic payments.

Clause 9 Heading to Division 12 of Part VII

27. The heading of Division 12 is altered by this provision to be 'Division 12 - Obligations created by custody and access orders'. The change reflects that the Division does not contain enforcement provisions but states various obligations and provides penalties for certain activities in disregard of those obligations.

Clause 10 Interfering with child subject to custody orders

28. This clause amends section 70 of the Act so that the remaining provisions state the grounds which are a precondition to the issue of a warrant for arrest of a person, who has contravened one of the subsections, under new subsection 70AA. Subclause (a) makes a minor drafting amendment to reflect the creation of section 112AD.

29. Subclause (b) omits subsections 70(5), (6), (7) and (8). The omitted provisions are to be repeated elsewhere in the Act. Subsection 70(5) and part of subsection 70(6) are translated to section 64 by subclause 5(a). The effect of subsections (6), (7) and (8) is restated in new sections 112AD and 112AM.

Clause 11 70AA Warrants for arrest of persons who contravene custody or access orders

30. This clause inserts new section 70AA after section 70 of the Act.

31. New subsection 70AA(1) provides that the section applies to cases in which the court, on application by a person entitled to the custody of or access to a child pursuant to a court order, is satisfied that there are reasonable grounds to believe that another person has contravened one of subsections 70 (1), (2) or (3), and the applicant has issued proceedings

under section 112AD for that other person to be dealt with under that section for the contravention of a custody or access order. The court must also be satisfied that it is necessary to issue a warrant to ensure that the person will appear to be dealt with for the contravention of a custody or access order.

32. New subsection 70AA(2) provides that where the preconditions in proposed new subsection 70AA(1) are satisfied the court may issue a warrant of arrest of the person.

33. New subsection 70AA(3) provides that where a police officer has arrested a person pursuant to a warrant issued under subsection 70AA(1) the police officer shall bring the person arrested before the court which issued the warrant or another court having jurisdiction under the Act before the end of the 'relevant period', which is defined in subsection (11), and the person may not be released before the end of that period unless a court has ordered the person's release.

34. The new subsection also provides that the police officer is required to take all reasonable steps to ensure that the person who had sought the warrant is notified that an arrest has been made and advised of the court before which the person arrested will appear in order that an application can be made under section 112AD of the Act. The purpose of giving notice is to ensure, so far as is possible, that the person who sought the warrant may make an application to the court under section 112AD for the arrested person to be dealt with for contravention of an order.

35. The new subsection further provides that an arrested person must be released after the end of the "relevant period" unless a court has ordered that the person be kept in custody or detention is authorised under other legislation.

36. New subsection 70AA(4) provides that where an arrested person is brought before a court and there is an application before the court for the person to be dealt with under section 112AD the court shall proceed to hear the application without delay.

37. If the arrested person is brought before a court and there is no application under section 112AD before the court, but the court is aware after making enquiries that there is an application under section 112AD before another court, new subsection 70AA(5) provides that the arrested person shall be released on recognizance to appear before the other court or remanded in custody to appear before that court. Any period of remand in custody must not be greater than 72 hours.

38. New subsection 70AA(6) provides that if the arrested person is brought before a court and there is no application under section 112AD before the court, or any other court, the arrested person is to be released.

39. Under new subsection 70AA(7), if a person is to be detained in custody to be taken before another court the order authorises the keeping of the arrested person in custody for the time specified in the order. If the arrested person is brought before another court within that time the court shall proceed to hear the application under section 112AD without delay, and the person shall be released if not brought before the other court within the time specified.

40. Under new subsections 70AA(8) and (9), if the hearing of an application under section 112AD involving a person who has been arrested and brought before a court, or who has been held in custody under an order made pursuant to new subsection (5), has commenced and the court adjourns, the court may order that the person be kept in custody, provided that the adjournment is for less than 24 hours. Alternatively, the court may release the person with or without conditions as to later appearance before the court.

41. New subsection 70AA(10) provides that a warrant issued under new subsection 70AA(1) will expire at the end of 6 months unless the court has ordered an earlier cessation date. The person who requested the warrant may request the issue of a fresh warrant at any time.

42. New subsection 70AA(11) is definitional. It provides that the 'relevant period', during which an arrested person may be detained prior to being brought before a court, is either a period of 24 hours, or 48 hours where the period commences on a Sunday or a public holiday.

Clause 12 Injunctions

43. This clause amends section 70C by omitting subsection (4). That subsection provides that the provisions of subsections 114 (4), (5) and (6) apply to injunctions issued under subsections 70C (1) or (2). Those provisions, which deal with non-compliance with the terms of an injunction, are to be included in the scope of new section 112AD.

Clause 13 Powers of Arrest

44. This clause repeals existing section 70D and substitutes new subsections 70D(1) and (2). The existing section provides that in certain circumstances a court may authorise the arrest without warrant of a person against whom an injunction under section 70C has been issued. The substituted provisions have the effect of attaching to an injunction, an authority to arrest a person against whom an injunction under section 70C for the personal protection of a person has been directed without warrant.

Under new subsection 70D(1) a person against whom an injunction is directed may be arrested by a police officer if the police officer believes on reasonable grounds that the person arrested has breached the injunction by causing or threatening bodily harm to someone for whose personal protection the injunction was ordered.

45. New subsection (2) provides that when a person has been arrested he or she may be held and dealt with as if he or she had been arrested under the provisions of section 114AA.

Clause 14 Persons not to be imprisoned for failure to
comply with certain orders

46. This clause makes a drafting change to section 107 of the Act consequent on the repeal of subsection 70(6), section 108 and subsection 114(4) and the insertion of provisions having a similar effect. The purpose of the section is to state that imprisonment is not to be used as a measure to ensure compliance with a maintenance or property order. The term "contravene an order" has different meanings in section 107 and Part XIII A. New subsection 107(2) operates to allow a person to be imprisoned if the contravention of an order is intentional and without reasonable excuse or is a contempt of court.

Clause 15 Repeal of section 108

47. This clause repeals section 108 which deals with contempt of court in proceedings under the Family Law Act. This provision is relocated in new section 112AP. The relocation of the section is made to reflect the role of contempt to punish a flagrant challenge to the authority of a court rather than to obtain compliance with an order.

Clause 16 Overseas enforcement of Maintenance Orders, etc

48. This clause amends section 110 to permit the establishment of reciprocity with prescribed overseas jurisdictions where maintenance liabilities are determined by, or collected by, public authorities. The existing section 110 of the Act refers only to orders made by a court. This has prevented the establishment of full reciprocity with jurisdictions such as Finland and Sweden. The amendment of section 110 is required to provide that orders made by a court, or a liability determined by and/or collectable by a public authority, may be registered or enforced in Australia.

49. Subclauses (a), (b), (c) and (d) amend the definition of "maintenance order" in subsection 110(1) to include determinations, however described, such as an assessment for maintenance, to establish that a maintenance liability may arise other than by a court order. The purpose is to enable maintenance liabilities created by assessment, by a public body other than a court to be enforced in accordance with section 110. It is intended that maintenance liabilities created by either method are to be included in the registration and enforcement provisions for overseas maintenance orders.

50. Subclauses (e), (g) and (h) amend subparagraphs 2(a) and 2(aa) respectively to enable maintenance orders made by a public authority to be registered and enforced under section 110 and to enable a public authority to be entitled to recover monies payable by a determination, assessment or order made by that authority or be entitled to collect, in its own name, moneys owing to it. These amendments will allow a public authority to collect by way of reimbursement any maintenance it has paid to a recipient or to collect maintenance otherwise owing to it.

51. Subclause (f) amends paragraph 2(aa) to be consistent with the other amendments.

Clause 17 NEW PART XIIIIA - SANCTIONS FOR FAILURE TO COMPLY
WITH ORDERS AND CONTEMPT OF COURT

52. This clause inserts a new Part XIIIIA in the Act. The purpose of the Part is to unify the provisions of the Act which provide sanctions for failure to comply with a court order and relocates and modifies the existing contempt provision in section 108. New Part XIIIIA applies to all orders made under the Act, including those orders made under Part VII in relation to children.

Division 1 - Interpretation

New section 112AA - Interpretation

53. New section 112AA provides definitions for the purposes of Part XIIIA, as follows:

- . "access order" means an order made under the Act which requires a person to be given access to a child. This term is used in new section 112AJ which provides for compensatory access orders.
- . "applied provisions" means the provisions of a State or Territory concerning alternative sentencing options as they have been modified by the regulations and as they apply to a particular type of sentence or order."
- . "court enforceable agreement" means an agreement which under the provisions of the Act may be enforced as if it were an order of the court. Such agreements are:
 - a child agreement registered under section 66ZC(1);
 - the parts of an approved maintenance agreement that a court has ordered under paragraph 87(11)(c) may be enforced as if an order of a court;
 - a maintenance agreement registered under subsection 86(1) of the Act, or deemed under subsection 87(6) to be so registered;
- . "order under this Act" has a particular meaning in Part XIIIA. This meaning includes, in addition to decrees and other orders made by a court -
 - an injunction made under section 70C or section 114;

- an undertaking given in proceedings and accepted by the court;
- a court enforceable agreement;
- a recognizance;

including an order, injunction, or agreement which is an order of another court and which has been registered in a second court. An undertaking cannot be registered in another court. The purpose of the definition is to list the type of obligation which, when contravened, may be considered for the purpose of imposing a sanction under section 112AC. The including of undertakings means that a breach of an undertaking will be dealt with by the court which accepted the undertaking as a contravention of an order punishable under section 112AD rather than as a contempt of court.

New section 112AB - Meaning of "contravene an order"

54. New section 112AB(1) provides, for the purposes of Part XIII A, that a person will be taken to have contravened an order under the Act only if he or she is bound by the order and has either intended not to comply with the order or, without having that intent, has failed to make any reasonable attempt to comply with the order.

55. The new section also applies to a person who was not a party to the proceedings and is thus not a person directly bound by the order by providing that he or she will be taken to have contravened an order under the Act if he or she has intentionally prevented a person who is bound by the order complying with an order or has aided or abetted the contravention of an order by the person bound by the order.

56. New subsection 112AB(2) provides that for the purposes of Part XIII A of the Act a custody or access order shall be taken to require that a person comply with subsections 70(1), (2) and (3).

New section 112AC - Meaning of "reasonable excuse for contravening an order"

57. New section 112AC provides examples for the purposes of Part XIIA, of the type of circumstances which may constitute a "reasonable excuse for contravening an order". The purpose of new section 112AC is to provide flexibility in determining the cases in which a sanction should be imposed while giving some direction as to the cases in which it is intended that a sanction should not be imposed. The examples will provide guidance to litigants and their advisers as to whether a court is likely to find that a sanction should be imposed in a particular case. By narrowing the gap between the expectations of those who have been denied the benefit of an order and the realities which confront them and the courts when dealing with an application for imposition of a sanction for non-compliance it can be anticipated that unnecessary applications for imposition of a sanction, with their associated emotional and financial cost, can be avoided.

The circumstances are:

- . that the person did not, at the time of the contravention, understand the obligations imposed by an order and the court is satisfied that the person ought to be excused - new subsection 112AC(2);
- . where an order relates to the custody of or access to a child and the contravention resulted in a person entitled to custody or access being deprived of custody or access, that the person who has contravened the order believed on reasonable grounds that it was necessary to contravene the order to protect the health or safety of any person and that the person deprived of access or custody was not so deprived for longer than necessary - new subsection 112AC(3). The requirement that the person deprived of access or custody be so deprived for no longer than is necessary places an obligation on the person who contravenes an order to

commence proceedings for variation of the custody or access orders at the earliest opportunity, where such a course is the appropriate response to a concern about the safety or health of a person.

DIVISION 2 - SANCTIONS FOR FAILURE TO COMPLY WITH ORDERS

New section 112AD - Sanctions for failure to comply with orders

58. New subsection 112AD(1) provides that where a court is satisfied that a person has contravened an order without reasonable excuse the court may impose the penalty which it considers appropriate. The concepts of 'contravening an order' and 'reasonable excuse for contravening an order' are defined in new sections 112AB and 112AC respectively.

59. New subsection 112AD(2) sets out the sanctions which may be imposed for failure to comply with an order. They are:

- . a sentence of imprisonment;
- . a fine of not more than \$2000 in the case of a natural person or \$10,000 in the case of a body corporate;
- . a recognizance to be of good behaviour;
- . a community-based sentence, such as a community service order;
- . sequestration;
- . a requirement that a person deliver a document, such as a passport, to the Registrar;
- . a compensatory access order.

The sanction imposed under subsection (1) may include a combination of the sentences or orders listed in subsection (2).

60. New subsection 112AD(3) provides the court with a discretion as to the date when a sanction shall commence to operate. The court may order that a penalty imposed under new subsections 112AD(1) shall not operate until a later date, or a later event such as a subsequent further contravention of the order. By delaying the operation of a sanction, the court may allow time for compliance with the order by the person against whom the sanction is ordered and may make such compliance a condition of the suspension of a sentence or order.

61. Pursuant to new subsection 112AD(4) the court may, when making an order under new subsection (1), also make any other order that it considers appropriate to ensure compliance with the contravened order.

62. Where the application under new subsection 112AD(1) is in relation to the breach of an access order new subsection 112AD(5) imposes an obligation on courts to consider whether the parties to the enforcement proceedings should be counselled in relation to the breach prior to an order, other than an interim order, being made to impose a sanction.

New subsection 112AE - Sentences of Imprisonment

63. New section 112AE(1) provides that sentences of imprisonment imposed as a sanction pursuant to new subsection 112AD(2)(a) shall be expressed to be -

- . for a fixed period of less than 12 months, or
- . for a period which ends when the person complies with the order or has been imprisoned for 12 months, whichever happens first.

Sentences of imprisonment for a fixed period may be imposed as a punishment or to coerce a person bound by an order to comply with that order. A sentence for an indeterminate period may only be imposed for the purpose of coercing compliance by a person bound by the order.

64. The proposition that imprisonment should only be imposed as a sanction when all other sanctions would be ineffective or inappropriate is given effect by new subsection 112AE(2). That new subsection provides that a court shall not sentence a person to imprisonment for failure to comply with an order unless the court is satisfied that there is no other appropriate way of dealing with the contravention.

65. New subsection 112AE(3) provides that the court is required to state its reasons for ordering that a person be imprisoned and the reasons provided are to become part of the court record.

66. New subsection 112AE(4) provides that the failure of a court to comply with new subsection (3) shall not invalidate a sentence of imprisonment.

67. New subsection 112AE(5) provides that the court may, at the time that it imposes a prison sentence, suspend the term of imprisonment and release a person who enters into a recognizance. The court may specify that the person may be released immediately or after the person has served a specified part of the sentence of imprisonment. This power may be exercised whether the sentence was as a punishment or for the purpose of coercing compliance or a combination of the two. The sentence shall take effect on breach of the recognizance.

68. New subsection 112AE(6) provides that the type of recognizance that may be entered into is a recognizance to be of good behaviour for a period of up to two years. Such a recognizance may be with or without surety or security.

69. If a court, which has sentenced a person to imprisonment until the person complies with an order, is satisfied that the order will be complied with if the person is released from prison the court may order the person's release under new subsection 112AE(7). This provision is in addition to the

courts power to vary or discharge an order for any other appropriate reason under new section 112AK. The procedure under section 112AK is to be used if a court has sentenced a person to a fixed period of imprisonment and is satisfied that having regard to the probability of compliance with the order, or other reason, it is appropriate to release the person.

New section 112AF - Recognizances

70. New subsections 112AF(1), (2) and (3) provide that a recognizance entered into pursuant to paragraph 112AD(2)(c) shall be for a specified period of up to 2 years and may be with or without security or surety.

71. New subsection 112AF(4) provides that a recognizance made pursuant to this new section may impose a condition such as attendance at a session or program of counselling by a court counsellor or welfare officer, or require the person to be of good behaviour during that period.

72. New subsection 112AF(5) requires a court to explain -

- . the purpose and effect of the recognizance, and
- . the consequences of failure to enter into a recognizance or of breach of a recognizance,

to a person who it proposes to require to enter into a recognizance. The consequence of failure to comply with a recognizance is that the breach can be dealt with under new section 112AD as a breach of an order under the Act.

New section 112AG - Additional Sentencing Alternatives

73. New subsections 112AG(1) and (3) provide that a court may order that a person be subject to a sanction or order known as

- . a community service order;
- . a work order;
- . a sentence to periodic detention;
- . an attendance centre order;
- . a sentence of weekend detention;
- . an attendance order;
- . a community-based order;
- . an order or sentence similar to those already mentioned, or;
- . a prescribed sentence or order,

where such sentences or orders are available, under an arrangement made pursuant to section 112AN, as a sanction for an offence in the State or Territory in which the court is exercising jurisdiction. The categories of sentences or orders which might be imposed are listed in subsection 112AG(3).

74. New subsection 112AG(2) provides that the maximum number of hours that a court may order a person be subject to a sentence or order is 500 hours, or such lesser number of hours as is prescribed in relation to the State or Territory in which the sentence is imposed. The purpose of this provision is to allow a lesser period to be specified following negotiations with the States, which will provide the facilities and staff for community-based sanctions. At present, there is a wide variation from State to State in the maximum number of hours that a person may be required to attend for a community-based sanctions in respect of a conviction for which a community-based sanction is available.

75. New subsection 112AG(4) provides that where a court proposes to pass a sentence or make an order that a person be penalised under one of the additional sentencing alternatives, the court shall explain to the person, the purpose and effect of the proposed sentence or order, the possible consequences of failure to comply with the sentence or order and the possibility that the order may be revoked or varied.

76. New subsection 112AG(5) provides that the laws of a State or Territory in relation to the sentences or orders which may be imposed under paragraph 112AD(2)(d) shall apply to the extent provide by, and as modified by, the regulations. This provision ensures that State or Territory laws necessary for the proper administration of community-based correctional programs are not excluded from operation in relation to sentences or orders made under the Act.

77. New subsection 112AG(6) is definitional. It provides as follows:-

- . "maximum period" means 500 hours, or such lesser number of hours that is prescribed in relation to any sentence or order in a particular State or Territory;
- . "participating State" is defined as a State in relation to which an agreement has been made under Section 112AN of the Act;
- . "participating Territory" has an analogous meaning.

New section 112AH - Failure to comply with a sentence passed or order made under paragraph 112AD(2)(d)

78. New section 112AH applies, by operation of subsection (1), where a court has imposed one of the orders or sentences referred to in new subsection 112AG(3).

79. New subsection 112AH(2) provides that where a person breaches such an order or sentence an information may be laid before a magistrate who may issue a summons to the person to appear before the court that passed the sentence or made the order or, if the information was laid on oath and the magistrate is of the opinion that to proceed by summons would be ineffective, he or she may issue a warrant for the arrest of the person.

80. New subsection 112AH(3) provides that if a person fails to answer a summons issued under new subsection 112AH(2) a warrant for the arrest of the person may be issued.

81. New subsection 112AH(4) provides that if the person is arrested he or she may, if the court that imposed the sanction is not sitting, be brought before a magistrate. The person may be released on recognizance to appear before the appropriate court, or be detained in custody, under new subsection 112AH(5). If the person fails to appear a warrant of arrest may be issued under new subsection 112AH(6).

82. When a person is brought before a court for a breach of a sentence or order and the court is satisfied that the breach occurred without reasonable excuse the court may, under new subsections 112AH(7) and (8) -

- . impose a fine of up to \$1000,
- . revoke the sentence or order and deal with the person as if he or she were then before the court for the original breach of an order under the Act in respect of which the order or sentence was imposed, or
- . take no action.

83. New subsection 112AH(9) provides that in deciding what action to take the court shall take into account matters such as -

- . the original sentence or order;
- . anything done under the sentence or order;
- . any fine or other order made; and
- . any other matter that the court thinks should be taken into account.

84. New subsection 112AH(10) provides that a warrant issued under subsections (2), (3) or (6) shall authorise the arrest of a person, bringing the person before a court as soon as practicable after the arrest and the detention in custody of the person until released on bail or by order of a court.

New section 112AJ - Compensatory access order

85. New section 112AJ provides that a compensatory access order is an order which entitles a person to such access as the court considers appropriate in addition to the access which that person would have been entitled to if an access order had not been breached. Under this provision access refused without reasonable excuse during, say, a weekend may be made up on another weekend. This provision should be read in conjunction with new section 112AL which requires the court to have regard to the welfare of the child as of paramount importance in such applications.

New section 112AK - Variation or discharge of sanction

86. New subsection 112AK(1) provides power for a court to vary or discharge a sanction where the court considers it appropriate to do so. The order may be varied or discharged only by the Family Court or the court which made the order.

New subsection 112AK(2) provides that the order made to vary an earlier order must impose a sanction which the court could have made when first dealing with an application under section 112AD.

New subsection 112AK(3) provides that when discharging an order the court may make any other order which it could have made when first dealing with the application under section 112AD.

New subsection 112AK(4) provides that where the court varies or discharges an order it may make directions as to implementation of the variation or discharge.

New section 112AL - Welfare of child of paramount importance

87. New subsection 112AL declares that in proceedings under section 112AD which concern an order made under Part VII or an order for compensatory access of the Act in relation to a child the welfare of the child shall be the paramount consideration. The subsection repeats section 60D which applies only to Part VII of the Act.

New section 112AM - Relationship between Division and other laws

88. New subsection 112AM(1) describes the acts or omissions to which the section applies.

89. New subsection 112AM(2) provides that if a person is prosecuted for an offence under a law and the act or omission of the person prosecuted is also a contravention of an order under the Act the court may adjourn any proceedings under section 112AD until the prosecution has been completed, or dismiss the application. This procedure ensures that a person will not be subject, at the same time, to proceedings under the Act and another law arising out of the same facts and that proceedings under the Act may be held in abeyance while the proceedings under another law are determined.

90. New subsection 112AM(3) and (4) are of similar effect to existing subsection 70(7). New subsection (3) provides that a person may be prosecuted and convicted of an offence under another law which also constituted a contravention of an order. New subsection (4) provides that a person shall not be subject to a double penalty where an act or omission is both a contravention or failure to comply under the Act and an offence against any law.

91. New subsection 112AM(5) provides that a compensatory access order made pursuant to paragraph 112AD(2)(g) shall not be a punishment for the purposes of this section. Accordingly, a compensatory access order may be made even though a parent may have been dealt with under another law in relation to the same incidents that gave rise to the need for compensatory access.

New section 112AN - Arrangements with States and Territories for carrying out of sentences and orders

92. New section 112AN provides that arrangements may be made by the Governor-General with States and Territories for the exercise of powers, and the performance of functions by State or Territory officers, and the provision of State or Territory facilities in relation to the carrying out of sentences or orders made under paragraph 112AD(2)(d). There is already provision for the making of similar agreements in relation to individual officers in section 112 of the Act. An arrangement has been made under that section with Western Australia to enable Judges of the Family Court of Western Australia to make Rules under section 123 of the Act.

93. New subsection 112AN(2) is definitional. It defines the persons who should be party to an agreement with the Governor-General. Those persons are the Governor of each State, the Administrator of the Northern Territory or of Norfolk Island and, in the case of the Australian Capital Territory the Chief Minister.

New section 112AO - Division does not limit operation of section 105

94. New subsection 112AO provides that Division 2 does not limit the operation of section 105, which provides a general power for courts to enforce orders. This provision ensures that enforcement action can be taken even though proceedings for the imposition of a sanction have been commenced.

DIVISION 3 - CONTEMPT

New section 112AP - Contempt

95. New section 112AP relocates and repeats the provisions of repealed section 108 with minor modification. New subsection 112AP(1) operates to limit the application of the contempt power in relation to contraventions of orders made under the Act to those contraventions which also involve a flagrant challenge to the authority of the court. The remaining subsections are in the same terms as existing subsections 108(2)-(6).

Clause 18 Injunctions

96. This clause amends section 114 by omitting subsections (4), (5) and (6). The effect of the repealed subsections is restated in new sections 112AD and 112AM.

Clause 19 Powers of Arrest

97. Subclause (a) amends section 114AA by omitting subsections 114AA(1) and (2) and substituting new provisions. The replaced subsections provide that where a court has issued an injunction under section 114 it may on the application of a party to the marriage authorise the arrest without warrant of the person against whom the injunction is directed and a police officer may arrest the person without warrant if it is believed on reasonable grounds that the injunction has been breached.

98. New subsection 114AA(1) provides that if a court grants an injunction for the personal protection of a party to a marriage, and if a police officer believes on reasonable grounds that the injunction has been breached by the person against whom it was directed by causing or threatening to cause bodily harm, the police officer may arrest that person without warrant.

99. Consequential drafting amendments are made by subclauses 19(b)-(f).

100. Subclause 19(g) amends section 114AA by omitting subsection 114AA(6). That subsection provides that an order authorising the arrest of a person shall cease no later than 6 months after the date of the order. As a consequence of these amendments a power of arrest without warrant will exist during the whole of the life of an injunction.

Clause 20 Staff

101. This clause amends section 114M of the Act to reflect the abolition of the Public Service Board and its replacement by the Public Service Commissioner.

Clause 21 Family Law Council

102. This clause makes a number of minor amendments to section 115. Subclause (1) converts references to "Chairman" in the section to "Chairperson", to make the office gender neutral.

103. Subclause (2) is a saving provision as a result of the drafting change to ensure that the occupant of the office remains in the office until the expiration of his appointment.

Clause 22 Reparations for certain losses and expenses relating to children

104. This clause amends section 117A of the Act to reflect the repeal of subsections 70(6) and 114(4). The provision provides for the making of orders for reparations to be paid by a person who has contravened a custody or access orders or who has breached an injunction. Such contraventions are now to be dealt with under new section 112AD and accordingly paragraphs 117A(1)(a) and (c) are amended to remove references to subsections 70(6) and 114(4) and to include references to section 112AD.

Clause 23 Rules of Court

105. Subclause (1) makes a minor drafting amendment to section 123 of the Act to reflect the repeal of section 108 and the insertion of new section 112AP. Subclause (2) is a transitional provision.

Clause 24 Amendments to change references in Part XIVA
from 'Attorney-General' to 'Minister'

106. This clause changes all references to the Attorney-General in Part XIVA of the Act, which makes provision in relation to the Australian Institute of Family Studies, to references to 'the Minister'. The specific amendments to be made are listed in the Schedule to the Bill. The purpose of the amendment is to allow a change of administrative arrangements in relation to the Institute.

