# National Network of Women's Legal Services

**Submission on**

# Family Law Amendment Bill 2004
**&**
# Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004

## INTRODUCTION

## Background to National Network of Women's Legal Services

The National Network of Women's Legal Services (NNWLS) is a national group of Community Legal Centres specialising in women's legal issues. It is comprised of the following agencies, some of which have been operating for over 20 years:

- Women's Legal Services located in capital cities in each State and Territory.
- Indigenous Women's Legal Services.
- ATSIC-funded Family Violence Prevention Services
- Domestic Violence Legal Services.
- Rural Women's Outreach workers

These services offer free legal advice, information, representation and legal education for women, providing assistance to more than 25,000 women across Australia each year. We target disadvantaged women including women from non-English speaking backgrounds, rural women, women with disabilities and Indigenous women. As a consequence, the NNWLS has developed an expertise in family law, violence against women and children and the legal aid system, as these issues affect disadvantaged women.

The Network is regularly asked to respond to government and Court initiatives and reform proposals and has developed a reputation for providing considered responses which incorporate a broad cross-section of views.

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**Structure of Submission**

NNWLS has decided to address both the above Bills in one submission because of the significant overlap of issues. A copy of this submission will be forwarded to both the Senate Legal and Constitutional Legislation Committee and the House of Representatives Standing Committee on Legal and Constitutional Affairs which are examining the relevant Bills.

# FAMILY LAW AMENDMENT BILL 2004

## Part 1 - Parenting Compliance Regime

Under the current *Family Law Act* section 70NG already provides that the Family Court (and other courts exercising family law jurisdiction) can vary a parenting order when it is hearing proceedings for a contravention of an existing order. However, that section is limited to situations in which the Court finds that a contravention has occurred and the person responsible does not have a 'reasonable excuse' as defined under the Act. When this section was introduced in 2000 NNWLS supported this approach and the ability of the Court to adjourn the proceedings to allow either party to apply for a further parenting order (see subsections 70NG(1)(c) and (1A) in particular).

Many of our clients are required by court order to send their children on contact visits with fathers who have been violent towards them, and sometimes directly the children as well. Some of the orders are the result of a judicial decision and others are consented to by women in a range of circumstances (eg. they may be unrepresented or they may have been unable to effectively advocate for the violence to be taken into account in negotiations).

Many women wish their children to have an on-going relationship with their father notwithstanding demonstrated violence and initiate contact after separation. However, if concerns are raised by the conduct of the father at handover, the children disclose abuse by their father during contact visits or the children's behaviour after contact is disturbed or aggressive, the mothers find themselves in an untenable position and may start to refuse contact. Where a court order exists, they may contravene that order. These issues have been well documented.[1]

Research conducted by Rhoades in 1999 exemplifies the problems of contact enforcement cases – including where the orders were made by consent. She analysed 100 files in which an enforcement application was filed. The overwhelming majority of applications were to enforce *consent* orders (n=88). Despite the fact that the most common problem was the resident parent's concerns about domestic violence (n=55), 50 of the orders had been made by consent. In other words, even though women may be

[1] Kaye M, Stubbs J and Tolmie J (2003) *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence*, Families, Law and Social Policy Research Unit, Griffith University, Queensland and Rendell K, Rathus Z and Lynch A (2000) *An Unacceptable Risk: A Report on Child Contact Arrangements Where There is Violence in the Family,* Women's Legal Service, Brisbane.

worried about domestic violence, they still consent to the violent partner having contact. In 32 of the cases involving domestic violence the enforcement proceedings ultimately led to 'more restrictive contact arrangements' being imposed on the father.[2] NNWLS is not aware of any specific research which has been undertaken regarding the operation of the new section 70NG which was introduced after the Rhoades research.

It must be noted that it is very difficult to obtain a grant of legal aid to vary a court order. There are significant hurdles to be overcome in such applications to legal aid. Therefore, for many of our clients, the only opportunity for review of a dangerous or unworkable contact order occurs in the process of contravention proceedings. If the mother has a chance to place evidence before the court regarding the violence which has occurred and/or the concerns which have arisen through the contact arrangements, the power of the Court to vary the original order at this time can be practical and operate in the best interests of children. However, if this evidence is not forthcoming because the woman is unrepresented or she cannot prove or substantiate her claims, the Court may vary the original order in a way which is unsafe and unsatisfactory.

The proposed section 70NEB seeks to extend the ability to vary the original order to situations where the court has not found a contravention or where a reasonable excuse has been proved.

In situations where a mother has been able to prove reasonable excuse as a result of violence and the Court uses the proposed section to restrict the father's contact to a safer arrangement, NNWLS would support the amendment. However, we are concerned that there is wide range of factual situations in which these powers could arise.

NNWLS suggests that consideration be given to including in the proposed clause 70NEB clauses similar to 70NG(1)(c) and (1A) so that parties have the opportunity to properly prepare and present their cases. We make the point that the mentioned subsections were introduced partly in response to submissions by NNWLS at the time but the final drafting did not fully reflect our ideas.

The NNWLS proposal commenced by requiring the court to have regard to whether there has been a history of domestic violence or child abuse. Further, in respect of subsection 70NG(1A)(a) relating to consent, the NNWLS drafting was as follows:

> … the circumstances surrounding the making of the original order (eg. whether it was made by consent at a mediation or legal aid conference or whether the parties were legally represented).

The purpose of the NNWLS proposal was to invite the court to scrutinise 'consent' arrangements to ascertain whether they may be the outcome of a possibly coercive process. We have always been concerned that, as enacted, the subsection did not reflect

[2] Rhoades H, *The 'No Contact Mother': Reconstructions of Motherhood in the Era of the 'New' Father* (2002) 16 IJLP&F 71-94 at 84-85

our issue and may imply that, where the original order was made by 'consent', the court should be hesitant about changing it.

***Recommendation 1***

That ideas similar to those contained in 70NG(1)(c) and (1A) should be added to the proposed section 70NEB but the wording should be altered slightly to clarify the intent behind the sections. The factors which should be relevant to the court's decision as to whether or not to vary the original order are as follows:

(i) whether there are any allegations of a history of family violence;
(ii) whether there are any allegations of child abuse;
(iii) the circumstances surrounding the making of the original order (eg. whether it was made by consent at a mediation or legal aid conference or whether the parties were legally represented at a court hearing);
(iv) whether there has been a change in circumstances which make complying with the original order impracticable;
(v) any other circumstance that results in the original order no longer being in the best interests of the child.

***Recommendation 2***

That the wording of existing 70NG(1)(c) and (1A) should be similarly amended.

## Part 14 - Recovery of Child Maintenance

NNWLS is concerned that this amendment will cover a tiny number of cases and we wonder why it is really required. In most cases where a man has been paying maintenance in accordance with a court order he would have a strong 'step' parent relationship with the child and would be caught under s66M in any event.

It could place a small number of women who mistakenly identified the wrong father in very difficult financial circumstances which will also impact on the children who reside with her. Further, it seems unfair to bring in this provision when women cannot claim back payments of retrospective child support. Therefore, while a woman could be made to pay back a wrongly identified man who is not the biological father she cannot then make a retrospective claim against the real father.

***Recommendation 3***

That s66X not be added to the Family Law Act.

## Part 15 - Frivolous or Vexatious Proceedings

NNWLS supports this provision. In particular we are pleased by s118(5)(b) which allows legal proceedings in other courts to be taken into account in assessing whether

proceedings are vexatious. Many of our clients are harassed by former partners in the civil courts for debts and over other financial matters, in domestic violence courts (often seeking 'cross-orders') and other courts.

***Recommendation 4***

NNWLS supports proposals to allow the court to be more robust in handling vexatious litigants.

## Part 16 - Rules as to Costs

The proposed section 117(1A) would effectively reverse the general rule under family law by providing that the Rules can require a party to family law proceedings to bear the costs of the other party unless the court otherwise orders.

This provision could be a double edged sword for our clients. On the one hand many are disadvantaged by tactics employed by their former partner to slow or obstruct the proper progress of court proceedings. On the other hand, those who are unrepresented struggle to understand and comply with procedural orders made and we are concerned that this provision may have punitive consequences.

It may be useful to add to s117(2A) a provision which states that the Court should also take into account whether a party is unrepresented and, if so, the circumstances giving rise to that situation. Litigants who choose to self-represent to avoid the mitigating influence of a lawyer should not benefit, however, those who self-represent because they are unable to afford a lawyer and unable to obtain legal aid should have their lack of legal counsel taken into account.

***Recommendation 5***

That a provision be added to s117(2A) requiring a court to take into account whether a party is unrepresented and, if so, the circumstances giving rise to that situation.

## Part 19 - Interaction of family law and bankruptcy

Firstly we wish to say that we consider the title to Part 19 is a misnomer. Many of the proposed amendments apply whether or not either of the parties is or becomes a bankrupt. For example, the suggested change to s79 by adding the new s79(10), is not limited to bankruptcy situations. This could occur in any case.

In particular we imagine it may occur when recently enacted provisions relating to transfers of debt become operative. It may be that a creditor of both parties jointly may seek standing in proceedings where one of the orders sought by the wife is to have a debt transferred to the name of the husband alone. While natural justice suggests this is appropriate, the reality for our clients is that financial institutions and many other creditors will be much better resourced for legal proceedings than they are. The cost and

complexity of some financial matters in the Family Court and other courts will be dramatically increased.

The government needs to consider the legal aid implications of these amendments. The recent Senate Report into Legal Aid and Access to Justice recommended an urgent increase in funding for family law.[3]

The current drafting makes it unclear how the needs of the mother and children (the s75(2) factors) are to be taken into account as against such a third party creditor. We are concerned that these provisions will make it harder for mothers to retain the family home for the benefit of their children.

Similar concerns arise in respect of s79A.

***Recommendation 6***

That the drafting of these new sections clarify the way in which the needs of dependent spouses and children are to be taken into account against third party creditors. Priority to providing children with security and adequate accommodation must be part of the legislative scheme.

***Recommendation 7***

If legislation of the kind envisaged in these two Bills proceed, funding for legal aid for property matters must be made available to parties affected by the proceedings.

[3] Legal and Constitutional References Committee (2004) Legal Aid and Access to Justice, recommendation 14.