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Australian Government
Attorney-General's Department

**Family Law and
Legal Assistance Division**

16 July 2004

Mr Phillip Bailey
Acting Secretary
Senate Legal and Constitutional Committee
Parliament House
CANBERRA ACT 2601

Dear Mr Bailey

Family Law Amendment Bill 2004 inquiry

I am writing in response to your email of 12 July 2004 to Mr Kym Duggan seeking the Department's response to the recommendations of the National Network of Women's Legal Services (NNWLS) made in recommendations 1 and 2 of their submission to the Committee (recommendations 1 and 2).

Any decision as to whether such amendments should be made would, of course, be a matter for the Government.

The NNWLS recommend firstly, that a provision similar to paragraph 70NG(1)(c) and subsection 70NG(1A) of the *Family Law Act 1975* (the Act) should be added to the proposed section 70NEB. Secondly, the NNWLS recommends amendment of the factors that the court should consider under subsection 70NG(1A) when considering whether to adjourn a hearing in accordance with paragraph 70NG(1)(c), to allow an application for variation of a parenting order to be made. The NNWLS recommends that those factors should include a range of circumstances including where there are allegations of family violence or child abuse.

The purpose of the proposed section 70NEB is to respond to the concerns expressed by many stakeholders that contravention applications often arise because the original parenting order is effectively unworkable. Often parenting orders are made by consent and it appears that in many cases parties do not give sufficient consideration to the obligations that arise under those orders. This may not become apparent until the parties attempt to operate in accordance with those orders. In such cases, a range of judicial officers from both the Family Court and the Federal Magistrates Court have suggested that there should be a power for the courts to vary the original order, rather than require parties to make a separate application for variation and be subjected to further court proceedings.

This is a different situation from that covered by the current section 70NG. That section only applies where a court has been provided with sufficient evidence to make a finding that an order has been breached. Issues relating to family violence should be considered in making this determination. Such issues clearly go to the question of whether or not the person had a

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"reasonable excuse" for the breach of an order. In these circumstances it is appropriate that there be restrictions on the courts' power to allow an adjournment for a party to seek a variation of the original order. The current provisions essentially relate to a persons ability to understand the original order or the length of time that has elapsed since it was made. There is no such finding in relation to a matter that is to be dealt with under the proposed section 70NEB. In cases under section 70NEB a varied order is of course still an order that would require the court to consider the best interests of the child as the paramount consideration and that requires the court to take account of the matters set out in subsection 68F(2) of the Act.

There is a very broad range of factors that the court must consider. In particular paragraph 68F(2)(g) specifically provides that the court must consider the need to protect the child from physical or psychological harm caused, or that may be caused, by being subject or exposed to abuse, ill treatment, violence or other behaviour; or being directly or indirectly exposed to abuse, ill treatment, violence or other behaviour that is directed to or may affect another person. Paragraphs 68(2)(i) and (j) also provide that the court must consider any family violence involving the child, or a member of the child's family and any family violence order that applies to the child or a member of the child's family.

In relation to recommendation 2 of the NNWLS, submission section 70NG currently sets out the courts' powers in those cases where there has been a contravention of a parenting order made out and where there has not been a reasonable excuse established. Paragraph 70NG(1)(c) currently provides for the option of adjournment of the proceedings so that a variation to the original parenting order can be sought.

In section 70NG cases, the applicant has satisfied the onus on them and demonstrated that a breach of court orders has occurred. In that circumstance it is appropriate that when the court is considering the response to that breach that there are fairly limited factors that the court must take into account when it is considering the option of further adjourning the proceedings rather than dealing with them. Generally the adjournment of the proceedings at that stage would not be the appropriate course and the limited circumstances that the court must consider in relation to this option are appropriate given that a breach without reasonable excuse has been established.

We would be happy to provide any further information that the Committee may require.

Yours sincerely



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