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Sunday, 17 August 2003

Committee Secretary
Standing Committee on Family and Community Affairs
Child Custody Arrangements Inquiry
Department of the House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Committee Members,

INQUIRY INTO CHILD CUSTODY ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION

The Eastern Community Legal Centre has been providing free legal advice, education and representation to disadvantaged members of the community for almost 30 years. A significant number of our clients are women with children who are victims of domestic violence and other forms of abuse.

Our submission deals primarily with Term Of Reference (a)(i) in relation to the proposed presumption that, upon separation, each parent should have the right to spend equal time with the children. We also deal with term (b) concerning the fairness of existing Child support formula briefly at the end of our submission.

Presumption of Joint Residency

It is our view that the Family Law Act 1975 should *not* be amended to incorporate the presumption that children spend equal time with each parent. The existing act, particularly sections 65E and 68F, ensures that the best interests of the child are the primary consideration in determining the custodial arrangements. The imposition of the presumption would have the undesirable effect of subjugating the interests of the child to those of the parents.

Under the current system the Family Court is compelled to give the interests of a child primacy.

> "In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration." [1]

Before making parenting orders for child custody the Family Court must also consider the relationship with both parents and the wishes of the child and factors, which might affect the weight, they give to those wishes. For example how old the child is; the effect on the child of any separation from a parent or other child; the practical difficulty and cost of the child having contact with a parent; the ability of each parent to care for the child; the age, sex and cultural backgrounds of the child (including any need to maintain contact with Aboriginal or Torres Strait Islander culture); the need to protect the child from any physical or psychological harm caused by any abuse or violence; the attitude of the parents to the child and to their parenting responsibilities and any violence or violence order in the family[2]. It is only after all these issues are considered should there be any determination made on child custody arrangements.

In the period, between separation and a court ruling, the presumption that children spend equal time with each parent would force children to live in joint custody arrangements, which is clearly not the preferred situation for the majority of families. In the year 2000 – 2001 only 2.5 per cent of separated couples came to this arrangement.[3]

If shared custody was presumed to be equal before any court ruling it could expose children to continued sexual and physical abuse, which in our experience is often the cause of the separation in the first place. It would also force women to litigate in the family court, a costly and traumatic experience.

Propositions in favour of an automatic right to shared parental responsibility are premised upon the misguided and one-sided belief that *all* non-custodial parents are willing or even capable of participating equally in their children's upbringing.

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[1] Family Law Act 1975 - Section 65E. http://scaletext.law.gov.au/html/pasteact/0/229/top.htm 2003

[2] Family Law Act 1975 - Section 68F. http://scaletext.law.gov.au/html/pasteact/0/229/top.htm 2003

[3] Family Court Statistics - Residence Order Outcomes - 1994-95 to 2000-01. **http://www.familycourt.gov.au/court/html/residence_orders.html 2003**

Further any attempt to relegate the interests of the child to a secondary consideration would constitute a prima facie breach of the Convention on the Rights of the Child, which provides in Article 3(1) that

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative or legislative bodies, the best interests of the child shall be a primary consideration".[4]

Upon Australia's ratification of this treaty on January 16 1991 and under international law we must refrain from enacting legislation, which is contrary to the object and purpose of the treaty. In our view, the proposed amendment would have the effect of violation the Convention.

Child Support System

Our experience and the experience of our colleagues shows a very large number of non-resident parents contact community legal centres each week seeking ways to avoid paying child support. While community legal centres help many parents who, through adverse circumstances are facing child support liabilities they are having difficulty meeting, many others are angry that they are obliged to pay child support at all.

Many parents are angry that they have to financially support their children when they don't have joint custody. This further financially disadvantages custodial parents and their children and increases the risk of poverty and homelessness.

Therefore our position is that parents should be compelled to pay child support and we will support any strengthening of the child support payment enforcement process. We should be finding ways to make recalcitrant non-custodial parents honour their responsibilities as parents. This will be in the best interests of the child

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[4] The Convention on the Rights of the Child - Article 3(1). http://www.unicef.org/crc/crc.htm 2003