

**National  
Network of  
Indigenous  
Women's Legal  
Services Inc**

www.nwjc.org.au/lawlsn



Network Strengthening  
Committee

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House of Representatives Standing Committee  
on Family and Community Affairs

Submission No: 1144  
Date Received: 15-8-03

Secretary: .....

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

Attention: Committee Secretary

Dear Secretary

**Inquiry into child custody arrangements in the event of family separation.**

The National Network of Indigenous Women's Legal Services Inc would like to take the opportunity to lodge a submission in relation to the 'Inquiry into child custody arrangements in the event of family separation'.

Of particular interest to the NNIWLS is the proposed legislation as it relates to a 'presumption of joint residence' and the implications that such legislation will have in matters relating to Indigenous women and children.

Please find enclosed the NNIWLS submission titled "A Legal Presumption of Joint Residence - Indigenous women, children and families" dated 11 August 2003.

The Government's proposed legislation is of great concern to the NNIWLS, and it is therefore hoped that our submission will be considered in its entirety.

The NNIWLS, Strengthening Committee (Executive) would be happy to discuss further representation of our Network during the Standing Committee's inquiries into the proposed legislation.

The NNIWLS, Coordinator, Denese Griffin, can be contacted by telephone on 08 9475 0755 should you wish to discuss this submission further.

Yours faithfully

Dianne Gray  
Convenor - NNIWLS

# **National Network of Indigenous Women's Legal Services Inc**

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## **Submission:**

### **- A Legal Presumption of Joint Residence – Indigenous women, children and families.**

### **Inquiry into child custody arrangements in the event of family separation**

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

# **National Network of Indigenous Women's Legal Services Inc**

## **- A Legal Presumption of Joint Residence -**

### **Indigenous women, children and families.**

#### **Purpose of this Briefing Paper**

The National Network Indigenous Women's Legal Services Inc. (NNIWLS) became aware of the Federal Government announcing a Parliamentary Inquiry into Joint Residency Arrangements in the Event of Family Separation, and that the Inquiry will be conducted by the Committee on Family and Community Affairs.

The NNIWLS maintains that the current legislative framework already encourages parents to decide on residence, it is only when disputes arise between parents that they seek assistance from the Family Law Court in relation to intervention. The NNIWLS believes the powers afforded to the Court under the *Family Law Act* are adequate, and that judges/magistrates need to be able to evaluate each case on its merits.

The factors taken into account should remain in 'the best interest' of the child. Changes to the *Family Law Act* should not be driven by one parent's demands superseding the rights of the child.

The NNIWLS have concerns about the proposed legislation as it relates to:

- 1) *Section 68F* of the Family Law Act 1975 (Cth), as it relates to Indigenous children and families;
- 2) Where any family violence has occurred;
- 3) The likely effects of any changes in the child's circumstances;
- 4) The practical difficulty and expense of a child having contact with a parent;
- 5) The capacity of each parent to provide for the needs of the child with strong reference to *s.68F*;
- 6) The need to protect the child from physical or psychological harm.

## 1. Section 68.F of the Family Law Act 1975 (Cth)

The NNIWLS strongly supports the commitments of both parents in playing an active role in the child's upbringing, as long as it is not at the detriment of the child/ren's cultural identity and well-being.

Section 68F should direct the judges and magistrates to recognize an Indigenous child's need to maintain a connection to his or her culture, and not simply invite them to decide whether the particular child has that need<sup>1</sup> when dealing with disputes between Indigenous and non-Indigenous parents.

Numerous complaints from Indigenous women throughout Australia were received by the NNIWLS, in instances where the child/ren were granted residency to the non-Indigenous father or father's parents. Indigenous women complained that discriminatory remarks were often made about her Aboriginality or about Aboriginal people in general, and that in these instances the child/ren adopted racist attitudes, which then impaired their relationship from being a strong happy and healthy one between mother and child/ren.

### **Case 1. Identity and Aboriginal children**

**A couple, an Aboriginal mother and a Non-Aboriginal father have separated after a 15 year relationship. They have 3 children between the ages of 8 – 14 years.**

**Throughout the relationship and during arguments the father often resorted to racial abuse of the mother, by calling her a "black slut" and "useless black cunt". When the mother attempted to separate from the relationship the father physically abused her and emotionally manipulated her.**

**The father would denigrate Aboriginal people and culture openly in front of the mother and children as a means of enforcing control on relationships and family dynamics.**

**The mother eventually left with the children. However, the father refused to return the children after a period of contact. The father told the mother that 'if she left no Court would ever let her keep the children once he had finished with her'.**

**The mother was so scared to attempt to apply to the Court of intervention that she eventually considered returning to the relationship.**

**The children exhibit symptoms of cultural identity crisis, low self-esteem and maternal alienation.**

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<sup>1</sup> Bringing them Home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Human Rights and Equal Opportunity Commission 1997, p - 483.

The NNIWLS supports the recommendations of the Bringing Them Home Report<sup>2</sup> (BTHR) and the decision of the Full Court in the matter of *B and R*, which held that ‘the Aboriginality of a child is a matter which is relevant to the welfare [now best interests] of the child’.

The court summarized a wide range of research on the subject:

- a) *In Australia a child whose ancestry is wholly or partly Indigenous is treated by the dominant white society as ‘black’, a circumstance which carries with it widely accepted connotations of an interior social position. Racism still remains a marked aspect of Australian society;*
- b) *The removal of an Aboriginal child from his/her environment to a white environment is likely to have a devastating effect upon that child, particularly if it is coupled with a long term upbringing in that environment, and especially if it results in exclusion from contact with his/her family and culture;*
- c) *Generally an Aboriginal child is better able to cope with that discrimination from within the Aboriginal community because usually that community actively reinforces identity, self-esteem and appropriate responses;*
- d) *Aboriginal children often suffer acutely from an identity crisis in adolescence, especially if brought up in ignorance of or in circumstances, which deny or belittle their Aboriginality. This is likely to have significant impact upon their self-esteem and self-identity into adult life.*<sup>3</sup>

The NNIWLS concur with the recommendations set out that the Family Court should order the appointment of a special ‘separate representative’ for every Indigenous child involved in a parenting dispute. The role of the separate representative (that is, separate from the legal representatives for the mother and father or other family” would include ‘to examine these issues and ensure that all relevant evidence and submissions are placed before the court’, [That article 30 of the *Convention of the Rights of the Child*], be implemented into the Family Law Act to include that the child’s right, ‘in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language’.

**Even though Indigenous representatives have been employed in some Family Law Courts this practice is still not happening in all Family Law Courts or in every State.**

### **Convention on the Elimination of All Forms of Racial Discrimination**

The NNIWLS also recommends that the Federal Government should ensure that all appropriate means to combat and eliminate racism against Indigenous people as set out in the Convention on the Elimination of All Forms of Racial Discrimination, in particular

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<sup>2</sup> ‘Bringing them home’ Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Human Rights and Equal Opportunity Commission, 1997, pgs.484-485.

<sup>3</sup> ‘Ibid, pgs 484-485.

“ensure that members of Indigenous people are free and equal in dignity and rights and free from discrimination, in particular that based on Indigenous identity”.<sup>4</sup>

The NNIWLS could not support any changes to the *Family Law Act* allowing equal residency with each parent until all discriminatory measures are eradicated in all family law proceedings, not only discriminatory views held by non-Indigenous parents but racist assumption that may be held by judges/magistrates which would then led to a ill-informed decision, that in turn will have a detrimental consequent upon the child when making a decision in the ‘best interests’ of the child.

#### **Racial and gender stereotyping of Aboriginal mothers.**

**It is the experience of the NNIWLS that Non-Aboriginal fathers regularly degrade the Aboriginal mother with the use of derogatory racial and gender stereotyping in Affidavit's which support his application to the Court. If the mother has no access to legal assistance as is often the case, she is unable to respond to such overtly derogatory stereotyping and as the Court bases its decisions of the 'evidence' before them, the best interest and cultural identity of Aboriginal children are placed in an un-nurturing environment.**

#### **Indigenous family structures and child rearing practices**

Indigenous family structures are unlike the stereotypical nuclear family structures consisting of a mother, a father and 2 children, they are complex and consist of an extended family structure. Indigenous families living in a single residence or community often consist of 4 generations.

It is a traditional practice and role of Grandparents or Aunties and Uncles to also care for and raise children. The care of grandchildren by Grandparents is a common daily occurrence within Indigenous communities. These arrangements are seen as informal under legislation until formalized by the Family Court.

Recognition of Indigenous child rearing practices must occur and the proposed legislation of a presumption of joint residence by only a mother and father fails to do this. Such legislation will further erode traditional care arrangements and have ramifications for the care, welfare and development of Indigenous children.

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<sup>4</sup> Social Justice Report 2002, Report No.2/2003, Aboriginal & Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, p 188.

## 2. Where Family Violence Has Occurred.

### **Bringing Them Home Report and the *Family Law Act (Cth) 1975.***

Violence to Indigenous women is 45 times higher than for non-Indigenous women. Twenty-three percent of these women need hospital treatment for their injuries compared to 6.6% of non-Indigenous violence victims. The rate of assault of women is such that about one-third of Northern Territory's Indigenous female population is assaulted each year. Weapons are reported to be used in around 50-60% of Indigenous attacks between spouses (Memmott 2001).<sup>5</sup>

Research has proven that in the majority cases where Indigenous women who were removed as children in turn as adults became disempowered and are in many instances unable to negotiate on equal terms. The BTHR noted:

The effects of forcible removal and institutionalization persist into adulthood, appearing indeed to be life long.

*...the individuals I have seen lack a sense of personal identity, personal worth and trust in others. Many have formed multiple unstable relationships, are extremely susceptible to depression, and use drugs and alcohol as a way of masking their pain. They see themselves as so worthless that they are easily exploited, laying themselves open to be recruited into prostitution and other forms of victimization (Dr Brent Waters submission 532 page2). The women who functioned well in spite of their disadvantageous upbringing were most likely those who enjoyed the 'emotional support of a nondeviant spouse with whom [they] had a close, confiding, and harmonious relationship.'*<sup>6</sup>

Indigenous women in many instances trying to escape violence find they are continually pursued by the former partner, feel disempowered and give into his pleas and enter back into a violent relationship. Some Indigenous women victims of violence have spoken about how police have dealt with their pleas for protection inappropriately by charging them with aiding and abetting, as they have succumbed to their ex-partners pleas only to be violated. Many of these women were not informed of a legal remedy available to them, such as tailoring a Restraining Order (AVO, VRO); to inform him that he is not allowed to come near her while he is under the influence of alcohol, or when she is aware of what will trigger his violence.

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<sup>5</sup> Child Sexual Abuse in Indigenous Communities by Janet Stanely, National Child Protection Clearinghouse, Australian Institute of Family Studies with assistance from Muriel Cadd and Julian Pocock Secretariat of National Aboriginal and Islander Child Care Presented at the Conference, Child Sexual Abuse: Justice Response or Alternative Resolution, 1-2 May, Adelaide.

<sup>6</sup> 'Bringing Them Home' Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families, 1997, Human Rights & Equal Opportunity Commission, p.187.

Those who are already disempowered or disconnected from others, and particularly those who are already troubled or have experienced multiple traumas, are most at risk when traumatized (Herman 1992). The implications for Indigenous communities is that some Indigenous women may be powerless because of what has happened to them as a child and previous (and on-going) trauma may be a barrier to change.<sup>7</sup>

Dr Williams Jonas AM stated:

*“Indigenous family violence is also an abuse of the fundamental human rights of Indigenous women and children – such as to security of the person. And it cannot be tolerated under any circumstances.*

*Aboriginal women often do not have the luxury of choosing between asserting their rights as women as opposed to their rights as Indigenous people. This national debate has put into sharp focus the unacceptable choice that many Indigenous women face between having to prioritize between issues of race and gender. And it was clear that issues of race would almost always hold dominance over issues of gender.”<sup>8</sup>*

**The NNIWLS have serious concerns about Indigenous women attempting to negotiating joint residency with violent partners after they have separated, as it will place Indigenous women and children at further risk.**

#### **Case 2: Family Violence and the presumption of joint residence**

Young Aboriginal mother has separated from her Aboriginal partner.

She is aged 20 years old and has three small children under the age of 4 years. The relationship was extremely abusive and the mother experienced repeated and ongoing physical violence and intimidation from her partner. The abuse included regular beatings with sticks, having boiling water poured on her as she lay on the floor, blows to her body and head, and broken ribs. The beatings and violence have happened so often the mother has difficulty remembering just how many times this has happened. The children have witnessed the abuse of their mother. They have witnessed the control and intimidation of their mother by their father.

<sup>7</sup> Child Sexual Abuse in Indigenous Communities by Janet Stanley, National Child Protection Clearinghouse, Australian Institute of Family Studies with assistance from Muriel Cadd and Julian Pocock Secretariat of National Aboriginal and Islander Child Care Presented at the Conference, Child Sexual Abuse: Justice Response or Alternative Resolution, 1-2 May, Adelaide.

<sup>8</sup> ‘Family Violence in Indigenous Communities: Breaking the Silence? Opening remarks at the launch of UNSW Law Journal Forum 8(1) delivered by Dr William Jonas AM, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Sydney, July 25, 2002.



The mother attempted to leave the relationship several times and was physically forced to return, once being dragged by the hair along a road and forced into a vehicle. Additionally, financial abuse existed with the father using the majority of income for the purchase of marijuana and alcohol.

The mother was only able to leave the relationship when she had to travel to the nearest capital city for medical treatment and the birth of her 3rd child. They live in a remote region and the nearest city was over 1000 km away.

After the mother left the relationship she had to apply to the Court for a child recovery order and child residence.

She has left her own mother and her own community, as this is the only way she will be safe from the children's father.

**This case example is not unusual, it is not out of the ordinary for many Aboriginal women it has a common thread that is experienced by extremely high numbers of Aboriginal women throughout Australia.**

Presumption of legal joint residence:

- How does the Government intend legislating around matters such as these?
- How will an Aboriginal mother and children be protected given the history and level of violence that exists in many Aboriginal communities and the level of disadvantage already experienced by Aboriginal women?

### **The connection between violence and crime and Incarceration of Indigenous women.**

Recent research conducted, 'Indigenous women and corrections – A Landscape of Risk', cited that Indigenous women face an unacceptably high risk of incarceration in prisons across Australia, and that Indigenous women are currently incarcerated at a rate higher than any other group in Australia<sup>9</sup>. The rising rate of over-representation of Indigenous women is occurring in the context of intolerably high levels of family violence, over-policing for selected offences, ill-health, unemployment and poverty.

Categories of criminal behaviour included fraud where Indigenous women had omitted to inform Centrelink of a de-facto relationship while claiming a supporting parent's pension.<sup>10</sup>

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<sup>9</sup> 'Indigenous women and corrections – A Landscape of Risk', Social Justice Report, 2002, Aboriginal & Torres Strait Islander Social Justice Commissioner, Human Rights & Equal Opportunity Commission, p.135

<sup>10</sup> Ibid, p.142.

Numerous Indigenous women who find they are not able to resist his pleas enter back into dysfunctional relationships after going on the sole parent pension. They find they cannot make or force him to be responsible for supporting her and the children so they continued to receive the pension as a means of survival, only to be caught out by the Department of Social Security. The Commonwealth Government in turn charges these women with fraud, recover the debt, but then impose a prison sentence. Many Indigenous women did not see themselves as breaking the law but trying to provide for their children on a minimum income.

Indigenous women are victims of a complex frame of dynamics upon their lives including violence, poverty, trauma, grief, cultural and spiritual breakdown. Research has proven there are consistent patterns indicating that incarcerated Indigenous women have been victims of assault and sexual assault at some time in their lives.<sup>11</sup>

Recent trends in incarceration also indicate that Indigenous women are increasingly goaled for violent assaults, and some commentators suggest there is a relationship between violent behaviour and victim of violence. Carlo La Prairie's investigations of similar statistics in Canada suggest that there are three ways Indigenous women living in violent situations may end up convicted of violent offences: 'they may retaliate with violence against abusive family members; they may resort to drug and alcohol abuse to escape abuse; or their victimization may lead to the abuse or neglect of others'<sup>12</sup>.

**Given these circumstances the NNIWLS would only see that equal joint residency would not only further exacerbate the violence, but further disadvantage Indigenous women who may not able to negotiate a safe outcome, as they will have to continuously live and revisit past violent relationships.**

### **Positive Indigenous Role Models.**

Exposure to overtly 'macho' behaviour and violence may be the only understanding of mainstream culture experienced by remote Indigenous youth.<sup>13</sup> Children can only grow into responsible non-violent adults if they learn not only from both parents that violence will not be tolerated, but if they know laws will not support any forms of violence.

The NNIWLS also recognizes Indigenous children need positive role models and children need to know that the law will protect them from violence. The NNIWLS believes that the cycle of violence has to stop and that children do not need destructive male role models playing an active part in their lives. By giving fathers joint residence

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<sup>11</sup> Ibid p.149.

<sup>12</sup> Ibid p.150.

<sup>13</sup> Child Sexual Abuse in Indigenous Communities by Janet Stanley, National Child Protection Clearinghouse, Australian Institute of Family Studies with assistance from Muriel Cadd and Julian Pocock Secretariat of National Aboriginal and Islander Child Care Presented at the Conference, Child Sexual Abuse: Justice Response or Alternative Resolution, 1-2 May, Adelaide.

arrangement if they have perpetrated violence will send out mixed messages to children, that the Government, laws and society tolerates violence.

The NNIWLS strongly supports and advocates the traditional role and place of Indigenous men in the raising of children. Family Violence and sexual abuse is not a part of our traditional cultures and the roles of Indigenous men as fathers has been eroded as a direct result of and effects of colonisation, dispossession of land and past government policies.

Aboriginal peoples and their families and communities view, violence and sexual assault as being an issue that effects the very fabric of our society. This society is made up of individuals, families, and communities, all linked by inter-relationships to land and family. As such Aboriginal society does not take the view that the issues that touch and pull at the fabric of our society is exclusive to women only. Indeed Men, and young boys are a part of this bigger picture, our relationship is mutual, and not mutually exclusive.

Indigenous communities have many strong, non-violent Indigenous male role models from whom children can learn and gain strength and wisdom from. 'Men's business', traditional values and skills are being passed on to male children who in turn will teach their children and grandchildren. It is to these men that the many of the communities burdens fall.

### **Case 3 : Indigenous male role models and family violence**

**My father started being violent towards my mother when I was about 5 years old. I loved my father deeply but the abuse continued throughout my childhood and eventually my brothers and I also suffered emotional and physical violence from my father.**

**The consequences of these years of trauma have been great. My relationship with my father suffered terribly and we were often 'at each other', particularly where my mother was concerned. It reached a point where I started being violent in retaliation towards my father, my brothers experiences have been the same.**

**My mother remained in the relationship for over 30 years, we were all adults by the time my parents eventually separated. The violence stopped when my parents separated and my father became ostracised from us as a family unit.**

**I have since healed in my relationship with my father. I love and care from him deeply. My father never really has understood the gravity of his actions nor ever really taken any responsibility for his violence. Alcohol was often an excuse for his actions, but this was a smoke screen to many of his own childhood traumas and ghosts within his spirit.**

**My brothers haven't been so lucky. I am my fathers only daughter so I had a different upbringing to my brothers in the real sense of the words. My father was their male role model and his violence and attitude towards raising boys to be men was unrealistic and detrimental to them as whole people.**

**My brothers although adults and fathers themselves still bear the scars of my fathers physical and emotional violence. Their self-esteem has suffered, they question and worry about their own parenting skills and negative stereotyping of Indigenous fathers. They have tackled the consequences of alcohol and drug use, relationship breakdown and separation from their own children.**

**I know that my mother stayed with my father for very real reasons and the consequences of her separating from my father when we were children would have been horrific and a greater burden for our family to bear.**

**Women and children need to know that they can be protected if they leave an abusive relationship. The presumption of joint residency will not give Indigenous children the opportunity to heal from the violence they have witnessed or experienced at the hands of those who they love. Non-violent fathers need to be supported in raising children and violent fathers need to take responsibility for their actions.**

**Men need to stop using violence against our women and children, the consequences for families is insurmountable.**

**The cost to our men is immeasurable.**

**The NNIWLS supports and encourages Indigenous men to continue to advocate against violence and abuse within our communities.**

#### **Sexual assault**

**It is the experience of the NNIWLS that there is a gross under estimate of the level of sexual abuse that exist for Aboriginal children. Findings have indicated that the majority of sexual abuse of children still remains unreported and no clear data is available.**

The extent of Child Sexual Assault in Indigenous communities is not recognized as it should be, partly because of a failure to report, and a failure to respond, to many assaults. There is a failure to report for many reasons, including:

- a fear of racism and due to reasons of shame;
- a fear of reprisal from the perpetrator in small, closed communities, or pay-back from relatives;
- a perceived need to protect the perpetrator due to reasons such as the high number of Indigenous deaths in custody. Fitzgerald (2001) writes that this is a realistic fear, particularly in Cape York communities where a death in custody would be seen as the women's (victim's) fault;
- a fear of the police response;
- difficulties in communicating with legal staff. It is difficult for some Indigenous people to translate their experience into terminology required for legal processes;
- the absence of someone to report to in remote communities. There may be no means of reporting in remote communities where poverty, isolation and the relatively small size of the community means there is no public transport and no private vehicles to provide access to support and secure shelter; and;
- lack of trust of the 'white' system.

**Due to the high level of sexual assault in Indigenous communities and lack of reporting, by the Federal Government giving sweeping powers of joint residency arrangements will certainly place Indigenous children at risk of further abuse<sup>14</sup>.**

### **3.The likely effects of any changes in the child's circumstances.**

Indigenous people are the most disadvantaged socio-economical groups. The Government made a commitment through its policy document *Health Throughout Life* to encourage breastfeeding awareness, with the aim of increasing Australia's rate of breastfeeding, particularly for babies up to 6 months of age.

Whilst Government and the Office of Aboriginal and Torres Strait Islander Health Service are promoting breastfeeding in Indigenous communities, joint residency would complicate or disrupt mother and baby, and create further health problems around infant health issues.<sup>15</sup>

It is also a child rearing practice in many Indigenous communities to breast feed children up until the 5-6 years of age. Given the issues surrounding the effects of colonization and child rearing practices in the general community it is important that the health and wellbeing of Indigenous children are considered by the Court and every opportunity given for such Indigenous practices to be recognized in the best interest of Indigenous children.

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<sup>14</sup> Ibid, p.2.

<sup>15</sup> Population Health, Australia Department of Health & Ageing, cited: website: [www.health.gov.au/pubhlth.4/08/03](http://www.health.gov.au/pubhlth.4/08/03).

#### **4. The practical difficulty and expense of a child having contact with a parent.**

Given the fact that single families mainly consist of mothers, and they are still the most socio-economical group in Australia, where single mothers are meant to commute to and from to pick the child/ren up when it is her turn for joint residency will place further financial hardships upon the family. The money going out on public transport, airfares, or petrol regularly, especially in cases where the separated parents may not live in close proximity, not to mention the time that may be wasted in traveling which could be going into more productive areas.

##### **Case 4: Difficulties for Indigenous families**

**Aboriginal mother of 5, separated from her second partner who is the father of the 3 youngest children. The mother and children have returned to the mothers 'country' and the father has remained in his 'country'. They live over 800kms apart.**

**The relationship was volatile and the separation difficult. There are current residence orders in place and the children have regular contact by telephone with their father and stay with him during school holiday periods.**

**The mother has had to apply for child recovery orders on 2 occasions as the father has refused to return the children at the cessation of contact and has failed to notify the mother of his address.**

**The children have eventually been returned to the mother and resumed a routine and stable life-style including attending school regularly.**

**The mother has a position under a CDEP and has a low income, the father is unemployed. The financial strain on the parent's is extreme, given that they each must pay the costs of the travel associated with contact. Costs of the children's fares are high and the children need to be accompanied by an adult on the bus which is the only mode of transport available to them.**

Presumption of joint residence;

- How will the government legislate in relation to the issues for mixed families and separation of siblings under the joint residence legislation?
- How will the government provide assistance to low income families suffering as a result of the increase in costs associated with joint residence?
- What priority does the government place on the best interests of the children?

**5. The capacity of each parent to provide for the needs of the child with strong reference to s.68F.**

As recommended in no.1 in regards to Section 68.F of the *Family Law Act 1975 (Cth)*, with strong reference to Justice Chisholm comments:

*'[It] covers a wide range of matters. It 'is not to be measured by money only, nor by physical comfort only...the moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded'...[It includes] ' all factors which affect the future of the child'...It includes the child's happiness...It includes both the immediate well-being of the child and matters relevant to the child's healthy development'.*

The fact that the child's best interest are paramount means that the court's orders will seek to secure those best interests even if this seems unfair to one of the parents.<sup>16</sup>

**6. The need to protect the child from physical or psychological harm.**

This also refers to no.1 & 2. Based on child abuse and neglect, which was notified (or reported) to child protection departments around Australia in 2001-02, 3,254 Indigenous children under 17 years had some form of abuse substantiated (i.e. The statutory protection authority believed that physical abuse, psychological abuse, sexual and/or neglect, had occurred). This rate of substantiation was disproportionately higher (4.3 times higher on average) in the Indigenous population, than in the non-Indigenous population. Substantiation varied across states, from two Indigenous children in Tasmania to a rate of nearly eight times higher for Indigenous children in Victoria and Western Australia.

The Roberson Report (1999, internet edition) says that:

*Violence is now overt; murders, bashing and rapes, including sexual violence against children, have reached epidemic proportions with both Indigenous and non-Indigenous people being perpetrators.*

Police reports in WA say that, in 2000, the rate of reports to police of sexual assault of Indigenous girls was approximately double that of non-Indigenous girls (Gordon, Hallahan & Henry 2002). However, only 10%-15% of sexual assaults are reports to police and this reporting rate is lower in Indigenous communities (Gordon, Hallahan & Henry 2002). The Robertson Report (1999) says that 88% of rapes in Indigenous communities go unreported. So, although there are proportionately more reported sexual assault of Indigenous girls than non-Indigenous girls, a lower proportion is reported.<sup>17</sup>

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<sup>16</sup> Ibid, p.482.

<sup>17</sup> Child Sexual Abuse in Indigenous Communities By Janet Stanley, National Child Protection Clearinghouse, Australian Institute of Family Studies with assistance from Muriel Cadd and Julian Pocock

## Conclusion

All services in the National Network of Indigenous Legal Services Inc. are providing legal help to Indigenous women and children. One of the most important points about the services is that they are provided by Indigenous women for Indigenous people. All of the services cover huge geographical areas and many of them are in rural and remote areas.

NNIWLS does support ongoing contact with children after separation as long as is not at the detriment of the child/ren.

The NNIWLS could not support any changes to the *Family Law Act* allowing equal residency with each parent until all discriminatory measures are eradicated in all family law proceedings, not only discriminatory views held by non-Indigenous parents but racist assumption that may be held by judges/magistrates which would then led to a ill-informed decision, that in turn will have a detrimental consequent upon the child when making a decision in the 'best interests' of the child.

Recognition of Indigenous child rearing practices must occur and the proposed legislation of a presumption of joint residence by only a mother and father fails to do this. Such legislation will further erode traditional care arrangements and have ramifications for the care, welfare and development of Indigenous children.

The NNIWLS strongly supports and advocates the traditional role and place of Indigenous men in the raising of children. Family Violence and sexual abuse is not a part of our traditional cultures and the roles of Indigenous men as fathers has been eroded as a direct result of and effects of colonisation, dispossession of land and past government policies.

Alcohol must stop being used as an excuse for violence and abuse against women and children. Non-violent fathers need to be supported in raising children and violent fathers need to take responsibility for their actions. The NNIWLS supports and encourages Indigenous men to continue to advocate against violence and abuse within our communities.

The NNIWLS has serious concerns about Indigenous women attempting to negotiating joint residency with violent partners after they have separated, as it will place Indigenous women and children at further risk. Given the evidence researched the NNIWLS could not support any legislation that would further place Indigenous women and children at risk of ongoing violence.

Additionally, due to the high level of sexual assault in Indigenous communities and lack of reporting, the Federal Government by giving sweeping powers of joint residency arrangements will certainly place Indigenous children at risk of further abuse<sup>18</sup>.

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Secretariat of National Aboriginal and Islander Child Care Presented at the Conference, Child Sexual Abuse: Justice Response or Alternative Resolution, 102 May, Adelaide.

<sup>18</sup> Ibid, p.2.



The NNIWLS resources and workers are already stretched to the limit trying to meet the needs of their communities and with the Government proposing 'the presumption of joint residence' it will further disadvantage Indigenous women and children.

The proposal would create a revolving door process, not only dealing with old clients, new clients but Services will have clients permanently on their books, as it will not create any relief for Indigenous women confronting violence. The proposed legislation has the capacity to perpetuate an additional cycle of abuse and disempowerment on the most disadvantaged people in our community.

The 'equal child residence' debate should not be about the Government imposing sweeping legislation to advance the 'few', but ask questions in regards to why one parent is denied access by the Family Court on a case by case basis. It is only then that Government will have an understanding of the decisions made by the Family Court, in the best interest of the children, instead of creating untenable laws that will place Indigenous women and children at risk of continuing violence and exacerbate their social and legal disadvantage.

#### **National Network of Indigenous Women's Legal Service Inc.**

##### **A Legal Presumption of Joint Residence Committee:**

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