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Submission to the Inquiry Into A Legal Presumption of Joint Residence In The Event of Family Separation

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1. Introduction

The Refugee Council of Australia welcomes the opportunity to provide input to the House of Representatives Standing Committee on Family Community Affairs Inquiry on Joint Residence Arrangements in the Event of Family Separation.

The Refugee Council of Australia is the nation's peak non-governmental agency concerned with issues relating to refugees, displaced persons and asylum seekers. The Council represents over 90 organisational members, as well as a considerable number of individual members. The Council works to promote humane, flexible, constructive and legally defensible policy by the Australian Government and the Australian community towards refugees, asylum seekers and displaced persons. The Council is an advocate for the welfare rights and settlement needs of this most vulnerable group in our community. In its efforts to enhance the dignity and respect accorded to refugees, asylum seekers and displaced persons, the Council monitors and responds to Government policy and represents the views of members to the relevant legislative and policy bodies.

Noting that the scope of this Inquiry is broad, this submission focuses on the potential consequences of a presumption of joint residence for refugees (including Special Humanitarian Program [SHP] entrants and Temporary Protection Visa [TPV] holders) and asylum seekers living in the Australian Community. The processes of separation and divorce are extremely difficult for refugees and asylum seekers given:

- * the high levels of trauma, disorientation and relationship breakdown in refugee families and the extreme disruption this causes children;
- * the lack of understanding of the Australian legal system and the fear of police and courts in many refugee communities;
- * the acute financial difficulties faced by many refugee families; and
- * a reluctance on the part of refugee women, with different family and cultural values, to report incidents of domestic violence.

The Council's broader concerns about a presumption of joint residence include:

- * an apparent shift in emphasis from the best interests of the child, for whom joint residence is potentially disruptive and difficult, to parents' rights;
- * a 'one size fits all' approach that neglects the need to assess each case on its own merits;

* a failure to take into consideration previous parenting patterns where mothers are usually primary caregivers;[1] and

* dealing with an unknown quantity - shared residence is currently the least common post-separation arrangement.[2]

The Council recognises that the Inquiry has been sparked by concern in some quarters that men are disadvantaged under current legislation, but maintains that the current Family Law Act is fair and reasonable, advantages neither parent and looks at the best interests of the child as the paramount consideration[3].

In formulating its position, the Council has drawn on the excellent submissions by the National Network of Women's Legal Services and the NSW Immigrant Women's Speakout Association.

2. Addressing the Terms of Reference

2.1 Terms of Reference (a)

(a) given that the best interests of the child are the paramount consideration:

(i) what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted; and

(ii) in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents.

This submission addresses the term of reference in its constituent parts.

given that the best interests of the child are the paramount consideration:

The Council questions whether the best interests of the child could remain the paramount consideration in the shift to presumptive residency arrangements.

"Paramount consideration" in this context means the supreme or superior consideration. A presumption is something that may be fairly or ought to be taken for granted, something that is a priori the more probable. The two notions are very similar. How are the inherent tensions between them to be resolved? The existing legislative arrangements provide a mechanism for balancing and deciding between competing tensions. Resolution is achieved by appeal to one supreme or a priori principle, the best interests of the child. If a second a priori principle is introduced, the mechanism for deciding between the competing tensions is itself fraught with tension.

The Council is concerned that such a proposal marks a shift in emphasis from the best interests of the child to the rights of parents. Shared residency arrangements for children are liable to be extremely unsettling and perhaps traumatic. There is clearly a strain placed on any child required to move regularly between two homes and two parents. A recent UK study found that 'children often carry the burden of shared care and found it emotionally straining to upset the balance between their parents'[4]. Parents seem to recognise this. Joint residency is a very uncommon arrangement[5]. Refugee children face immense difficulties in settlement, independent of those experienced by their parents, which would be compounded by the

confusion of any joint residency arrangement. A Refugee Resettlement Advisory Council Report (2002) states that

‘The challenges and stresses of the transition to adulthood are compounded when a young person is making the transition to a new culture, dealing with the practical adjustments of settling in a new country, and trying to come to terms with the upheaval and trauma of their past. This may interfere with their identity formation as they struggle to reconcile the competing values of their country of origin and those of their peers in a new country’[6].

The needs of refugee children are sensitive and complicated. The current Family Law Act establishes the best interests of the child as the most important consideration and handles residency disputes on a case-by-case basis. A presumption of joint residency, concerned with parents’ rights, threatens this most crucial tenet of Family Law.

A presumption of joint residency is not consistent with the best interests of the child, particularly a refugee child already under extreme stress. what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent.

There are a number of complicated factors that uniquely affect refugee families in the event of family breakdown and that should be considered in making residency decisions. These stem from the high levels of trauma and confusion experienced by refugee families and the language, cultural and other barriers they face in gaining access to the legal system during times of crisis. The characteristics of family breakdown in refugee families, including potentially high levels of domestic violence, are important. A presumption that children spend equal time with each parent is likely to place a great strain on refugee families and to disadvantage refugee women.

The Council’s view is that in the event of family breakdown a legal presumption of joint residence would be highly inappropriate.

The current Family Law Act encompasses the most important factors in determining what is in the best interest of the child:

The four clear principles of the Family Law Act

- children have a right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together
- children have a right of contact, on a regular basis, with both parents, and with other people significant to their care, welfare and development
- parents share duties and responsibilities concerning the care, welfare and development of their children
- parents should agree about the future parenting of their children.[7]

Other factors the court must consider

- any expressed wishes of the children
- the nature of the relationship of the child with each parent

- the likely effect of any changes in the child's circumstances
- the practical difficulty and expense of a child having contact with a parent
- the capacity of each parent to provide for the needs of the child
- the child's maturity, sex and background, including issues of race, culture and religion
- the need to protect the child from physical or psychological harm
- the attitude to the child and to the responsibilities of parenthood
- any family violence which has occurred.[8]

The Council wishes to explore two additional points of concern, pertinent to refugee children and parents, which suggest there should not be a presumption that children spend equal time with each parent. These include:

- settlement issues (including language and literacy barriers which make access to the legal system difficult); and
- unreported domestic violence.

2.1.1 Settlement Issues (including language and literacy barriers which make access to the legal system difficult)

The NSW Resource Centres Association and Anglicare have identified domestic violence and family breakdown in newly arrived refugees and humanitarian entrant families as an issue of concern.[9] The Refugee Council facilitated a series of consultations in 2002 as a tool by which these service providers could develop a comprehensive response to newly arrived refugees and humanitarian entrants experiencing family dysfunction. Pertinent to this Inquiry are some of the factors contributing to the breakdown of refugee families, identified through these consultations. These included:

Family Issues

- A high level of trauma experienced in their country of origin and in exile including experiences of torture and deprivation
- Exhaustion post-arrival
- Diagnosed and/or undiagnosed mental illness
- The absence of traditional systems of managing family violence e.g. the role of elders and the extended family in mediation
- The absence of external support structures such as friends and community
- Financial pressures experienced during settlement including chronic unemployment
- Alcoholism and/or substance abuse
- Changing family dynamic and composition

- Additional pressures of managing composite families
- Changed roles in relation to financial management creating conflict e.g. Centrelink payments being received by each family member rather than the head of the household
- Intergenerational conflict as a result of different rates of adaptation
- Relationship breakdown on arrival in Australia.

Information Issues

- A lack of information on the Australian legal system provided before arrival
- Low levels of English
- Varying literacy levels making written information provision inadequate
- Perception that Legal Aid is only available to one party in a dispute and lack of knowledge about other funding alternatives
- Lack of interpreters particularly for small and emerging communities
- Cultural norms not being taken into account when language is interpreted literally
- Added barriers providing information to refugee men
- The stigma of being a victim or perpetrator of domestic violence.

The prospect of facing court to challenge normative residency arrangements is likely to engender further confusion and fear in families already under extreme stress. It may be impossible, for financial or cultural reasons or through an inability to understand the system, to engage in the legal system at all. A presumption of joint residency precludes culturally appropriate alternatives for refugee families, such as extended family playing a pivotal role in childcare. Refugee women, although likely to have been primary caregivers before separation, are unlikely to challenge a presumption of joint residency.

2.1.2 Unreported Domestic Violence

Incidents of domestic violence are prevalent in the refugee and wider community.[10] A period of crisis such as settlement may exacerbate incidents of domestic violence and, perversely, encourage refugee women to stay in a violent relationship.

The Refugee Council facilitated consultations of 2002 found that addressing the issue of domestic violence in refugee communities is complex and impaired by various factors pertinent to this Inquiry.[11] These included:

For Settlement Workers

- Problems identifying domestic violence and child abuse and responding to family breakdown
- Gaining access to essential services for separated clients without documentation, where the family's entry documents are held by one person, usually the perpetrator.

For Generalist Service Providers

- A lack of cross-cultural training provided to the police or the court system
- A shortage of emergency housing for very large families
- A lack of sensitivity from some schools to family breakdown

and a very important issue, relevant to the terms of this Inquiry

- The absence of domestic violence provisions for refugees with a Temporary Protection Visa. As a result a woman may feel compelled to stay in an abusive relationship because her claim for protection is based on that of her partner. Where that relationship breaks down, if a woman wishes to seek further protection she will have to make an application for protection independently. If her claim was based on that of her husband there is a risk that she will be returned to the country where she and her husband fled.

For Domestic Violence Workers

- The difficulty of finding refuges that accept adolescent boys. Where none are available the separation can exacerbate existing trauma and separation anxiety symptoms
- Limited access to some refuges for women with a disability
- The lack of specialist training available to some refuge workers on how to deal with the mental health issues of clients from linguistically and culturally diverse backgrounds
- The lack of specialist training available to some refuge workers in supporting the needs of refugee women
- The lack of services available to provide crisis intervention out-of-office hours
- Legal processes being intimidating to some people and unintelligible to many outside the legal profession.

Women from traditionally male dominated societies, perhaps with complex notions of honour and shame, are further unlikely to report domestic violence.

Families faced with domestic violence, particularly refugee families undergoing the stresses of settlement, are already extremely vulnerable. If a presumption of joint residency was introduced, the onus is likely to be on the woman concerned to challenge residence and contact arrangements.

Refugee women may not report domestic violence, a factor that would ordinarily influence residence arrangements. Refugee women on Temporary Protection Visas risk removal in the event of relationship breakdown.

in what circumstances such a presumption could be rebutted

The Refugee Council does not support a legal presumption of joint residence.

The Council stresses that presumptions of any kind are unsuitable when dealing with refugees whose needs are complex and diverse. In the event that such a presumption is

brought into law the Council wishes to reiterate the following factors that should be considered in making residency decisions affecting refugee families:

- * refugees already face problems in breaking through language and cultural barriers. There is likely to be difficulty understanding the legal system (exacerbating stress) and challenging normative residency arrangements;

- * incidents of violence, substance abuse and other mitigating factors that would ordinarily influence residency decisions may go unreported; and

- * refugee children already face immense problems in settlement. It is crucial that any decisions involving their future continue to put their best interests first and are decided on a case-by-case basis.

Accordingly, a legal presumption of joint residence would be highly unsuitable for refugee families.

in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents.

The Council suggests that this a matter for the Family Court to decide, whilst taking the opportunity to reiterate the crucial role of extended family and community in the lives of many refugee children and their particular need for stability during the settlement phase.

The existing Family Law Act identifies a number of factors (see page 4) applicable to refugees, that are taken into account in making residency decisions. Clearly, in cases of parental neglect or abuse, alternative residency arrangements with other persons will be made.

Having said that, it is important to note that refugees are less likely than others in the community to have extended family. For many separated families, grandparents (and other relatives) can provide an island of stability for children. Many refugees do not have this option and therefore, in the case of separation, parenting arrangements are even more important.

Refugee families, as outlined, face the pressures of settlement and may be affected by domestic violence. Where the influence of extended family or community is considered by the Court to be beneficial and potentially stabilising, refugee children should have contact with other persons.

A Court should consider the special circumstances of refugee families in determining residency and contact.

2.2 Terms of reference (b)

b) whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children.

It is difficult to see the inherent connection between the existing child support formula and the separate issue of a parent's care of and contact with his or her children.

The existing child support formula does not appear to be working:

'In 2000, a survey conducted of the Child Support Agency (CSA) clients revealed that only 28% of payees reported always receiving payments on time, while 40% reported that payment was never received.'

The CSA failed to collect nearly \$770 million in 2000-2001 and the debts written off by the CSA during this period raised by 27% to \$74 million.[12]

The Council suggests that this issue is a matter for a separate inquiry.

The Council reiterates that the existing arrangements for providing for the care of children and their contact with significant family members, most especially their parents, is objective. The Council stresses, however, that refugee families may struggle with the legal processes required to resolve residency disputes in the Family Court.

In terms of determining contact, the existing Family Law Act assesses each case individually and advantages neither parent. The Council believes this is entirely fair.

The existing arrangements, in relation to determining residence, care and contact, work fairly for parents and uphold the best interests of the child as the paramount consideration.

3. Conclusions

The Council does not underestimate the need to ensure that both parents, in the event of separation, have contact, where appropriate, with their children. Incidents reported in the media where men have failed to gain satisfactory access to their children can be attributed to mistakes in individual cases rather than flaws in the system.

The Council challenges the suggestion that a presumption of joint residence serves 'the best interests of the child' and urges the Inquiry to acknowledge that normative joint residency arrangements may serve to heighten disruption, during a time of crisis, for the parents and children involved.

The Council is gravely concerned about the implications of a presumption of joint residence for refugee families. These families have experienced a succession of extreme crises, which in many cases has resulted in family disruption, and are often ill-equipped to engage fully in the Australian legal system. The Council is particularly anxious that refugee women could be disadvantaged through a presumption of joint residence. The Council submits that legal presumptions of any kind are highly unsuitable in dealings with refugee families.

4. Recommendation

That no change is made to the current Family Law Act to introduce a legal presumption of joint residence in the event of family separation.

[1] Submission of the NSW Immigrant Women's Speakout Association to the Enquiry Into Joint Residence Arrangements in the Event of Family Separation p. 7

[2] 'Australian Bureau of Statistics Family Characteristics Survey 1997' Cat 4442.0, AGPS, Canberra in National Network of Women's Legal Services Briefing Paper – A Legal Presumption of Joint Residence p. 4

[3] FLA as cited in National Network of Women's Legal Services Briefing Paper – A Legal Presumption of Joint Residence p. 3

[4] National Network of Women's Legal Service Briefing Paper – A Legal Presumption of Joint Residence p 5

[5] 'Australian Bureau of Statistics Family Characteristics Survey 1997', Cat 4442.0, AGPS, Canberra in National Network of Women's Legal Service Briefing Paper – A Legal Presumption of Joint Residence p 4

[6] Refugee Resettlement Advisory Council, 'Strategy for Refugee Young People', RRAC 2002 in Report of the Review of Settlement Services for Migrants and Humanitarian Entrants, DIMIA 2003.

[7] Section 60B(2) of the FLA as cited in National Network of Women's Legal Service Briefing Paper – A Legal Presumption of Joint Residence p 3

[8] Section 68F of the FLA as cited in National Network of Women's Legal Service Briefing Paper – A Legal Presumption of Joint Residence p 3

[9] Refugee Council Consultation on Family Breakdown Amongst People Who Have Newly Arrived in Australia as Part of the Humanitarian Program.

[10] Submission of the NSW Immigrant Women's Speakout Association to the Enquiry Into Joint Residence Arrangements in the Event of Family Separation p 3: 'The ABS Women's Safety Australia

survey found that 23% Australian women experience abuse from partners as adults in their lifetime, but this figure is nearly doubled if we consider only divorced/separated women: i.e. 42% of divorced/separated women experience abuse.

[11] Refugee Council Consultation on Family Breakdown Amongst People Who Have Newly Arrived in Australia as Part of the Humanitarian Program

[12] National Network of Women's Legal Services Briefing Paper – A Legal Presumption of Joint Residence p 6