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Attorney-General's Department
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Dear Chair

Submission to the Family Law Council Discussion Paper on Relocation

The Human Rights and Equal Opportunity Commission (the Commission) is established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (the HREOC Act). It is Australia's national human rights institution.

The Commission's relevant functions are set out in Section 11 of the HREOC Act and include the power to promote an understanding and acceptance, and the public discussion, of human rights in Australia.¹

One area of Commission responsibility is the rights of children under the *Convention on the Rights of the Child* (1989) (the CRC). Australia agreed to be bound by the CRC in December 1990 when it ratified the Convention. The Australian government has made the CRC a 'relevant international instrument' under the HREOC Act.²

This submission is, therefore, limited to providing some guidance on the principle regarding 'the best interests of the child' under Article 3(1) of the CRC as it relates to selected questions posed by the Discussion Paper.

The Commission also brings to the attention of the Council Article 3(2) of the CRC which reads:

States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

¹ Section 11(1)(g) of the HREOC Act.

² Section 3(1) of the HREOC Act.

1. Definition of ‘relocation’ (Paragraph 2.1, page 4)

In the Commission’s view, any definition of ‘relocation’ under the Family Law Act should be based on the impact of the distance and relocation on children and their parents (rather than the distance per se). Such a definition would shift the focus to an examination of the ‘best interests of the child’ in the circumstances of the case.

2. Definition of the ‘best interests of the child’ (Paragraph 3.9, page 8)

One of the most important aspects of the ‘best interests of the child’ principle is that it seeks to ensure an individual assessment of the circumstances of each and every child.

Article 3(1) of the CRC reads as follows:

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

There is little international jurisprudence to assist in the interpretation of what amounts to ‘the best interests of the child’ and due to the plethora of circumstances that arise, it will be extremely difficult to develop a precise definition.

Further, given the wide scope of issues and circumstances that may arise in each individual case, the Commission is concerned that defining the ‘the best interests of the child’ may restrict the ambit of the term and limit the important emphasis on examining the individual circumstances of each and every child. As such, the Commission cautions the Council against any attempts to define the term in the legislation.

However, the Council may wish to refer to the Commission’s *Human Rights Brief* on the best interests principle. That document is available at http://www.hreoc.gov.au/human_rights/briefs/brief_1.html.

The Commission also recommends that the Council refer to the United Nations Children’s Fund (UNICEF) *Implementation Handbook for the Convention on the Rights of the Child* (2002) for its discussion of Article 3 of the CRC (pp39-51).

3. Presumption either for or against relocation (Paragraph 6.50, page 42)

Again, the Commission’s concern is that any decisions regarding relocation ensure that the best interests of the child be a primary consideration. To the extent that any presumption in favour of either the resident or contact parent may shift the focus away from this principle, the Commission would caution against it.

The Commission notes the concern of the Supreme Court of Canada in this regard (as noted in Paragraph 6.17 of the Council's Discussion Paper):

[A] presumption in favour of the custodial parent has the potential to impair the inquiry into the best interests of the child. This inquiry should not be undertaken with a mind-set that defaults in favour of a pre-ordained outcome absent persuasion to the contrary.³

Please do not hesitate to contact me should you have any further queries.

Yours sincerely

Graeme Innes AM
Human Rights and Disability Discrimination Commissioner
28 March 2006

NOTE: It would assist in the future if correspondence could also be sent in electronic form as a Word or text document.

³ *Goertz v Gordon: Women's Legal Education and Action Fund* [1996] SCR 27.