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Feminist Legal Clinic Inc. is a new community legal service operating in Sydney, Australia and focused exclusively on advancing the human rights of women and girls.

We refer to the list of issues and questions raised in relation to the eighth periodic report of Australia by the Committee on the Elimination of All Forms of Discrimination (“the Committee”) and the replies provided by the Australian Government dated 16 March 2018. We note with concern the failure of the Australian Government to fulfill its reporting and implementation obligations pursuant to the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”).

Discrimination by Removal of Babies and Children (*Articles 1-3*)

Our particular concern is the removal of babies and children from Australian mothers in a number of contexts. Pursuant to Article 3 of CEDAW, Australia has undertaken: *to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.* General Recommendation 19 confirms that this includes the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; the right to liberty and security of the person; and the right to the highest standard of physical and mental health. The removal of children from mothers by force or under duress is inconsistent with the basic observance of these fundamental rights and freedoms.

It has been announced that the government of New South Wales (NSW) has set a target to double the rate of adoption within 4 years.ⁱ People who adopt are also to be eligible for payment in futureⁱⁱ. NSW already boasts that it leads Australia in out-of-home care adoptions. Furthermore, the Federal Government is currently conducting an Inquiry into Local Adoption “as a viable option” for children in out of home care with a view to establishing a national framework for this purpose.ⁱⁱⁱ This would seem to herald a return to the child removalist policies of the past.

The devastating impact of permanent removals on both mothers and children has been extensively documented^{iv} in a number of Australian government reports including *Bringing them Home: The Stolen Children Report* by the Australian Human Rights Commission in 1997^v, and the Senate Community Affairs Reference Committee Reports on the *Forgotten Australians* in relation to the child migrants in 2004,^{vi} and on *Commonwealth Contribution to Former Forced Adoption Policies and Practices*^{vii} released in February 2012. It is quite clear from the human suffering documented in these reports, with each of them prompting a Government apology, that permanent removal of children is not an appropriate solution to disadvantage.

Sadly, research by the Australian Bureau of Statistics (ABS) indicates that despite the apologies, Aboriginal women in particular continue to have their children removed at a rate that now exceeds even that of the notorious Stolen Generation period.^{viii} Although only an estimated 5.5% of the child population, in 2015-16 Indigenous children constituted 36.2% of all children placed in out-of-home care. Indigenous children aged 1-4 and 5-9 were 11 times more likely than non-Indigenous children of the same age to be in out-of-home care.^{ix} Unfortunately, there is a fine line between care and protection and social engineering.

A policy favouring a return to adoption does not take account of the critical bond between a mother and child and the lifelong trauma inflicted by permanent removal.^x A move toward permanent adoption from foster care placement will mean that there will be increased pressure to permanently remove children earlier from their mothers, thereby reducing the opportunity for women to retain or regain care of their child or maintain some level of ongoing relationship. This policy ignores the intense psychological bond that arises from childbearing. Mothers must be supported as far as possible to retain care of their own children, for both their and their child's benefit.

When a child is adopted this removes the obligation on government to conduct regular welfare checks and reduces the government's potential liability in respect to children who may otherwise be classed as wards of the state. NSW Family & Community Services plays a vital role in protecting children in care and this change in policy follows the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse^{xi} and other shocking reports^{xii} that have drawn public attention to this crisis in out of home care for children. However, the use of adoption simply creates a legal fiction whereby birth certificates are effectively falsified. It cannot guarantee the safety of children in their new homes. There is no data to suggest that this policy will cure the scourge of child abuse in out of home care, although it is likely to hide it more effectively.

Reproductive Prostitution (*Article 6*)

Certainly there is strong demand by those wishing to adopt babies, including an increasing number of male couples. This has resulted in a trade in babies from impoverished women in developing countries to wealthy Australians and has also seen an exponential growth in commercial surrogacy arrangements.^{xiii} These arrangements are beset with ethical issues, as evidenced by several notorious cases.^{xiv} There are suggestions that regulation, rather than prohibition, will ultimately provide a solution to this dilemma.^{xv} However, this approach ignores evidence that even using gestational surrogacy, mothers become attached to babies in utero and equally that babies are stressed by separation from the mother who gave birth to them, regardless of their genetic makeup.^{xvi} It also relegates women's health and well-being as secondary to their role as a reproductive vessel for the benefit of others.

Commercial surrogacy is illegal in almost all Australian jurisdictions, but despite this Australians are reported as the largest client market for international surrogacy arrangements.^{xvii} It has been reported that 25 per cent of all international surrogacy arrangements are being contracted by Australians.^{xviii} Although it is a criminal offence in the ACT, NSW and Queensland for residents to engage in commercial surrogacy arrangements anywhere in the world, very few prosecutions have been brought. Instead, the courts have been largely tolerant of surrogacy arrangements made overseas in defiance of domestic laws and there are increased calls to legalise commercial surrogacy,^{xix} with former Family Court Chief Justice Diana Bryant a vocal advocate for this approach.^{xx}

Employment, Economic & Social Rights (*Articles 11 & 13*)

The Australian Government is still reluctant to remove its reservation in relation to paid maternity leave, let alone provide women with ongoing financial recompense for their work of mothering and caring for families. Instead the Australian Government has taken steps in recent years to significantly reduce single mothers' access to social security payments. Furthermore, the failure to effectively enforce child support payment by fathers results in significant financial disadvantage for many women.^{xxi} While the work of mothering continues to be an unrecognised form of unpaid labour, systemic economic and social discrimination will continue to be endemic and women will continue to be vulnerable to violence, exploitation and having their children removed.^{xxii}

Until the introduction of a reasonable Supporting Mother's Benefit by the Whitlam government in 1973, it was common for the babies of unwed mothers in Australia to be routinely removed from delivery tables against the wishes of the mother and placed with total strangers.^{xxiii} Since then, the number of babies available for adoption in Australia has dropped dramatically which effectively demonstrates the link between a woman's capacity to retain care of her child and her access to financial resources. However, too often children are still removed from vulnerable and disadvantaged mothers in circumstances where they could be given more assistance to retain care of their child.

Healthcare - Inadequate Services for Maternity (*Articles 12 & 14*)

Article 12 of the Convention provides: *States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.*

In the absence of adequate family support, women who are very young, have a disability, mental health issues or drug and alcohol dependency often require intensive assistance to raise their children themselves. The possibility of providing supported accommodation or supplying free services within the home should be closely investigated in these cases, rather than removing children. Many women are also trapped in violent and abusive relationships and require financial, legal and emotional support to leave abusive partners. Domestic violence frequently commences during pregnancy or following the birth of a child.

Women's refuges and domestic violence counselling and legal services have been steadily eroded and increasingly mainstreamed so that they are unable to provide adequate support for women in these circumstances. For example, the NSW Women's Refuge Movement has been largely dismantled in recent years following implementation of a government policy "*Going Home, Staying Home*", which involved putting feminist run refuges out to tender and then often awarding the management contracts to large religious charities to run.^{xxiv} Most of the refuges have then been converted into generic homelessness services with reduced hours, and stripped of specialist domestic violence workers and children's programs.

Governments have also failed to support midwifery services and a continuity of care model of maternity service delivery. The provision of appropriate midwifery services would also enable effective implementation of Article 14 that requires states: *take into account the particular problems faced by rural women and have access to adequate health care facilities* by enabling Indigenous women in remote areas to "give birth on country".^{xxv}

In 2017 attempts to finally decriminalise abortion in both Queensland and NSW^{xxvi} were unsuccessful with the churches providing significant opposition. In NSW there has also been an attempt to introduce legislation recognising the unborn child as having a separate legal identity to that of its mother.^{xxvii} Australia must use its external affairs power under the Constitution to pass national legislation to ensure abortion is decriminalised in all states and that women are guaranteed free access to this service through the public health system, regardless of where they live.

Access to Justice (*Article 15*)

Australia's system of dividing responsibilities between its federal government and its states continues to impede measures to protect women's human rights. This is apparent in the context of Family Law matters involving domestic violence or child abuse, where women are forced to navigate Commonwealth and state court jurisdictions to secure protection for themselves and their children. Misuse of the legal system by perpetrators of violence is widespread and the threat of separation from children is a potent means of controlling women.

The use of de-gendered language in legislation and a disingenuous equality narrative also operate to detract from measures introduced for the protection of women and to undermine specialist services and facilities. For example, there is an increasing trend for women to be inappropriately named as defendants in applications for Apprehended Violence Orders^{xxviii} and then to be refused access to courthouse safe rooms which are increasingly being made available to men who have been identified instead as victims. Women's safe rooms and domestic violence support services must continue to be made exclusively available to women and should not be mainstreamed.

While police inaction in the context of domestic violence has long been a concern, we have now observed an increasing trend for police to act against women, even in cases where they are visibly the victim of violence. This arises not only where the man was the first to place the call to the police, but also in situations where there has been any disclosure of mutual conflict, regardless of physical disparities or other power imbalances. Increasingly, women who are victims of abuse are instead being identified as perpetrators when they fight back, with legislation that was introduced for their protection now being actively used against them.

Access to justice and remedies continues to be a major problem for Australian legal systems with both Legal Aid and the community legal sector threatened with cutbacks in recent years and the private profession being prohibitively expensive. With free legal services increasingly scarce, many women are having to represent themselves in jurisdictions such as the family court, which is intimidating and formalistic. Court fees, onerous bureaucratic requirements and lengthy delays also constitute a significant impediment to justice.

Changes must also be made to bail and sentencing legislation to ensure that women who are pregnant or who have care of children are not separated from their children on account of incarceration. In recent years there has been a disproportionate increase in women's incarceration,^{xxix} particularly Indigenous women and of these an estimated 80% are mothers.^{xxx} Separation from one's child is cruel and unusual punishment and should never arise on account of being refused bail or sentenced for minor transgressions. Community based treatment options must instead be made available for women. The fact that many women, particularly those who are Indigenous, are losing care of their children on account of time spent on remand or while serving sentences in respect to relatively minor matters, constitutes one of the most gratuitous human rights violations currently occurring within Australia.

Family Law (Article 16)

The other context in which Australian children are regularly removed from their mother's care is through operation of the Family Law. The presumption of shared parental responsibility introduced by amendments to the Family Law Act in 2006^{xxxi} has resulted in mothers increasingly being separated from babies and young children, including in circumstances where they have expressed fears for the child's safety. This presumption of "shared parental responsibility" disregards the critical emotional and physical bond that typifies the relationship between a mother and baby. Furthermore, the failure to adequately take account of the extent to which domestic violence and child sexual abuse are gendered crimes in which the perpetrators are overwhelmingly male has resulted in women and children in these circumstances being exposed to significant harm as a result of these provisions.

Summary

- The critical bond between a mother and child must be recognised in law and should not be broken other than in the most extenuating of circumstances.
- There should be a presumption in family law that it is in a child's best interests to be with its mother.
- Children are not commodities. Wealth should not be the criteria for according parenting rights. Surrogacy and adoption should be outlawed.
- Australia must introduce national legislation to decriminalise abortion and make it freely available through the public health system.
- Adequate maternity health care, including midwifery led services offering continuity of care, must be made available to all women, including those in remote areas.
- Women must be provided with adequate financial assistance and support to retain care of their own children. Children should never be removed from mothers on account of socio-economic factors, disadvantage or disability.
- Mothers and children must have protections from violence and abuse under the Family Law and must be provided with financial, legal and counselling assistance and supported accommodation where necessary.
- Women's Refuges and domestic violence services must be restored, expanded and adequately funded to provide the level of support required for women to escape abusive relationships and raise children on their own when necessary.
- When necessary, children should be placed with guardians who are members of their extended family or close community so that they can know their true identity and maintain contact with their mother as far as possible.

We urge the Committee to make recommendations that the Australian Government recognize maternal rights and avert an Atwoodian dystopia for Australian women.

If you require any further information in relation to this submission, please contact Anna Kerr on 0402 467476 or by email at anna@feministlegal.org.

Yours faithfully

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