Family Law Amendment (Parenting Management Hearings) Bill 2017

Joint Submission

The National Council of Single Mothers & Their Children Inc.

The Council of Single Mothers and their Children (Victoria) Inc.

council of single mothers and their children

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Dear Committee Secretary,

Family Law Amendment (Parenting Management Hearings) Bill 2017

The Council of Single Mothers and their Children Inc. (CSMC) is a non-profit organisation founded in 1969 by single mothers to improve their lives and that of their children. Based in Victoria, we achieve change both by championing the voices and needs of single mother families and providing specialist support services.

The National Council of Single Mothers and their Children Inc. (NCSMC) formed in the early 1970's to provide a lead voice for single mothers and their children around Australia on issues in common. NCSMC believes having access to information and support, when and as required is empowering. It enables women to make informed decisions, and better equips them to protect and support themselves and their child/children.

Our combined strengths are our expertise and commitment in working with and for the advancement of women and children affected by poverty, hardship and/or family and intimate partner violence. We strive to find better solutions and more nuanced conversations that enable policy narratives to work for the individual whilst simultaneously tackling structural and societal barriers that impede wellbeing. Together we provide information, referrals and assistance to single mothers through our electronic platforms, responding annually to thousands of individual requests whilst our information posts can reach more than 100,000 per week. A mother heads 84% of lone parent households, and evidence shows single mother families are disproportionally affected by hardship, poverty and/or domestic violence.

After extensive consideration of member experiences with family court determinations and recent engagement with separated mothers who have accessed socio-legal services, NCSMC and CSMC offer conditional support for the Parenting Management Hearings Bill 2017. We outline our position in the following recommendations with additional detail, including our reservations, in the submission below. Both Councils would welcome an opportunity to speak to this submission or appear before the committee and wish the Committee well with its deliberations

Warm Regards,

Terese Edwards
Chief Executive Officer
NCSMC

Jenny Davidson
Chief Executive Officer
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Our Recommendations

1. The Parent Management Hearing Panel be clearly designated as more suited to self-litigants who are not fearful of the other party, and have equity in finances and other power dynamics. As part of this designation, we recommend information is made available to all potential applicants at the outset and includes at a minimum:

    a. Purpose
    b. Greatest suitability
    c. How any allegation of family or intimate partner violence or child abuse (of any kind) will be addressed
    d. How the voices of the children can be heard
    e. Determinations must be adhered to
    f. No merit-based review of a parenting determination is allowed unless there are substantially altered circumstances.

2. The Parent Management Hearing should not proceed or commence where allegations are raised that involve child abuse and/or sexual abuse, unless the self-litigants have informed the Panel that all the allegations and reports are before the Panel. The Panel must have access to best practice and accredited training in complex trauma and child abuse in all its forms including sexual, neglect, family violence (direct or witnessing) and other adverse childhood events.

3. We are particularly pleased to see the emphasis on Panel members hearing clearly the voices of children. We recommend extending this to ensure the voice of each child affected is heard early in the proceedings, as well as ascertaining their response to proposed outcomes. Due consideration and weight must be given to their views, particularly where these differ from 'expert view' and we recommend a right of appeal for children who are not satisfied with the determination. We also suggest that more creative and child friendly methodologies are employed including:

    a. Allowing submission to the Parent Management Hearings of children's drawings and stories
    b. Engaging skilled play therapists (particularly with young children and those whose disability inhibits their ability to speak) to determine their views on specific questions such as a proposal to live part-time with each parent
    c. Engagement of a child advocate where there is any sense the child's view varies from the proposals under consideration and that as necessary, each child in the family have an advocate
    d. One panel member meeting with a child as for example, magistrates currently do, to determine the view and/or best interests of a child in respect to a name change without the consent of the second parent
    e. Children, particularly teenagers, able to address the panel regardless of the consent of their parents
    f. Use of video, audio recordings and other technologies that may facilitate the voices of children in a panel hearing

4. Shortfalls and concerns raised in regard to the conduct of Independent Children's Lawyers and Family Consultants/Assessors are not replicated in the Parent Management Hearing Panel. Either should, wherever appointed, meet with the child or children, even those in rural and remote areas, and spend sufficient time with the child to ascertain their views.

5. We support the *child's best interest* being the paramount consideration and additionally recommend that:

    a. Having regard to the complex nature of determining a child's best interests, it be defined, measurable and guided by child welfare experts working with appropriate cultural frameworks and considering the many and varied circumstances the Panel may need to consider

    b. Rather than the presumption that the parents should have a shared parenting responsibility we suggest the better presumption is that children are entitled to live in a caring and nurturing environment where they are protected from harm and exploitation. If this is the starting point, we believe it will encourage parents to see their responsibility rather than their entitlement and to begin to work together to make this possible. It then also provides a framework for them to address any future difficulties that may arise.

6. Self-litigants have the right to expunge the option of the Parent Management Hearing Panel and attend Family Court, without penalty, as the reality of the process may be more challenging, feel less safe and present with fewer support options than anticipated.

7. We are delighted to see Aboriginal and Torres Strait Islander kinship structures recognised in the proposed legislation and recommend in addition that:

    a. The body of panel members reflect the cultural diversity of Australia and be gender equal
    b. Undertake cultural sensitivity training
    c. Be supported by a full range of culturally appropriate services and strategies.

8. The Parent Management Hearing Panel must undergo accredited training in the effects and gendered dynamics of family and intimate partner violence including how it can continue after separation with financial and other forms of control and how all of this can influence self-litigants affected by such violence. Such training should also include knowledge about and safe guards against, litigation abuse.

9. In addition to the flexibility provided to the Panel to dismiss an application, we recommend a prehearing in order to determine suitability. At the pre-hearing, the panel can be informed about the presence of family violence, ensure there are sufficient safeguards and supports to prevent litigation abuse, and to ensure the safety of all parties.

10. The Parent Management Hearing Panel needs to be funded to accommodate people so they are able to fully participate, including as necessary, determinations provided in Braille or the language of the parties, hearings involving hearing loops, Auslan and other language interpreters, wheelchair access, and other considerations as required.

11. We support the proposed trial of the Parent Management Hearings but strongly recommend that they not extend beyond the trial period without a full and transparent evaluation, independently conducted and publicly released. The evaluation must include the experiences of self-litigants and children, and take particular care to engage those who are least likely to volunteer their views.

12. We note the assurance in the General Outline to the Explanatory Memorandum that the Parent Management Hearing Panel is not a replacement for the Family Court. We recommend that in order to ensure this does not become a default substitute, full costing models of the proposed Parent Management Hearings are released publicly and that these demonstrate the Family Court is not in deficit due to this initiative.

Please find below, the substance of our arguments supporting the recommendations.

The Parent Management Hearings Role:

The Parent Management Hearings as proposed may have a useful role in providing a more timely and affordable option for self-litigants and could become an outreach function of the family court. Parent Management Hearings are likely in our view to be more suited to self-litigants who have not raised allegations of abuse, are not fearful of the other party, demonstrate reasonable equity in finances and other power dynamics, but who have not yet been able to reach an agreement, either through mediation or independently.

Family violence and allegations of child abuse:

It is reasonable to assume that self-litigants other than those above will access the Parent Management Hearing Panel. We therefore believe the panel must undergo accredited training in the effects and gendered dynamics of family and intimate partner violence, including how it can continue after separation with financial and other forms of control, and how all of this can influence self-litigants affected by such violence. Such training should also include knowledge and safe guards against litigation abuse.

We recommend self-litigants be provided with the option of a safe room and/or video evidence and that no self-litigant is ever exposed to cross-examination by another party to the hearing. This is particularly traumatising where the other party is or has been the perpetrator of family violence but even in less contentious circumstances, this can create a nervousness that will impede full participation and therefore, the best possible determination.

Due to the high rate of family violence in Australia, whether disclosed or not, we consider a self-litigant should have the right to expunge the option of the Parent Management Hearing Panel and attend Family Court, without penalty, as the reality of the process maybe more challenging and arrive with less safety and support options than anticipated. We believe it

would be a regressive step if any self-litigant felt compelled, coerced or fearful that the Parent Management Hearing Panel is the only option.

The value of a timely and affordable outcome should not be at the expense or harm to the child or an enabler of continued domestic violence.

CSMC and NCSMC would like the Committee to understand and build in safeguards against litigation abuse. We trust that the proposed Parent Management Hearings do not become a more *affordable* way of continuing this abuse.

> *Twice in less than 4 years, my ex made grossly false allegations about my mental health in order to try to gain custody of our son. Both times, he was unsuccessful but it has still cost me tens of thousands of dollars in lawyers' fees and counselling due to the stress of family court. He even put that I was a risk to my child. Without ever having produced one shred of evidence that even hints at this!*
>
> *My ex comes from a very wealthy family and once told one of our friends he would "ruin me". He dragged out Court proceedings (both divorce and custody) for over 2 and a half years (I'm still paying for this 4 years later), and he and his partner made my life a living hell. All so I wouldn't come out with enough funds to buy a home for my girls and I, even though I'd been paying my own mortgages for 15years... Financial and litigation abuse is just the same as other abuse.*
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> *From 2005 until 2014, I never spent a year without being in court.*
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> *Went through court between 2011- 2013, after my ex kidnapped my then 2 year old daughter, threatened to kidnap my 5 month old, then threatened to kill us all. Turned up to court a few times claiming that he just wanted to be a good dad, then missing a heap of court dates because the judge kept giving him chance after chance. Cost me $12k and eventually I was granted sole custody.*
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> *If they can't control you one way they will use another...4 years in court for me, he went through 5 lawyers as they all wanted him to stop and refused to represent him.*

Culture and disability:

We are pleased to see the proposed Parent Management Hearings Bill highlights cultural sensitivity and is inclusive of self-litigants with disabilities. We have made suggestions in our recommendations that we consider will strengthen these intentions.

The Voice of the Child

The National and Victorian Councils of Single Mothers and their Children Inc. welcome progressive changes that are child focused and provide opportunities to hear the voices of all affected children in all processes associated with the Parent Management Hearings. We hold the unequivocal position that their voice, and/or their advocate, should be included in parenting deliberations at the commencement of hearing as well as ascertaining their response to the proposed outcome.

Engagement with each affected child whether a lone child or multiple children, taking into account their age, maturity and ability, needs to occur in a supportive and sensitive manner. Where any child shows evidence of extreme shyness or trauma or other vulnerability, they should be allowed to have an appropriately trained (Trauma Informed Practice) support person to assist them.

We strongly believe the children have a right to have their voices heard regardless of parental consent and that their views should be given due weight and consideration even and perhaps particularly, where their views conflict with those of their parents and any expert involved. In saying this, we are aware for example, that family mediation, which can be an alternative to court, still requires the permission of both parties for the child`s voice, their wishes, and their concerns to be included in the mediation. This occurs irrespective of whether or not the mediation service promotes itself as a 'child inclusive service'. NCSMC trusts that this roadblock will not be part of the Parent Management Hearings.

> *My son was a little shy of 12 years, articulate, resilient but mostly a beautiful boy. He has no memory of his father and myself together as we separated around his second birthday. However, his father re-married, and the new wife had 'capacity to look after my son' when he was 11 years old. Apparently, the change would reduce the cost of his child support (the father informed me) and give him access to the family payment system (again informed by the father). My son did not want to ever spend a week away from me, he was used to two nights away per week and they were not consecutive. One night until he was eight years old and then two nights after that. Interestingly, it was my son who asked to increase to two nights with his father, as his father never had the capacity before despite both of us being in paid work full-time. My son told his father his wishes, he wrote it in a book, spoke to a counsellor at school, but he could not express this in our meditation because his father would not give his permission for his voice to be heard. I agreed to attend this mediation (perhaps I had no choice) but I was comfortable because it was 'child inclusive'. My son's voice and wishes were never part of this process and we went to court.*

The Independent Children's Lawyer and or Family Consultant/Assessor:

A recurring theme reported to both our organisations is the conduct of the Independent Children's Lawyer and the court appointed Family Consultants or Assessors. We note their highly influential positions in determining parenting outcomes and strongly recommend that both these roles must meet a professional standard, and that there are complaint and review mechanisms along with the process of peer review. A matter regularly reported to us is that the Independent Children's Lawyer or Family Consultant, has not met with the child, and/or the time has been insufficient to have formed any valid position. We hear too that the lawyer/consultant has not represented the views of the child or children or, critically, the outcome has decreased the child`s safety and welfare.

Below are direct quotes regarding the lived experience of women and children with the Independent Children's Lawyer or Family Consultant:

> *My son's ICL refused to even look at the evidence against my ex-partner instead stating: "you chose to have the child with him"*
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> *My children's lawyer, the Independent one, did not meet with my children but decided that she could speak on their behalf. What the hell is that all about.*
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> *I'm terrified, my children are terrified, what will this process do to us and why won't the children's lawyer read the school reports. They have been in school for seven years (in total) and she has seen them less than one hour (three children). Honestly, I need more than one hour to get them up, breakfast and dressed for school, but she feels that she can make a decision. One hour!*
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> *The ICL that I met with shared with me that she barracks for the same football team as my ex! It was as if they were having a beer at the pub, a place where he's very comfortable. I felt defeated before it started.*
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> *The Family Consultant arrived for my appointment in my ex's car. They were talking and laughing like buddies and I felt so cheated. The upshot of all this is that the judge ordered me, my toddler and baby to move interstate without any family or emotional support, all because the family consultant told the court I made up the violence and my ex needs to be near the children. Not even financial help to manage and now the kids are struggling in day-care 11-hour long days because of my work and commute in the city.*

We draw to the Committee's attention, the research: *The Independent Children's Lawyers (ICLs): Who are they really representing?*[1] Their findings echo experiences women have shared with such as:

> Respondents were asked who the ICL met and interviewed. Despite the supposed role of the ICL to determine and advocate for the child's best interests, only 12% of respondents indicated that the ICL solely met with and interviewed their child or children. 30% reported that the ICL did not meet or interview the child but rather met and interviewed the other parent (19%), themselves (7%), or both themselves and the other parent (4%). Another 9% indicated that the ICL met and interviewed the other parent and the child or children and 1% indicated they met and interviewed themselves and their child or children.
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> More astonishingly, only 10% of respondents reported that the ICL met and interviewed all parties, that is, the child or children, themselves and the other parent. But the most inconsonant finding is the indication by 38% of respondents that the ICL did not meet or interview anyone, neither the children, themselves, nor the other parent involved in the proceedings.

Findings of the study conclude that:

> ICLs were regularly and without proper transparency acting in manners inconsistent with their primary responsibility. This report recognises the importance of the principles upon which ICLs are founded and the potential for ICLs to play an important role in Australia's Family Law System and truly act as best interests advocates for children. But this report concludes that current inadequacies in ICL practice undermine these principles and potential, to a point where ICL practice is more damaging than it is supportive.
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> It's essential that the shortfalls of the Independent children's lawyers (and Family Consultants or Assessors) are overcome and that the child truly has a chance for their voice, their wishes, their concern and their safety to take central place at a hearing.

[1] Available at: http://www.familylawexpress.com.au/family-law-research-journal/wp-content/uploads/2015/10/Neither-Seen-Nor-Heard-Final-Report.pdf

In the best interest of the child:

In the 'best interest of the child' needs to be defined and inclusive in the hearings, as the current system, which is supposed to be premised on the best interest of the child, is demonstrably failing children as well as the 'protective mother'.

It is not acceptable for a child to be exposed to unsafe, abusive and/or toxic environments because as a society we have elevated the need for parental contact (usually fathers contact) over the welfare of the child. It is not acceptable to vilify the protective role of mothers in this manner. It is not acceptable to override the need for supervised contact because there is a dearth of services.

Simply and distinctly articulated by Rosie Batty, "You can't be an abusive man and a good father" and the Panel in Parent Management Hearings, should accept and not deviate from this position. Furthermore, we impress upon the Committee the need for policies and practices that ensure the Panel operates from the facts that are before them and the voices of the children and does not use their deliberation to fit a populist discourse.

Much is written about the 'presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility' or 'shared parenting' as it is commonly known. Shared-Time parenting after separation was an extensive change to the family law system introduced in 2006, empowered through legislation, and remains an ever-present onus for the courts and socio-legal environment. The Australian government invested heavily in expanding family and relationship support services and research, at the same time as it introduced shared-parenting amendments (Smyth 2017)[2] and despite this defining principle in 2014–15, only 12% of children in the general population is in a shared cared arrangement (Smyth 2017). This presumption is similar to the one that prior to the late 1960's, said no woman could raise a child on her own (best interests of the child) and saw thousands of woman compelled to give their children up for adoption.

The original misgivings held by NCSMC and CSMC about the external impetus for 'shared parenting' was validated and after an extensive inquiry, the realisation of very real safety concerns for women and children have resulted in both new and currently proposed legislation, giving greater focus to protection. However, remnants of this principle exist and the recent *Federal Parliamentary Inquiry into a better Family Law System to support and protect those affected by family violence* has made a raft of recommendations including the 'end of the presumption of shared care'. The Committee, after an extensive inquiry, found that this presumption was 'improperly relied upon such that the safety of children is not being appropriately prioritised'.

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[2] Smyth and Chisholm: Shared-Time Parenting After Separation in Australia: Precursors, Prevalence, and Postreform Patterns[†] Available from: http://onlinelibrary.wiley.com/doi/10.1111/fcre.12306/full

Given all the above, we are profoundly disturbed to see (point 57 of the general outline of the Explanatory Memorandum), state that "The Panel must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility (proposed section 11JE)". We have suggested an alternative approach in our recommendation that the presumption should be that *'children are entitled to live in a caring and nurturing environment where they are protected from harm and exploitation'*.

We make this recommendation both to ensure the safety of children and believing a shift in discourse may encourage parents to see their responsibility to the child rather than their own entitlement and to begin to work together to make this possible. We contend changing this mindset can also provide a framework for the parents to address any future difficulties that may arise.

We stress as we make this suggestion, that we are not at all opposed to shared care and indeed, many of our members are single mothers who have negotiated some form of shared parenting arrangement with the father of their child or children and are very content with it.

We do however contend that the politicisation and popularisation of the concept has contributed to an unhealthy growth in the sense of parental entitlement. We seek to rectify this imbalance and encourage changes in legislation and language that will help us all, as parents and as a society, focus more genuinely on the well-being of our children.

Child Sexual Assault / Abuse

CSMC and NCSMC could not support a Parent Management Hearing to proceed where allegations are raised that involve child abuse and or child sexual assault unless self-litigants confirm that all allegations and reports are before the Panel, trauma informed specialists are involved, and all required supports are available to ensure the children are safe. This may include reports or allegations from third parties or be instigated by the Panel. The gathering of reports, and the associated cost of instigating reports would need to be an integral part of the Panel`s function. The Panel must have access to best practice and accredited training in complex trauma and child abuse in all its forms such as sexual, neglect, domestic violence (direct or witnessing) and other adverse childhood events.

If the gravity of a hearing that involves child abuse is beyond the capacity and expertise of the Panel, we strongly recommend that the Panel seeks an urgent hearing with the Family Court and ensures an interim order is issued.

We are uncertain that the Parent Management Hearings Panel will have the expertise to complete an investigation and deliberation for child abuse and therefore seek a safety net to avoid further harm to a child.

Conclusion

CSMC and NCSMC are conditionally supporting a trial of the Parent Management Hearings Bill. We are uncertain however, if the investment will be worth it and wonder if it might not be better as an outreach arm of the Family Court. There, it will be best suited for self-litigants who have not raised abuse, are not fearful of the other party, where there is equity in finances and other power dynamics, but the parties could not reach an agreement either through mediation or independently. In these circumstances, we consider the Parent Management Hearings could be a more affordable and timely process for self-litigants.

To give full effect to this, a screening and information session should be part of the pre-hearing process.

We are firm in our belief that the Parent Management Hearings should not be viewed as a replacement to the Family Court. It is, in our view, essential that this highest level of family law deliberation operate in a way that protects the vulnerable and upholds community expectations. The original reasons for the establishment of the Family Court remain.

That said, we are not immune to the widespread disaffection with the Family Court and the inequities in the sociol- legal environment and we fully endorse the call for a Royal Commission as advocated by Bravehearts.

We appreciate the current proposals to reform the Family Law in respect of family violence, but as concerns about it are greater than this, we fear that distracting advocates for change through trialling of a new Parent Management Hearings system is not only inadequate but could be dangerous. The trial of Parent Management Hearings should only take place from a position of strength and offer an alternative on a 'fit for purpose' basis, not because of a failure in our current system.

Additionally, we would welcome the filling of current vacant positions (Judges) at the Family Court and trust that the Parent Management Hearing Panel will not occur at the expense of the family court, which could extend already long delays.

We are unclear as to how the Panel will undertake inquiries and gather information. If this is not properly resourced and managed, an incomplete picture will be used for deliberations and the best interests of the children will not be met.

Our support is also conditional on the commitment that there will not be any rollout or a continuation of the Parent Management Hearings beyond the stated trial without a full and transparent evaluation. The evaluation must include the experiences of self-litigants and children where possible, and be matched by a political will and policy willingness to understand any issues identified and take steps to address them.

Finally, we return to our concerns about the 'best interests of the child'. This is already a contested principle so however it is used in this context; it needs to be manifestly and transparently understood. The ways it is defined and measured need to be guided by child welfare experts and become the cornerstone of the Parent Management Hearing.

We are concerned that the 'child's best interest' has become a standard phrase without true meaning and as we watch the Family Court fail children and see children forced to spend time with their abuser and the 'protective mother' become a negative label that can attract the wrath of the courts, we despair. We remain dismayed that children do not receive access to the financial support as determined by the child-support agency and that their childhood is influenced by financial hardship despite the child-support scheme stating that they operate in the 'child's best interest'. Inadvertently the Family Court and possibly too, future Parent Management Hearings determinations, support this injustice.

There is much work to do to restore faith in the meaning of 'in the child's best interest'.