Submission to the Senate Legal and Constitutional Affairs Committee

Family Law Amendment (Parenting Management Hearings) Bill

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Introduction

We are pleased to support the enactment of this Bill. The purpose of this submission is to provide some background explanation to the Committee and to explain how we envisage the Panel working.

On pages 8-10 we make some comments on the Bill, including recommendations for amendments.

Parenting Management Hearings: An Overview

This new initiative was announced in the Budget on May 9th 2017. There has been a lot of consultation on the draft legislation needed to give effect to it. This has included an exposure draft circulated to a range of stakeholders. We have also been involved in consultations with many judges on the proposal.

Parenting Management Hearings are intended to be used in cases in which both parties are, or choose to be, self-represented. In his Second Reading Speech, the then Attorney-General described this as "a new statutory authority designed to offer self-represented litigants a more flexible and inquisitorial alternative to the court process." The Hearings will relieve the pressures on the courts by giving to self-represented litigants in suitable cases a more appropriate and structured alternative to the courts for the resolution of their parenting issues.

The new process is consensual. No-one has to go to a Parenting Management Hearing (see s.11KC).

Background

This new initiative arose from a submission made to the Government by the authors of this

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submission together with Dr Nicky McWilliam in early 2017.[3] This submission made a range of recommendations, most of which are still under consideration; but the Government moved quickly to provide funding for one recommendation, which was to trial a new program intended for self-represented litigants. The former Attorney-General, Senator Brandis, decided to call these Parenting Management Hearings (PMHs).

The model, as put to the Government, is that there should be multi-disciplinary and inquisitorial hearings to resolve parenting disputes in cases where both parents will continue to have parental responsibility, but cannot agree on their future parenting arrangements in the aftermath of parental separation. The Program is specifically designed for self-represented litigants – people who would otherwise be trying to represent themselves in the court system. It is not designed to exclude lawyers (who will play important roles in any such Hearings) and nor is it intended to displace the courts. The model put to the Government is that in every case going to hearing, there will be an independent children's lawyer who will lead evidence and ask questions of the parents, avoiding the need for parents to try to cross-examine one another. The Panel will also have a Presiding Member who is a family lawyer.

There are three reasons for trialling this new approach. First, as is now widely accepted, the adversarial system of justice is usually not appropriate for parents who need to continue to cooperate after the litigation is over. Secondly, it is not well-suited to the needs of self-represented litigants. They must endeavour to present their case to judges who are sometimes described as sphinxes in that they are traditionally mute and seen as being impassive and reactive. For many people unused to the legal system and what can appear to be a bewildering array of procedures, this can lead to situation of either alienation or an inability to articulate their views and grievances. Thirdly, parenting cases, particularly those involving allegations of domestic violence, child abuse, mental illness and drug and alcohol addiction, are particularly well-suited to a multi-disciplinary approach.

The proposal, as put to the Government, combines features of the Children's Cases Program, (trialled in NSW in the mid-2000s) and the Informal Domestic Relations Trial in Oregon. It also draws upon much experience in the tribunal sector with multi-disciplinary panels.

The Children's Cases Program

Years ago, the Family Court of Australia recognised that the adversarial system was not well-suited to the resolution of disputes about children. Alastair Nicholson, the former Chief Justice of the Family Court, argued that major reform of the adversarial process was necessary to address "the weaknesses of the traditional processes that allow the parties via their legal representatives (where they have them) to determine the issues in the case, the evidence that is

[3] The authors of this submission subsequently wrote a detailed paper explaining how the tribunal approach could work.

to be adduced and the manner of its use".[4] Looking back over sixteen years as Chief Justice, he wrote that:[5]

> "These weaknesses have been exacerbated in recent years as the proportion of litigants who represent themselves has increased. Judges find themselves being presented with reams of unnecessary material, usually dwelling on events long past, adult rather than child focused, and replete with allegations about what each party is alleged to have done to the other. Witnesses are called who can provide little or no relevant information, and trials become lengthier and more expensive. The relationship between the parties — if it is not already in tatters — deteriorates to the extent that they are unable to effectively co-parent their children in the future to any extent without hostility."

The Children's Cases Program was a response to this need.[6] It offered the prospect for a major reform to the processes for dealing with parenting disputes, inspired by the processes of continental Europe. In this innovative program, litigants spoke directly to the judge, explaining what orders they sought and why. Judges could take an active role in determining what evidence might assist the court in coming to the determination of the issues. An evaluation of the program by Dr Jenn McIntosh and colleagues showed demonstrable benefits in terms of reducing the stress of litigation on parents and therefore indirectly benefiting children.[7]

The principles underlying the Children's Cases Program were given legislative effect in the concept of the Less Adversarial Trial in the 2006 reforms. However, the idea of the Children's Cases Program was never embraced by the Federal Magistrates Court which took over more and more of the basic trial load in the cases where that program was likely to be most efficacious. Individual judges, applying Division 12A of Part VII, may well utilise some of the features of the Children's Cases Program, but this varies no doubt from one judge to the next.

The Family Court retained the LAT at least in form, although too often, in the Eastern States, the first day of the less adversarial trial seems more like a pre-trial conference of the traditional kind. It may be, as some have argued, the Children's Cases Program was too resource intensive for a high-volume court, especially in terms of the time required of family consultants. However, this does not mean that other features of the Program cannot be scaled to a higher volume environment, with appropriate adaptations.

The Informal Domestic Relations Trial (Oregon)

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[4] The Hon. Alastair Nicholson, 'Sixteen years of Family Law: A Retrospective', (2004) 18 *Australian Journal of Family Law* 131, 144.

[5] Id, 144–45.

[6] For a comprehensive account, see Harrison, M, *A Better Way* (Family Court of Australia, 2007).

[7] *The Children's Cases Pilot Project: An Exploratory Study of Impacts on Parenting Capacity and Child Well-Being* (Family Transitions, 2006). See also J. McIntosh, D. Bryant and K. Murray, 'Evidence of a Different Nature: The Child-Responsive and Less Adversarial Initiatives of the Family Court of Australia' (2008) 46 *Family Court Review* 125.

The ideas behind the Children's Cases Program have been taken up elsewhere. It was, for example, one of the inspirations for the Informal Domestic Relations Trial in Oregon.[8] This program was piloted in Deschutes County Circuit Court. It has been recommended for statewide implementation. In this program, the judge plays an active, inquisitorial role, engaging parties directly in discussion about what needs to be done. The approach is to highlight areas of agreement between the parties and isolate issues that need to be resolved. The process is designed to induce the parties to be more cooperative both with each other and the process.

In the Oregon program, both parties give explicit and voluntary consent to such a hearing. The court informs litigants by way of informational brochures and orally at multiple stages in the proceedings. The judge actively controls the process. The parties speak to the judge with no direct evidence nor cross-examination being permitted. The judge may ask questions but the lawyers and parties may not. Non-party witnesses are limited to experts. All traditional rules of evidence, including prohibitions on hearsay evidence are waived. The court determines the evidentiary weight to be given to exhibits.

Typically, IDRT cases last a couple of hours and decisions are given usually on the day of the hearing or trial. Shorter trials seem to be much easier to be scheduled into the court's trial calendar and are more likely to be heard when scheduled. Interestingly, cases involving domestic violence where both parties are self-represented appear to be particularly well-suited for that IDRT process. The IDRT process allows the victim to avoid cross examination by the perpetrator, and the judge is able to maintain a level of control in directing the lines of enquiry and the focus of the trial. The great majority of self-represented litigants have opted for the IDRT process over a traditional trial.

The IDRT process appears to reduce conflicts which might otherwise be evident at a traditional trial mainly because the parties do not cross examine each other, the parties are able to tell their side of the story directly and "be heard" and because testimony is provided in a more respectful manner that is the case with traditional hearing.[9]

The IDRT offers a particularly useful way of dealing with the needs of self-represented litigants. Matters can be dealt with relatively quickly, as the trial is judge-led, rather than relying upon the parties to present the case for themselves with all the difficulties that entails for self-represented parties.

Multi-disciplinary tribunals

Australia has had a good experience with multi-disciplinary tribunals, allowing the decision-making to be informed by people who bring to the issues a range of different disciplinary

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8 W Howe and J Hall, 'Oregon's Informal Domestic Relations Trial: A New Tool to Efficiently and Fairly Manage Family Court Trials' (2017) 55 *Family Court Review* 70.

9 Ibid.

backgrounds. Wise decision-making in parenting cases requires some legal knowledge to manage the process and to give reasons for decision consistent with the law. It also requires a knowledge from other disciplines, including child development, understanding of family violence (with all its heterogeneity), child abuse, mental illness and addiction.

In the court system, much of this expertise is supplied by expert witnesses, including family consultants. However, Chapter 15 expert witnesses are typically very expensive, and may not be willing to write reports at a cost that more impecunious litigants can afford. Family consultants also give the courts the benefit of their expertise. However, they have a range of backgrounds. Some are qualified clinical psychologists, but not all. Given the pay rates for family consultants, it can be difficult to attract well-qualified applicants to the positions.

The proposal we made to the Government involves multi-disciplinary panels that will have relevant expertise in determining parenting cases. This can only improve the quality of decision-making.

Features of the pilot program

Differential case management

It must be emphasised that Parenting Management Hearings should not offer some lesser form of justice. Indeed, for self-represented litigants they may represent a superior quality of justice. The relevant law and court procedures have become excessively complicated, with requirements that are irrelevant to many matters.

This is consistent with the idea of differential case management. Not every case should be dealt with in the same way, and not every category of litigant should have to join the same queue. There are those who would argue that there should not be three tiers of adjudication – the Family Court, the Federal Circuit Court and Parenting Management Hearings. They might prefer all cases to be dealt with by the courts. There are nonetheless limitations on the capacity of the courts to offer differential case management within the existing constitutional limitations. It may well be that, with greater freedom to innovate, the Parenting Management Hearings will develop some processes that can eventually be adopted by the courts within the Chapter III constraints.

It is intended for self-represented litigants

The Government has decided that parties should be able to be represented with the leave of the Panel. The Panel must have regard to "whether there are reasonable grounds to believe that there has been family violence by a party to the parenting management hearing, or there is a risk of family violence by a party to the hearing; and the capacity of a party to effectively

participate in the hearing without legal representation, having regard to any power imbalances between the parties to the hearing or any other relevant factor".[10]

In the Second Reading Speech, this explanation is given:

> It is envisaged that legal representatives could support vulnerable parties in the hearings, including victims of family violence or parties with a disability. The intention is to ensure that these parties are assisted to present their case effectively, for the purpose of ensuring a fair hearing. The general position that legal representation during the hearings is not allowed, does not, of course, preclude parties seeking legal advice in relation to their family law matter, and about the suitability of the Parenting Management Hearings Panel in their individual circumstances. Using legal services in this limited way may present a more cost-effective option for families than having to pay for legal services from initiation of legal action to its finalisation some years later.

If a party feels the need for legal representation, their primary option is of course, not to consent to take part in a Parenting Management Hearing at all but instead to go to, or remain in, the court system.

It involves a multi-disciplinary Panel

The pilot program provides an opportunity to see how multi-disciplinary tribunals can improve decision-making in children's cases. In his Second Reading Speech, the then Attorney-General explained:

> A key feature of the Parenting Management Hearings model is its multi-disciplinary approach. The Panel will be constituted by members with specialist skills and expertise in family law, family dispute resolution, family violence, psychology, mental health and child development.

Although one of the concerns expressed in the Consultation process was about the capacity of the Panel to deal with issues of family violence and child abuse, the reality is that, assuming the Government makes wise appointments, the Panel members will be eminently qualified to deal with such issues. By way of contrast, some judges who hear a high volume of family law cases in the Federal Circuit Court have little or no background in family law, or knowledge about family violence or child abuse, prior to their appointment. Of course, they are well-qualified in other respects.

The Panel is not bound by the rules of evidence

Division 12A of Part VII already gives to courts a considerable degree of flexibility, dispensing with at least some of the rules of evidence. The Panel will have more flexibility than courts have under Division 12A. As was explained in the Second Reading Speech:

[10] Section 11LJ.

Unlike the traditional adversarial system, where opposing sides assemble and present their evidence to advocate for a particular outcome, those managing the hearings will undertake inquiries and gather information to promote informed and safe 4 outcomes for families. The rules of evidence will not apply, allowing parties to speak freely to the Panel members. This approach will allow Panel members to investigate and focus on the information and issues most pertinent to the dispute, whilst ensuring that the process is procedurally fair, and vulnerable family members get the support they need.

The proposed section 11LD provides:

(1) In a parenting management hearing:

(a) the procedure of the Panel is within the discretion of the Panel; and

(b) the Panel is not bound by the rules of evidence; and the Panel may inform itself in any way it thinks fit; and

(c) the hearing is to be conducted with as little technicality and formality, and as quickly and economically, as the requirements of this Part and a proper consideration of the matters before the Panel permit; and

(d) the Panel may give directions in relation to the conduct of the hearing.

(2) Subsection (1) is subject to this Part, the Panel rules, the Principal Member directions and the rules of natural justice.

(3) Without limiting paragraph (1)(e), the Panel may direct a party to a parenting management hearing:

. (a) to give such information or documents to the Panel as are specified in the direction; or

. (b) to attend a post-separation parenting program.

(4) In deciding whether to give a direction of a kind mentioned in paragraph (3)(b), the Panel must regard the best interests of the child as the paramount consideration.

Is this a Families Tribunal?

The idea of a multi-disciplinary tribunal to hear parenting disputes is not new; it was proposed by a unanimous Parliamentary committee in its report *Every Picture Tells A Story* in 2003.[11] At that time, the Government chose to fund the Family Relationship Centres instead.[12] One of the difficulties with the committee's proposal was that the Families Tribunal was to be a lawyer-free zone. Yet many people want to be represented by lawyers, and, of course, lawyers play an important role both in narrowing the issues and helping people to settle.

[11] Family and Community Affairs Committee of the House of Representatives, *Every Picture Tells a Story: report of the inquiry into child custody arrangements in the event of family separation* (Canberra: Parliament of Australia, 2003).

[12] See P Parkinson, "Keeping in Contact: The Role of Family Relationship Centres in Australia" (2006) 18 *Child and Family Law Quarterly* 157.

A further problem was that if much of the work in resolving parenting disputes were given to a tribunal, the courts which are already funded and established for this purpose might be left with an inadequate workload. Judges have tenure till the age of 70, whether or not there is work for them to do for which they are appropriately qualified.

It was right for the Government to have rejected the idea of the Families Tribunal as it was presented at the time. The Family Relationship Centres represented a means of reaching many more people with practical assistance for their relationship problems.

The Parenting Management Hearings will not be a replication of the Families Tribunal. Lawyers will not be excluded. The model put to the Government has the involvement of Independent Children's Lawyers to adduce evidence and senior lawyers with family law experience as decision-makers. Law graduates are likely to have roles in assisting with case preparation as well.

Parties will generally not have legal representation at the hearing, but this is because the model is designed to assist those who cannot afford legal representation, rather than giving lawyers a different forum in which to litigate. Lawyers may well assist clients to prepare for the Parenting Management Hearing. The cases that require an intensive forensic examination will remain in the courts, as they should do.

The Bill

The Family Law Amendment (Parenting Management Hearings) Bill provides the legislative framework for the pilot program by creating a new Part IIIAA of the Family Law Act.

General

The Bill is undoubtedly very lengthy. It runs to over 120 pages. The vast bulk of this consists of duplication of sections of Part VII as well as other sections of the Act to do with counselling and mediation.

No doubt the decision to re-enact so much of the Act rather than simply referring to Part VII and modifying its application where necessary, was made out of an abundance of caution. The kind of issues the Attorney-General's Department, in consultation with Parliamentary Counsel, needed to grapple with include that tribunal decisions are not Orders and a tribunal is not a court. So what would otherwise be called 'orders' are called 'parenting determinations' and instead of referring to 'the court', the legislation refers to "the Panel". Even still, it may be that many sections could have been cross-referenced rather than re-enacted, while others are probably unnecessary (such as telling the Panel it needs to have a hearing before making a determination, unless the parties consent to a matter being dealt with on the papers).[13]

These should nonetheless be regarded as minor criticisms. The legislation is workable, and that is probably all that matters at this stage, for a pilot program.

[13] Sections 11L, l1LC.

Legal representation

The decision to allow legal representation with leave is a departure from the idea that these Hearings are intended for self-represented litigants. However it is clear from the EM and the 2nd Reading Speech that the Hearings are intended for self-represented people, and so having legal representation is an exception. Furthermore (and as a revised explanatory memorandum ought to make clear) it is not intended that just because leave is given, the proceedings of the Panel will be converted into a full-dress adversarial legal hearing. In other tribunals, the members engage directly with the parties. They allow the legal representatives to make remarks by way of opening and closing their client's case, and to suggest particular questions be asked. This supportive, rather than representational, role of lawyers, is better suited to the nature of a tribunal of this kind.

One of the challenges for the Panel will be what to do if it is minded to allow one party to have representation while the other one is not allowed to do so. As it stands, the person who alleges violence may be given leave to be represented while the person against whom the allegation is made may not meet the relevant criteria. Granting leave to be represented to one but not the other may create an unfairness in circumstances where his (or her) consent to the process was premised on neither party having legal representation.

If the Government does want to allow legal representation with leave, then fairness dictates that if leave is granted to one, it must automatically be granted to the other – should he or she so wish it. There must be a level playing field.

Recommendation 1

If leave to have legal representation is given to one party, the other must automatically have a right to legal representation as well.

Matters that are excluded

The Panel will not have jurisdiction to hear relocation cases or those involving child sexual abuse allegations. In relation to previous parenting determinations or parenting orders, the *Rice and Asplund* test of significant change of circumstances applies.[14] The court must also consider dismissing the case if there are issues of abuse or family violence. It may also dismiss matters which are too complex for the Panel, or unsuitable for other reasons. In our view, the Government has achieved an appropriate balance between competing considerations in setting these limits.

[14] Section 11NA.

It is important to be clear what the limitations of the Panel are likely to be. It is very doubtful that Panel members will be less qualified to deal with complex cases and those involving issues of abuse or family violence than the courts. The Panel is likely to be highly qualified to deal with such matters. However, Parenting Management Hearings are intended to be short - typically about two hours per case. They are therefore not well-suited to cases where there are to be multiple witnesses subject to lengthy cross-examination.

Our only reservation about this part of the Bill is in relation to the wording of s.11NA(2):

> The Panel must dismiss an application for a parenting determination in relation to a child if the application seeks a change of where the child lives in such a way as to substantially affect the child's ability to live with or spend time with a parent or other person who is significant to the child's care, welfare and development.

The first author has argued previously that relocation cases be excluded for constitutional reasons. However, the constitutional problems apply only to interstate relocations. Increasingly, we are seeing relocation disputes which involve moving less than 100kms. Sometimes the argument is about moving suburbs within the same city. Not infrequently, the reason for the move is because housing is too expensive where the parent is then living. Family breakups cause severe economic dislocation that can lead to the necessity for relocation of the home.

If this subsection is not amended, then the Panel is going to need a hearing before it can determine whether it must dismiss the case – and that is a waste of time for the parties and money for the taxpayer.

We propose instead a simple rule:

> The Panel must dismiss an application for a parenting determination in relation to a child if the application seeks a change of where the child lives which involves a move of more than 100kms from the home of the other parent, or a move to another State or Territory,

Recommendation 2

Section 11NA(2) be amended to provide that an application for a relocation be dismissed if it involves a move of more than 100kms away from the home of the other parent, or an interstate move, and the matter be transferred to the Federal Circuit Court.

> and the move is opposed by the other parent.

Commencement of determinations

Section 11PD provides that the determination does not come into effect until a day specified in the determination. This is an example of a level of detail which could cause difficulties without

any great benefits. It requires the Panel to remember to put in a commencement date for every determination. By way of contrast, court orders take effect from the time they are made unless specified otherwise.

Recommendation 3

Section 11PD(1) be amended to provide that a determination commences operation from the date of the determination unless another day of commencement is specified.