HUNTER VALLEY FAMILY LAW PRACTITIONERS ASSOCIATION

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The Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Submission: Family Law Amendment (Parenting Management Hearings) Bill 2017

Background

I make this submission as President of and on behalf of the Hunter Valley Family Lawyers Practitioners Association (**"the Association"**).

The Association is comprised of a body of family lawyers and barristers in the Newcastle and greater Hunter Valley area of New South Wales, however there are members from further afield throughout Australia.

Members from the Association primarily work out of the Newcastle Registry of the Commonwealth Court, which is recorded as being one of the busiest registries in Australia. The Newcastle Registry is well known for dealing with the most complex matters concerning child abuse, with matters regularly consisting of extreme family violence, drug and alcohol misuse and serious mental health issues.

This submission is made on behalf of the Association and any view expressed herein is not necessarily the views of any one particular member.

Introduction

The Association makes this submission to the Committee on Legal and Constitutional Affairs and more specifically the proposed amendments to *the Family Law Act 1975* (Cth) (the **"Act"**), being the *Family Law Amendment (Parenting Management Hearings) Bill 2017* (Cth) (**"the amendment"**).

The Act is one of the most important and powerful pieces of legislation that the Commonwealth government has enacted. The Act is a vehicle for separated families to access resolution in times of dispute, turmoil and loss.

Since 1975, the Act has undergone significant reform. In particular 'Part VII – Children' has seen amendment after amendment, changing its meaning to reflect the ideals of an evolving society and the political agenda of the government of the day.

Consequently, the Act has become a metaphoric jungle for those who use it. The Act requires judges, lawyers and self-represented litigants, to navigate a complex legal pathway for matters to be resolved. This has no doubt led to angst and bewilderment on those who have engaged in the family law jurisdiction.

It must be said however, the intention of the Act when created in 1975, was not for users to experience complexity and delay when dealing with the court system. Rather, the purpose of the court is stated in the second reading of the Act as being one of speciality, being a body comprised of highly trained judges, informed by highly trained social scientists.

The originating Act principally imposed upon the court a duty to make orders that were in the best interests of the child and this decision was primarily a discretionary one of the relevant judicial officer. Ultimately, matters could be dealt with without the need to traverse a complex legislative instrument.

Overtime, the Act has become a piecemeal of reform.

The originating Act was sequentially numbered 1 through to 123 and was no more than about 120 pages. The Act in its present form, contains a myriad of numbered and alphabetised sections and subsections that span in excess of 500 pages.

The current legislative pathway in determining parenting matters provides for rebuttable presumptions, triggers and complex legal terms and phrases. The proposed amendment does not ameliorate these issues, rather it complicates the Act even further.

For users of the present Act, confusion and frustration is evident. For the court system, time is often spent explaining the Act to self-represented litigants who no doubt struggle to interpret what is being explained to them and for judges and lawyers, time is often wasted in hearings and judgments to explore and address the legislative pathway.

There is a collective will amongst users of the Act for change to ensure that the legislation and the court system remains relevant and outcomes are delivered to the community which are cost effective and timely.

It must be said however, any change must be well considered, supported by evidence based research and holistically provide a solution to the present issues that the jurisdiction faces.

Any change cannot erode the fundamental rights of individuals that utilise the Act and any change to Part VII of the Act must always ensure outcomes that are in the best interests of a child.

The Amendment

The amendment as proposed caused the Association significant concern. These concerns are summarised below:

The origins of the amendment

1. This amendment was first highlight by the then Commonwealth Attorney General, George Brandis, on Budget Night in 2017. The concept of parent management hearings was announced through the appropriation of monies within the budget papers.

2. Prior to this announcement, there was minimal to no consultation with stakeholders about a proposed change to the handling of parenting hearings. Further, scant information was provided to the public after the release of the budget papers.

3. In the Explanatory Memorandum which accompanies the amendment, the government has not demonstrated that there is any current, evidence based research that underpins the legislative reform.

4. As part of the government announcement at or about the time of the Budget, the government justified these hearings following on from a private submission made by an interested party in 2017. This was the only recent 'suggestion' to government about changing the process of parenting hearings. Otherwise, the government had explored these types of hearings following on from the 2003 report, "Every Story Tells a Picture."

5. Ultimately, the government did not adopt parent management hearings as contemplated in the 2003 report. Notwithstanding, the 2003 report is now 15 years old and there have been two major legislative reforms to Part VII of the Act, being in 2006 and 2012 which substantially altered the process in determining parenting cases.

6. It goes without saying that such a fundamental reform to the most significant piece of social policy that the Commonwealth is responsible for, ought not be considered without first having commissioned a report into the operation of the present Act and engaged in extensive consultation with all stakeholders, including judicial officers, social scientists, specialist medical practitioners, mediators and family lawyers.

7. The need for extensive consultation should and must be done before the Government unilaterally amends the Act. The alternative is a further complication of the Act and surrounding legislation, with tacked on additions and amendments as needs are realised. An example of the "fix it up on the way approach" is the labyrinthine Child Support legislation, a source of acute frustration and anger in the community.

Removal of the right of legal representation

8. This is a significant and fundamental change to the area of Family Law, which seriously compromises the right of litigants. The right of legal representation affords individuals an objective and dispassionate voice to articulate their position. Once removed, the rights and freedoms of individuals are limited and access to justice and equality before the law is extinguished.

9. Family law matters are inherently emotional and carry extraordinary consequences for families. On many occasions, litigants are not in a physical or mental state to articulate their case in a logical or persuasive way. This is not a criticism of litigants in the family law system, litigants are charged with emotion and are obviously a witness in their own case.

10. Litigants need a reasonable and skilled source of personal assistance to come to terms with what has often been the most significant event in their lives; to their security, future and happiness and that of their children. Every case is different, and advice must be tailored to individual clients.

11. Paradoxically, the amendment arbitrarily imposes upon litigants within their own hearing, the need to not only be a witness in their case, but also their own advocate.

12. Whilst leave can be granted for a party to be legally represented, there is a real chance that some litigants will engage in these hearings on their own, without legal representation and fail to advance to the Tribunal, relevant and potentially key evidence in the determination of their case.

13. This will mean that in some instances, evidence of drug and alcohol abuse, mental health issues and overt or covert instances of family violence will be concealed from the fact finder and decisions made which potentially pose risk to a child or the litigant in any future parenting arrangement.

14. Whilst there are provisions for leave to be granted for legal representation to rectify power imbalances in the conduct of hearings, the role of any lawyer who is granted leave to appear in the hearings is subject to serious limitations.

15. Further, if leave is granted for a party to have legal representation to overcome a potential power imbalance, there is no apparent right for opposing litigant to have legal representation. Naturally, this creates a legal imbalance which cannot be rectified without each party having unfettered access to an advocate. Anything other than this, will see one party seriously disadvantaged in the hearing of their matter which impinges upon their common law right to representation when they are before the law.

16. It is the concern of the Association that the removal of a persons' automatic right to legal representation will, in many instances, result in victims of family violence being left in a situation where they are required to deal directly with the alleged perpetrator. Lawyers provide a necessary barrier between a victim of family violence and the alleged perpetrator, resulting in the case of an otherwise disadvantaged litigant being well articulated and free from fear of reprisal.

17. Despite a litigants' ability to seek leave to be legally represented, such a system relies on a victim self-reporting his or her fear of the alleged perpetrator in circumstances where social science has well established that this is unlikely to happen in almost 50% of cases.

18. Simply, there is no evidence that the removal of a right to legal representation will achieve a better outcome for the litigant. Whilst it may be 'cheaper' for litigants in the short term, the costs for incorrectly determined parenting arrangements is indeterminable, both for the litigant and the community at large.

19. The amendment does nothing to redress an imbalance of power between litigants, including necessarily educating them as to what evidence they should adduce to best advance their case and how they might gather that evidence. Only then can the government be assured that litigants can feel that they have had a fair hearing. This is an essential element for any system of justice.

20. The experiences of self-represented participants in the Administrative Appeals Tribunal in relation to child support reviews, where there is no automatic right to representation goes some way to illustrating the storm of disaffected litigants that the amendment will generate.

21. The removal of a person's automatic right to legal representation and equality before the law is an affront to entrenched common law rights and freedoms which Australia has a long and proud history of acknowledging and applying.

22. Absent and evidence based research that the removal of a person's right to representation will achieve outcomes that are in a the best interests of a child, this proposed change ought to be extinguished.

<u>Inquisitorial Tribunals</u>

23. The move away from an adversarial system to resolve parenting disputes to one of an inquisitorial tribunal is a major departure from the status quo. Again, there is no current, research based evidence that supports such a notion.

24. The Panel of members who will determine parenting cases will be drawn from no more than lawyers and social scientists, which will be a lesser qualification than presiding judges that determine parenting cases presently.

25. The complex operation of Part VII of the Act will confront many on the Panel as being challenging at the least. The likelihood that the Act will be misapplied or an error of fact arising from the hearing is likely.

26. The consequence for litigants will be that some parenting outcomes will be incorrect. Whilst there are avenues of appeal, such creates a degree of complexity, delay and expense which is contrary to the purpose of the amendment.

27. Whilst matters involving child sexual abuse will be screened out of the hearings, such is just one of a gamut of risk that children are exposed to in separated families. The risk extends to matters of drug and alcohol abuse, problem gambling, mental health issues, parental alienation or alignment and instances of family violence and its effects. These are just a few of the matters that require complex assessment by the court to ensure appropriate parenting orders are made for a child.

28. The explanatory material that gives context to the amendment does not explain how the hearings will be conducted, other than there being greater involvement of the Panel Members to make direct lines of inquiries which may remove the need for cross examination and the removal of the application of the rules of evidence. It is intended that most of the matters will be determined 'on the papers.'

29. It is too common that many self-represented litigants experience literacy difficulties. This issue is often concealed by a litigant as they report feeling shame. In a system where trial by affidavit is in operation and a person has not had the advantage of legal representation, that person is automatically disadvantaged.

30. In furtherance to the above point, where one party to the relationship has greater literacy or financial resources to engage a lawyer for the purpose of preparing their affidavit for the intended hearings, that person will likely have a significant advantage in succinctly presenting their case on paper. This situation creates enormous prejudice to the other party in the relationship who may have inferior literacy skills or financial resources to advance their case. The model which is presented within the amendment, by reason of truncated hearings and the removal of advocates, creates an extraordinary prejudice and infringes upon the notion of natural justice.

31. In addition, it would seem that there are no provisions for litigants within the hearings, to have access to subpoenaed material which would allow assertions made by a party to be tested. Where there is an intention on the part of Panel Members to exclude cross examination and make decisions 'on the papers' such will preclude a rigorous assessment of the evidence and it will likely see disenfranchisement for litigants believing that they have not fully been heard as the evidence remains substantially untested.

32. The concept of confronting an accuser should not be read in a pejorative way. Numerous allegations and assertions are made in parenting cases which are critical in determining what arrangement should be in place to promote a child's best interests. These allegations must be canvassed to determine where the truth lies and what arrangement is optimal for the child.

33. Presently, interim hearings are performed 'on the papers' with cross examination only permitted in extraordinary instances. It is widely commented on by judicial officers that outcomes which are

determined 'on the papers' cause Judges great angst in making decisions given evidence is untested and findings are tenuous without further, more thorough exploration of the evidence. Often, interim findings are contradicted or reversed at a final hearing once the evidence has been tested by reason of cross examination and a witness being challenged by evidence produced under subpoena.

34. In its present form, the proposal under the amendment for the conduct of hearings will see allegations and assertions remaining untested. This will have a significant bearing on the outcome of cases as Panel Members will need to weigh and balance allegations and assertions in a vacuum of evidence, principally limited to what a person has written in an affidavit.

35. It stands to reason that a Panel charged with delivering outcomes for litigants expeditiously, will ultimately make decisions that may be made without having all of the relevant material before it or otherwise failing to give due consideration to certain pieces of evidence.

36. Any decision made in this context, seriously runs the risk of not being in a child's best interest, possibly disastrously so.

The underlying legislation

37. The amendment creates a new 'part' of the Act, being Part VIIAA which selective copies large pre-existing sections of Part VII. In addition, the amendment provides for new sections, such as section 11JB which essentially mirror pre-existing sections of the current Act.

38. As outlined earlier, one of the major complaints made by Judges, lawyers and self-represented litigants is the difficulty of navigating the current Act. The amendment does not simplify the legislative pathway.

39. Thus, it cannot be so that the new legislative provisions that underwrite the amendment will provide Panel members a 'faster' way in applying the law in determining a parenting dispute.

40. Instead, the amendment reaffirms the current legislative process in determining a parenting matter, save that hearings are conducted in a truncated manner where the access to evidence is curtailed.

41. If anything, the creation of a new Part and more sections of the Act will simply confuse litigants. This arises where there are prospectively two Parts to the Act that will determine parenting matters.

42. For an Act which is already overcomplicated and overwhelming for self-represented litigants to understand, the proposed amendment simply compounds the issue of complexity.

Proposal

The Association believes that the introduction of the amendment without any recent evidence based research to underpin such radical reform of the Act is fraught with danger. Any major legislative reform to the Act and in particular to Part VII of the Act, has serious and far reaching consequences for children and families who confront separation.

Making a decision for a child that may stand to operate for the entirety of the child's minority should not be rushed. The consequences of the decisions under the Act are significant. It is counter-intuitive to say that a quick outcome will be in a child's best interest. Rather, decisions for children who range in ages from 1 week to 17 years of age, require thorough and careful thought in order to reach the maxim of what is in the best interest of the child.

The issue with the Act is that it is a patchwork of ill-conceived reform and quick fixes. Various amendments have created a more complex system. The changes to the Act have not been matched by the appropriate funding of the court system and timely replacement of Judges and Justices of the respective courts.

Reforms to the jurisdiction have long been targeted at structural change to make matters faster and cheaper for litigants. A prime example of this is the introduction of the Federal Circuit Court. This, in practise, makes a great deal of sense, but if long term funding and resourcing is not made available by the government to support the operation of the system, it progressively slows and becomes unresponsive.

The same can be said to this proposed tribunal. If the amendment is passed, long term funding must be continued to make is sustainable. Inevitably, if the government of the day fails to provide adequate funding for the amendment and its subsidiary cause, the amendment will become inefficient and it will ultimately fail.

This begs the question; won't we end up back where we started?

The more prudent approach would be to utilise the appropriated money for the amendment to fund immediate shortfalls in court resources to assist in hearing the backlog of cases. A longer term strategy needs to be considered, which is best done through the family law system inquiry.

Whilst the Association supports outcomes for litigants which are quicker and cheaper, the Association says that broadly this proposition can be achieved through other means that are less invasive than the present amendment. For example, the Association would support:

a) Holistic reform to the Act to make it easier to navigate and simpler to understand;

b) The Rules of the relevant courts being aligned or merged;

c) The Courts being provided with increased funding to ensure appropriate judicial resourcing that can handle matters promptly;

d) Increased funding for Legal Aid Commissions throughout all States and Territories, along with Community Legal Centres in terms of Commonwealth funding of family law matters; and

e) The roles of Registrars in the Federal Circuit Court are expanded to share the load of simpler parenting matters with Judges. This would allow some matters to be streamlined to finality where parties consent to same.

Of the above few points, there is the proposal for increased funding to the Courts and Legal Aid Commissions and the like. This financial outlay must be compared to the long-term productivity savings which will be generated where effective outcomes are delivered to separated families in a timely way.

An increase in the funding for Legal Aid and Community Legal Centres will assist socially and economically disadvantaged litigants navigate parenting matters through the provision of comprehensive and considered legal advice, assistance in drafting court documents and providing representation for litigant at hearing.

In turn, matters will be dealt with more expeditiously and determined on all of the evidence relevant to the matter. Outcomes will therefore prevail which will be better for families who would have otherwise had to struggle through the proceedings on their own.

These are just a few of the many examples of ways in which the family law system could achieve outcomes for litigants more quickly and cost effectively than what the present system allows. The Association will make more fulsome submissions to the larger family law inquiry to expand upon the above.

Conclusion

The Association opposes the introduction of the amendment.

It is the view of the Association that the amendment should not be enacted until after this major review has been undertaken.

It would seem logical that the Government should make no major change to the Act until it has considered more broadly such other changes to the Act that may achieve a more efficient area of law.

Yours sincerely,

Christopher White
President