

Chapter 1

Introduction and background

1.1 On 7 December 2017 the Senate referred the Family Law Amendment (Parenting Management Hearings) Bill 2017 (the bill) to the Legal and Constitutional Legislation Committee (the committee) for inquiry and report by 26 March 2018.

1.2 The Senate Selection of Bills Committee recommended that the bill be referred for inquiry for a number of reasons, including to:

- provide Senators with an opportunity to consider what, in the family law setting, is an innovative proposal tailored to the particular needs of self-represented litigants;
- address issues of concern to relevant stakeholders [that] require opportunity for feedback;
- consider expert views on impacts and possible improvements;
- address concerns about the bill dramatically affecting the manner in which proceedings are conducted; and
- assess potential impacts on families experiencing family violence.¹

Background and purpose of the bill

1.3 On 6 December 2017, the Assistant Minister to the Prime Minister, Senator the Hon James McGrath introduced the bill into the Senate. In his second reading speech he outlined the nature and purpose of a new pilot program to resolve family law disputes, the Parenting Management Hearing Panel (PMH, or Panel). This bill, he stated, would create:

...a new statutory authority designed to offer self-represented litigants a more flexible and inquisitorial alternative to the court process. During the pilot phase, there will be no costs charged to families who choose to participate.

... A key objective of the Panel is to give to parents who would otherwise be in a court without legal representation the option to obtain a binding decision about parenting arrangements in a quick, fair, just, informal and economical way, all the time ensuring that decisions are made in the best interests of children and that safety is prioritised.²

1 Senate Standing Committee for the *Selection of Bills, Report No. 15 of 2017*, 7 December 2017, Appendix 8.

2 Senator the Hon James McGrath, Assistant Minister to the Prime Minister, *Senate Hansard*, 6 December 2017, p. 9913.

1.4 The Explanatory Memorandum notes the initiative's inclusion in the 2017–18 Commonwealth Budget, as well as the intent of the PMH, which is:

...aimed at transforming the family law system to support families to resolve their family law disputes as quickly as possible, while adequately managing risks.

1.5 The Explanatory Memorandum provides an outline of the general nature, purpose and function of the PMH:

The Panel would be an independent statutory authority that would conduct hearings and make binding administrative determinations in respect of parenting arrangements for children—similar to 'parenting orders' made by a court under the *Family Law Act 1975* (the Act). The parenting management hearings model would encourage and support families to resolve their parenting disputes in a prompt and informal way, through a more user-friendly and less-adversarial forum than the traditional court system.

Parenting management hearings will be a consent-based forum, and parties cannot be compelled to participate. Families will still be required to try to resolve their disputes themselves, where possible and appropriate, through family dispute resolution services.³

1.6 The Explanatory Memorandum suggests that this initiative would benefit not only separating couples who choose to resolve their disputes through the PMH, but also their children:

Research has consistently shown that reduced parental conflict after separation and the timely resolution of parenting disputes is beneficial for children and families. Unlike the traditional adversarial system, where two opposing sides present their case, those managing the hearings will undertake inquiries and gather information to promote informed and safe outcomes for families.⁴

1.7 The Attorney-General's Department (AGD or department) noted that the PMH pilot would complement the ongoing review of the entire family law system being undertaken by the Australian Law Reform Commission (ALRC), which was commissioned by the government in September 2017 and due to report in March 2019.⁵

Key provisions and principles

1.8 The bill would establish the PMH as a pilot program, initially in the Sydney suburb of Parramatta, with second location to be announced in late 2018.⁶

3 Explanatory Memorandum, p. 1.

4 Explanatory Memorandum, p. 1.

5 *Submission 26*, p. 2. This review is discussed at greater length in chapter 2 of this report.

6 Explanatory Memorandum, p. 2.

1.9 The Explanatory Memorandum states that the PMH would be underpinned by two key principles, which are set out in the bill as Objects:

The first principle is that the hearings will be fair, just, economical, informal and prompt. The second principle is that the best interests of the child will be the paramount consideration. This second principle is consistent with the key objective underpinning existing Part VII (Children) of the Act.⁷

1.10 Additionally, the Explanatory Memorandum states the PMH would have the capacity to recognise and address family violence, as it is a common factor of family law cases. It outlines a number of ways that the Principal and other Members of the PMH would be able to recognise and consider such cases appropriately:

Recognising that family violence is a common experience among separated parents, with a majority of parents reporting either emotional or, to a lesser extent, physical abuse, it is critical that any forum established to resolve parenting disputes is equipped to identify and respond safely and effectively to family violence.

The Principal Member appointed to lead the Panel would be required to have specialist knowledge of, and experience in, dealing with matters relating to family violence. Further, the Bill would ensure that in each case that comes before it, the Panel will give careful consideration to the family's individual circumstances, and will make an assessment about the capacity of the Panel to manage any safety risks for the family through the forum. The Panel will not be empowered to deal with applications involving allegations of child sexual abuse.

Under a more inquisitorial model, Panel members would have greater control over hearings, directing lines of enquiry and the focus of the hearing; questions will be asked by Panel members, avoiding the potential for cross-examination of a victim by a perpetrator of family violence.⁸

1.11 The proposal also provides for participants in hearings to be supported by other services, such as counselling and family violence services, to 'minimise the intensity and duration of conflict', including for children.⁹

1.12 The Explanatory Memorandum also outlines the key features of the bill as follows:

- to provide a forum for resolving less-complex family law disputes between self-represented parties;
- to resolve matters in a fair, just, economical, informal, less-adversarial and prompt way;
- to ensure the best interests of the child is the paramount consideration;

7 Explanatory Memorandum, p. 2.

8 Explanatory Memorandum, p. 1.

9 Explanatory Memorandum, p. 2

- to ensure parties are assisted by support services, integrated with the Panel, where appropriate, and
- to ensure that the outcomes of the parenting management hearings will be binding on parties and enforceable by a court.¹⁰

1.13 The bill would make consequential amendments to a number of other acts:

- *A New Tax System (Family Assistance) Act 1999*;
- *Australian Citizenship Act 2007*;
- *Australian Passports Act 2005*;
- *Federal Court of Australia Act 1976*;
- *Migration Act 1958*;
- *My Health Records Act 2012*;
- *National Disability Insurance Scheme Act 2013*;
- *Social Security Act 1991*; and
- *Social Security (Administration) Act 1999*.¹¹

1.14 The Explanatory Memorandum is clear that the PMH has not been designed to replace the Family Court system, but simply to:

...provide access to a different type of forum for parents in conflict and encourage a cultural shift away from the courts as the default arbiter of last resort. While the pilot may help to ease the caseload of the courts, it is not intended to replace the courts or other important services that help parents to resolve their disputes.¹²

Provisions in greater detail

Parenting Management Hearings Panel

1.15 The bill would establish the PMH Panel as a statutory authority under proposed section 11T. According to the Explanatory Memorandum, it would be able to:

receive and consider applications for parenting determinations (see new Subdivision A of Division 2 of Part IIIAA);

conduct pre-hearing conferences in relation to applications for parenting determinations (see new section 11KD of Part IIIAA);

conduct parenting management hearings to consider such applications (see new Subdivision B of Division 2 of Part IIIAA), and

10 Explanatory Memorandum, p. 2.

11 Explanatory Memorandum, pp. 2–3.

12 Explanatory Memorandum, p. 2

make parenting determinations (under new section 11P).¹³

1.16 Under new section 11JG, the panel would be able to make decisions (including the discharging, varying, suspending, or reviving of a determination by the panel) on the following types of matters:

- (a) the person or persons with whom a child is to live;
- (b) the time a child is to spend with another person or other persons;
- (c) the allocation of parental responsibility for a child;
- (d) if 2 or more persons are to share parental responsibility for a child—the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;
- (e) the communication a child is to have with another person or other persons; and
- (f) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.¹⁴

1.17 New subsection 11JG(3) of the bill prevents the panel from making parenting determinations in relation to the provision of medical procedures for a child or in relation to the parentage of a child.

1.18 The procedure for the conduct of parenting management hearings provides that:

- (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.¹⁵

1.19 A party to a PMH may appeal a decision or determination of a Panel, only on a question of law, to the Federal Circuit Court (proposed section 11Q). The Explanatory Memorandum clearly states that appeals can only be made on a question of law, rather than merits:

Merits review will not be available. This is intended to ensure there is an appropriate level of finality following a parenting determination to promote stability for children affected by a determination. This takes into account the required consensual nature of the forum and the objective of the forum to be a quicker and more informal way of obtaining a binding decision in respect of a parenting dispute. The Bill also provides that a parenting determination may be reconsidered by the Panel or a court, should there be

13 Explanatory Memorandum, p. 93.

14 Proposed subsection 11JG.

15 Proposed section 11LD.

a significant change in circumstances in relation to the child who is the subject of the parenting determination.¹⁶

Composition of the panel

1.20 Each PMH must be heard by a Panel made up of a Principal Member and other Panel members, who are appointed by the Governor-General (proposed sections 11U and 11UA(1)).

1.21 To be eligible for appointment as a Principal Member, the person must have been enrolled as a legal practitioner for at least five years and have extensive knowledge and skills including in the matters of family law and family violence (proposed subsection 11UA(2)).

1.22 A qualified legal practitioner may also be a Panel member provided they have been enrolled as a legal practitioner for at least five years and have knowledge of and experience in matters of family law (proposed subsection 11UA(3)).

1.23 Other Panel members, without a legal qualification, are required to have at least five years' experience working with families or children, as well as having specialist knowledge in one or more of the following areas: psychology; counselling; social work; family dispute resolution; community work; family violence; mental health; drug or alcohol addiction; child development; or any other field relevant to the duties of a Panel member (proposed subsection 11UA(4)).

1.24 Each Panel must consist of at least one legally qualified panel member (Including the Principal Member) and at least one non-legally qualified panel member (proposed subsection 11VB(1)).

1.25 On the qualifications and constitution of the panel, the AGD submitted:

The multi-disciplinary nature of the appointment requirements reflects that many families presenting to the family law system have multiple needs. Recent research by the Australian Institute of Family Studies has found that for families using the courts to resolve their family law disputes, 38.1% presented with four or more risk-related or complex issues (for example, family violence, safety concerns, substance misuse, problematic social media or pornography use, gambling). Families using the courts presented with an average number of three risk-related or complex issues.

Given the complex profile of families using the court system, in order to assess whether a matter is appropriate for a PMH, the Panel must be skilled enough to identify those complexities. While it is intended that the Panel deal with less complex family law parenting disputes, this does not equate to cases absent all complexity...

The qualification requirements set out in the Bill reflect the importance of having highly-skilled experts in a range of disciplines on the Panel, who

will be well placed to identify risks and conduct proceedings in a way that is appropriate to the circumstances of each individual matter.¹⁷

Parties to a parenting determination

1.26 The bill provides that the following people would be able to apply to the Panel for a parenting determination: a parent of a child; a child; a grandparent of a child; or a person concerned with the 'care, welfare, or development of the child' (proposed section 11K).

1.27 A parenting management hearing can only be conducted with the consent of each person with parental responsibility of the child (proposed section 11KC). Where consent has not been provided, the Panel would dismiss the application (proposed subsection 11NA(1)).

1.28 Where the parties have consented to a determination without appearing before the Panel, and if it appears to the Panel that the matter can be adequately determined without the parties appearing before the Panel, the Panel may make a parenting determination on the papers (proposed section 11LC).

1.29 In limited circumstances a person can seek leave of the Panel for legal representation when appearing before the Panel (proposed section 11LJ). This includes where there are reasonable grounds to believe that there has been family violence, or a risk of family violence to a party and the capacity of a party to effectively participate in the hearing without legal representation.

1.30 Where it appears to the Panel that a child's interest should be independently represented by a lawyer, the Panel may direct that child's interest to be represented by a lawyer (proposed section 11LK). The role of the independent lawyer is to act impartially to the parties of the parenting management hearing and to ensure that the views of the child are put before the Panel (proposed subsection 11LL(5)).

Jurisdiction of the Panel

1.31 The bill lists the circumstances in which the Panel must dismiss an application for a parenting determination (proposed section 11NA), including: where an application is for the relocation of the child (proposed subsection 11NA(2)); when the application alleges child sexual abuse or risk of child sexual abuse (proposed subsection 11NA(3)); or when relevant court proceedings are instituted (proposed subsection 11NA(7)).

1.32 Additionally, the Panel has the flexibility and discretion to dismiss an application for a parenting determination 'if the Panel is satisfied that it is appropriate in all the circumstances to do so' (proposed subsection 11NB). This decision may be based on:

- (a) the complexity of the matters for consideration by the Panel;
- (b) the capacity of the Panel to manage any risks relating to the safety of the parties or the child;

(c) the capacity of the Panel to determine the matters for consideration in a manner consistent with the objective of the Panel referred to in subsection 11TA(1);

(d) the capacity of a party to effectively participate in the parenting management hearing, having regard to any power imbalances between the parties or any other relevant factor;

(e) if a family violence order applies, or has applied, to the child or a member of the child's family—any relevant inferences that can be drawn from the order;

(f) any other matter that the Panel considers relevant.¹⁸

1.33 Where the Panel suspects there has been abuse of, or risk of abuse of the child, or family violence or a risk of family violence by of the parties, the Panel must consider whether to dismiss an application for parenting determination (proposed subsection 11NB(3)).

1.34 Additionally, the Panel may dismiss an application for a parenting determination in the following circumstances:

- if consent of a party to the application was obtained by fraud, threat, duress or coercion (proposed section 11NC);
- if the Panel is satisfied that the application was frivolous, vexatious, or an abuse of the process of the panel (proposed section 11ND);
- if there has been a failure by a party to proceed with the application (proposed section 11NE); and
- where there has been a written request by a party that the application be dismissed, and where the Panel is satisfied that this is appropriate (proposed section 11NF).

1.35 At any stage of a parenting management hearing, the Panel may direct the parties to the hearing to attend counselling, attend family dispute resolution, or that one or more parties attend an appropriate course, program or other service (proposed section 11MC).

Consideration of the best interest of the child

1.36 Part VII of the *Family Law Act 1975* (the Act), outlines the framework that courts must apply when considering the best interest of the child. The Parenting Management Explanatory Memorandum notes that the bill is consistent with current family law provisions, as this part of the Act would continue to apply to PMH processes.¹⁹ The bill states that PMH considerations in relation to the best interests of the child include:

18 Proposed subsection 11NB(2).

19 Noting, in particular, its consistency with 60B of the Family Law Act. Explanatory Memorandum, p. 37.

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- that the Panel have regard to the kinship obligations and practices of the child's Aboriginal or Torres Strait Islander culture (proposed section 11JA);
 - as a primary consideration the panel should have regard to the benefit of the child in having a meaningful relationship with both parents, and 'the need to protect the child from physical or psychological harm', however, that greater weight should be given to the latter (proposed section 11JB); and
 - other considerations listed at proposed subsection 11JB(4), including the views expressed by the child, and the nature of the relationship of the child with each of the parents.

Panel rules and directions

1.37 The minister may, by legislative instrument, make rules relating to receiving referrals of matters, the transfer of a matter to a relevant court, or the allowances or fees to be paid by the Commonwealth or other persons to witnesses appearing at a parenting management hearing (proposed subsection 11SB(2)). However, the minister cannot make rules that:

- (a) create an offence or civil penalty;
- (b) provide powers of:
 - (i) arrest or detention; or
 - (ii) entry, search or seizure;
- (c) impose a tax;
- (d) set an amount to be appropriated from the Consolidated 16 Revenue Fund under an appropriation in this Act;
- (e) directly amend the text of this Act.²⁰

1.38 The Principal Member is responsible 'for ensuring the effective, orderly and expeditious discharge of the business of the Panel' (proposed section 11V). The Principal Member may give directions 'in relation to the practice and procedure of the Panel, and the conduct of parenting management hearings' (proposed subsection 11VA(1)). The Principal Member directions may deal with the following matters:

- (a) the requirements for making applications to the Panel;
- (b) the form and manner in which, and the time within which documents may or must be given to the Panel;
- (c) arrangements for assessing the suitability of, and risks associated with, applications for parenting determinations;
- (d) procedures for amending applications for parenting determinations;
- (e) matters relating to pre-hearing conferences;
- (f) management hearings;
- (g) the arrangement of the business of the Panel;

20 Proposed subsection 11SB(3).

- (h) the Panel members who are to conduct parenting management hearings;
- (i) the places at which the Panel may sit.²¹

1.39 The Principal Member is also able to make decisions in cases where the panel is unable to make a majority decision. The department stated:

The bill provides that, in the case of the two-person composed panel, the presiding member's decision would prevail. In the case of three, where there might be a majority and someone in the minority, the majority decision would prevail.²²

Compatibility with human rights

1.40 According to the Explanatory Memorandum, the bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.²³

1.41 The Explanatory Memorandum does note that a number of human rights issues are engaged by the bill over several international agreements to which Australia is a party. However, the Explanatory Memorandum concludes:

The Bill is compatible with human rights because it promotes the protection of human rights, particularly the best interests of the child in the CRC. To the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to achieve the legitimate aims of the Bill and the Act.²⁴

Comment made by the Senate Scrutiny of Bills Committee

1.42 The Senate Scrutiny of Bills committee asked for the Attorney-General to provide more information on the bill's inclusion of no-invalidity clauses and reversal of the evidential burden of proof in some cases. More specifically, the committee sought the Attorney-General's:

- [d]etailed justification for including no-invalidity clauses in proposed subsections 11LG(8), 11PB(8) and 11PC(7) of the bill, which mean that a failure to inform the Panel of relevant matters, or a failure by the Panel to provide reasons for, or explain the consequences of, making a parenting determination, will not invalidate a parenting determination²⁵; and

21 Proposed subsection 11VA(2).

22 Ms Ashleigh Saint, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, 23 February 2018, p. 44.

23 *Explanatory Memorandum*, p. 4.

24 *Explanatory Memorandum*, p. 29.

25 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2018*, 7 February 2018, p. 59.

- advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in some provisions of the bill, by reference to the *Guide to Framing Commonwealth Offences*.²⁶

1.43 The Scrutiny Committee reported on these matters on 21 March 2018.²⁷

Financial implications

1.44 The Explanatory Memorandum states that the 2017–18 Budget allocated \$12.7 million over four years to implement this measure for trials of the PMH at two locations, one in Parramatta and the other yet to be determined.²⁸

Conduct of the inquiry

1.45 This bill was referred to the committee for inquiry at the same time as the Family Law Amendment (Family Violence and Other Measures) Bill 2017 (Family Violence bill). The committee is due to table its report into that bill on 20 April 2018.

1.46 Although these bills would both make amendments to Australia's family law framework, the committee undertook separate inquiries to give each bill due consideration, and is reporting on the bills separately. That said, it should be noted that several submitters made a single submission to both inquiries, with the committee's approval. The committee also undertook two hearings in Sydney and Melbourne, at which some witnesses gave evidence on both bills.

Submissions and public hearings

1.47 Details of the inquiry were advertised on the committee's website, including a call for submissions to be received by 7 February 2018. The committee also wrote directly to a number of relevant individuals and organisations inviting them to make submissions.

1.48 The committee received 32 submissions, which are listed at appendix 1 of this report. All submissions are available in full on the committee's website, except two submissions accepted in confidence.

1.49 The committee held two public hearings on 21 February 2018 in Sydney and on 22 February 2018 in Melbourne.

Structure of this report

1.50 This report consists of two chapters:

- This chapter sets out a brief background and overview of the bill's intent and provisions, as well as the administrative details of the inquiry.

26 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2018*, 7 February 2018, p. 62.

27 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, 21 March 2018, pp. 190–206.

28 The committee's website can be found at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs

- Chapter 2 outlines the provisions of the bill in more detail, discusses matters raised by submitters and witnesses about the proposed amendments, and outlines the committee's views.

Acknowledgements

1.51 The committee thanks all organisations and individuals that made submissions to this inquiry, as well as those that gave further evidence at public hearings.