

Chapter 2

Issues and concerns raised

2.1 This chapter outlines the key issues raised in submissions received by the inquiry and by witnesses giving evidence at hearings, and also sets out the committee's views and recommendations.

Support for the bill

2.2 Many submissions were favourable about the proposed PMH process, particularly in its efforts to move resolution of parenting issues to an inquisitorial—rather than adversarial—format. For example, Relationships Australia Victoria (RAV) submitted:

RAV believes that the Parenting Management Hearings Panel, staffed by members with expertise in family law and co-occurring complex issues, is a constructive and viable option for less adversarial resolution of disputes relating to children. In particular, the alignment with the existing principles and Best Interests of Children contained in the *Family Law Act 1975*, and the safety provisions detailed in the Bill, could provide vulnerable parents and children with determinations to support safety and well-being.¹

2.3 The Eastern Domestic Violence Service (EDVOS) also noted the benefits of such a shift:

Essentially the adversarial system has not worked. Pitting one parent against the other leads to greater conflict between parents, creating a negative and irreparable impact on their parenting relationship and causes harm to their children. Moreover, we find that the adversarial system is embraced by people with high conflict behaviours, in particular coercively controlling fathers who thrive in it.²

2.4 Some evidence noted potentially positive effects of the PMH on the court system more generally. For example, Ms Kylie Beckhouse, the Director of Family Law, Legal Aid New South Wales (LA NSW), suggested that:

Our lawyers are well aware of the strains facing the family law system and the delays being experienced by those seeking a court adjudication. The impact of these delays on children we represent cannot be underestimated. We therefore welcome any measure that will lead to a speedier, more cost effective and safe resolution of family law disputes. We sincerely hope that some of the cohort of families who are currently stuck in the family law court system will be eligible for parenting management hearing processes so that some pressure is taken off the existing system.³

1 *Submission 6*, p. 3.

2 *Submission 11*, p. 2.

3 *Proof Committee Hansard*, 22 February 2018, p. 17.

2.5 The AGD cited a number of parliamentary reviews and other expert opinions that supported the Commonwealth working towards a tribunal-based system, including for cases involving family violence.⁴

2.6 Others endorsed the expertise and experience of the Principal and other Members of Panels stipulated in the bill, to bring a range of perspectives to the decision-making of panels.⁵ For example, RAV submitted that the Panel:

...staffed by members with expertise in family law and co-occurring complex issues, is a constructive and viable option for less adversarial resolution of disputes relating to children. In particular, the alignment with the existing principles and Best Interests of Children contained in the *Family Law Act 1975*, and the safety provisions detailed in the Bill, could provide vulnerable parents and children with determinations to support safety and well-being.⁶

2.7 The Commissioners for Children and Young People from Western Australia and South Australia particularly noted support for the child's right to be heard in the PMH process contained in the bill.⁷

2.8 The committee noted that the overwhelming majority of evidence received for this inquiry supported broad reform of the family law system and consideration of alternatives to the existing court processes. Some submitters and witnesses supported a move to a less adversarial, consent-based model of dispute resolution, even if they did not support the bill currently being considered.⁸

Concerns raised

2.9 A number of concerns were raised by witnesses and submitters that will be discussed in turn.

Timing of the pilot program

2.10 On 27 September 2017 the former Attorney-General, Senator the Hon George Brandis QC, commissioned the Australian Law Reform Commission (ALRC) to undertake a comprehensive review of the family law system and report

4 See *Submission 26*, pp. 3–4, citing: House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story Report* (2003); House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into A better family law system to support and protect those affected by family violence* (2017); Family Court of Australia, *Less Adversarial Trial Handbook* (2009); and Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protections Systems* (2016).

5 For support in submissions see, for example: EDVOS, *Submission 11*, p. 2; Women's Legal Services Australia (WLSA), *Submission 17*, p.12; and RAV, *Submission 6*, p. 3.

6 *Submission 6*, p. 3.

7 See respectively *Submission 1*, p. 1 and *Submission 3*, p. 1.

8 For example, see the views expressed by Rape and Domestic Violence Services Australia (R&DVSA), *Submission 10*, p. 1; and Domestic Violence Victoria (DV Vic), *Submission 12*, pp. 2–3.

by 31 March 2019.⁹ Some evidence received by the committee argued in favour of this review running its course before the commencement of the pilot programs looking to improve parts of the family law system.¹⁰ For example, the Australian Human Rights Commission (AHRC) argued:

While there have been a number of inquiries into family violence and family law over the past decade, the Commission considers that the ALRC review provides a unique opportunity to address a broad range of concerns about the implementation of children's rights across the whole family law system...The operation of the Parent Management Hearings may raise complex issues that will benefit from a consideration by the ALRC in its review of the family law system.¹¹

2.11 Similarly, the Family Law Section (FLS) of Law Council of Australia (Law Council) suggested that the PMH initiative represented a 'radical departure' from the existing family law system, and so argued:

The FLS finds it difficult to understand why the Government might choose to embark now, with limited review or research about changes of this magnitude, when the ALRC has been tasked with undertaking a 'broad and far reaching' review focusing on 'key areas of importance to Australian families'.¹²

2.12 The then-Attorney-General addressed this issue in the Senate on the day the bill was introduced to Parliament:

The fact that we're undertaking such a comprehensive review must not arrest or abate more immediate needs for law reform. There are two the government identified and announced in the budget, one of which you have referred to—that is, parenting managing conferences. This is a pilot program, and I'm at pains to make that point. We are running two pilot programs. The first is to be commenced in the Parramatta registry in the middle of next year, and the second is to be commenced at a location yet to be announced at the end of next year. We are piloting a new mode for the resolution of disputes over children. It is paramount that the interests of children, when parents are separating, are treated with all the seriousness, care and concern

9 Senator the Hon George Brandis QC, Attorney-General, *First comprehensive review of the Family Law Act*, Media Release 27 September 2017, available at www.alrc.gov.au/inquiries/family-law-system/terms-reference (accessed 8 March 2018).

10 See, for example: Hunter Valley Family Law Practitioners Association (HVFLPA), *Submission 4*, p. 2, AHRC, *Submission 7*, pp. 4–5; People with Disability Australia (PWDA), *Submission 8*, p. 3; Australian Women Against Violence Alliance (AWAVA), *Submission 9*, p. 1; R&DVSA, *Submission 10*, p. 2; DV Vic, *Submission 12*, p. 2; WLSA, *Submission 17*, p. 5; safe steps, *Submission 18*, p. 4; Law Council, *Submission 20*, p. 5; Ms Zoe Rathus AM, *Submission 21*, p. 1; and Victorian Family Law Bar Association (VFLBA), *Submission 23*, p. 2; and Domestic Violence Action Centre (DVAC), *Submission 24*, p. 2.

11 *Submission 7*, pp. 4–5.

12 *Submission 20*, p. 5.

that they deserve to be treated with. These are pilot programs. They don't detract from the more comprehensive review...¹³

2.13 The AGD also noted the ALRC review would take time to complete and implement, and so it would not be able to address the need for immediate reform of 'chronic and critical need' in the family law system.¹⁴ Additionally, the AGD stressed that the bill only proposed pilot PMH programs, and that the outcomes of the trials would inform both the ALRC review and future Commonwealth policy:

The evaluation of the PMH pilot will be able to provide insights into the impact of a less-adversarial approach to resolving parenting disputes between unrepresented parties; as well as the effectiveness of the specific model proposed for the pilot in this Bill.

Any recommendations made by the ALRC relevant to PMH policy would be able to be taken into account when assessing whether the pilot should continue, be modified or terminated. Delaying the commencement of the pilot until after the conclusion of the ALRC review (31 March 2019) would significantly, and unnecessarily, defer the gathering of the empirical evidence necessary to support future decisions about the appropriateness, or otherwise, of an inquisitorial model for resolving parenting disputes.¹⁵

2.14 The AGD also pointed out that these bills and the ALRC review are not the only efforts being made by the Commonwealth to improve family law processes. It stated that other dispute resolution trials are also being undertaken in 'a broader program of work which is trying to better equip the sector to be able to support families and children'.¹⁶

Evidence base and lack of consultation

2.15 Some evidence questioned whether there was a robust evidence base for the PMH trials to be initiated.¹⁷ For example, Ms Karen Willis, the Executive Officer of the Rape and Domestic Violence Services Australia (R&DVSA), told the committee:

...we were very concerned with the parent management program that was being proposed. In the first instance, the evidence on which it was based, when we checked it, really isn't terribly robust. The evidence was based on some work done where basically six people, three judges and three magistrates, were interviewed. Unfortunately, with people who are in positions of doing things like that, often their view will be influenced by 'what is best for me and what I think'. There weren't actually any clients of

13 Senator the Hon George Brandis QC, Attorney-General, *Senate Hansard*, 6 December 2017, p. 9867.

14 Referencing the House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry, cited above. See *Submission 26*, pp. 4–5.

15 *Submission 21*, p. 5.

16 Ms Ashleigh Saint, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, 23 February 2018, pp. 52–53.

17 For example, see: R&DVSA, *Submission 10*, p. 2; and Domestic Violence Action Centre (DVAC), *Submission 24*, p. 1.

those courts involved in that review of that particular model. And of course the model that was being reviewed and evaluated, on which this is based—well, the recommendation here [in the bill] is different. So we're a bit concerned about the evidence base and we do think that, if we're going to be doing anything in the family law area, it needs to be evidence based.¹⁸

2.16 Some evidence argued the government had not undertaken consultation in developing the PMH policy.¹⁹ For example, Ms Zoe Rathus AM submitted:

The timing of this Bill is rather strange and does not assist to build confidence in future consultation and review. The funding for the PMHP was allocated in the federal budget in May 2017. On the very evening the budget was brought down Professor Patrick Parkinson presented an address in the Banco Court of the Supreme Court of Queensland in which he described his vision for such a tribunal. At that stage there had been no public consultation on his vision, but in his address he advised that in January, 2017, Brian Cox SC, Dr Nicky McWilliam and he had provided a 'private paper for the Government' which had 'presented a comprehensive agenda ... for family law reform' and contained ideas he had canvassed that evening. So it seems that the money was allocated before the family law community had been given an opportunity to consider and comment on this extremely new, novel and untested tribunal model.²⁰

2.17 Professor Patrick Parkinson AM and Mr Brian Knox SC addressed these concerns in their submission and appearance before the committee, referring not only to the consultation and research that was undertaken in developing the proposal, but also the consultation the Commonwealth undertook on an exposure draft of the bill. In particular, they referred to the widespread calls for Australia's family law system to trial a more inquisitorial process, the successes of the Informal Domestic Relations Trial in Oregon, USA, and Australia's positive experience with multi-disciplinary tribunals in a range of applications.²¹

2.18 Ms Paula Piccinini, the General Manager of Direct Services for EDVOS, also expressed positive views on the consultation that preceded the bill's introduction to Parliament:

We did have some input because, when the Attorney-General's Department was drafting the legislation, we were fortunate enough to receive a confidential draft and to respond to questions. We put in a submission to the Attorney-General's Department, and I spoke at length with some of the senior policy lawyers there about the legislation.²²

18 *Proof Committee Hansard*, 22 February 2018i, p. 44.

19 HVFLPA, *Submission 4*, p. 2; and Ms Rathus, *Submission 21*, p. 2.

20 *Submission 21*, p. 2.

21 *Submission 3*, pp. 3–5.

22 *Proof Committee Hansard*, 23 February 2018, p. 15.

2.19 As noted above, the AGD stressed in its submission that the PMH initiative was for a pilot program only, which would collect further evidence to inform future Commonwealth policy:

The department considers that a small pilot of this nature is an important step in building an evidence base about whether an inquisitorial and multidisciplinary approach to resolving parenting disputes is able to provide improved outcomes for families, whilst ensuring safety is prioritised. The pilot provides an opportunity to test the recommendations made by various reports and experienced practitioners about the merits of a less adversarial approach.²³

Cost of the pilot

2.20 Some witnesses and submitters noted the significant cost of the PMH pilots. For example, the Hon Peter Rose AM QC, a former Judge of the Family Court of Australia, argued the PMH would be costly to pilot and implement more broadly. He noted it would be a 'multi-layered, cumbersome, lengthy and costly new structure' that necessitated 'a substantive new legal system; establishment of new decision making body; panel support staff including those with professional qualifications; panel staff and, potentially, consultants'.²⁴

2.21 The AGD commented that the Commonwealth funding commitment of \$12.7 million was for two fully-evaluated PMH trial sites over four years, as well as funding for support services, Independent Children's Lawyers (ICL) and an evaluation of the pilot.²⁵

Selection and expertise of the panel

2.22 While some submissions supported the stipulations outlined in the bill for the expertise and experience of the principal and other members of Panels, others expressed some concerns.²⁶

2.23 For example, Women's Legal Services Australia (WLSA) stated that each PMH should include one member with expertise in 'family violence, child abuse and trauma informed practice from a victim's-survivor's perspective'.²⁷

2.24 A number of bodies representing the legal profession raised questions about the capacity of panels to determine cases fairly, ensure procedural fairness was applied, and guarantee the independence of panel members.²⁸

23 *Submission 26*, pp. 4–5.

24 *Submission 2*, pp. 2–3.

25 *Submission 26*, p. 2.

26 For support in submissions see, for example: EDVOS, *Submission 11*, p. 2; WLSA, *Submission 17*, p.12; and RAV, *Submission 6*, p. 3.

27 *Submission 17*, p.12. The WLSA proposal was also explicitly supported by other submissions, including: safe steps Family Violence Response Centre, *Submission 18*, p. 6; Ms Rathus, *Submission 21*, p. 6.

28 HVFLPA, *Submission 4*, p. 5.

2.25 For example, Hunter Valley Family Law Practitioners Association (HVFLPA) noted that Panel members would 'be drawn from no more than lawyers and social scientists, which will be a lesser qualification than presiding judges that determine parenting cases presently'.²⁹ Similarly, the Victorian Family Law Bar Association (VFLBA) commented that the stipulations for non-legally trained members were too vague. It commented that panel members with extensive training and experience in the social sciences may not be as effective as judges in adjudicating parenting cases and ensuring procedural fairness:

It cannot seriously be contended that skill in the social science, or community or health work areas in any way qualifies a person as an impartial adjudicator to determine a dispute according to the law.

It is submitted that the unexplained, but central to the Panel concept, must be the notion that the appointed social scientists, community and health workers will somehow be better or more efficient adjudicators than Judges. There is simply no evidence to support such a notion. Judges and Justices should be appointed to deal with Family Law Act matters by reason of their experience, training and personality.³⁰

2.26 Regarding these matters, the AGD submitted:

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.³¹

2.27 On the legal expertise of the panel more specifically, the department stated:

The Bill adopts stricter, and arguably more onerous, qualification requirements for legally qualified members than those which are applicable to Family Court and the Federal Circuit Court judges. Legally qualified Panel Members must possess *specialist knowledge and skills relevant to the duties of a Panel member including knowledge of and experience in matters of family law*.³²

The capacity to recognise and respond to family violence or child abuse

2.28 The committee noted concerns in evidence that the parenting management hearings may not be able to reliably assess and handle cases where there was family violence, either disclosed or undisclosed, including ensuring parties' safety and access to procedural fairness.

2.29 For example the Law Council argued that the proposal contained only a 'simplistic and ineffective mechanism' for recognising and dealing with victims or

29 For example, see HVFLPA, *Submission 4*, p. 5; VFLBA, *Submission 23*, p. 11. Also cited by the Law Council, *Submission 20*, p. 14.

30 VFLBA, *Submission 23*, p. 11. Also cited by the Law Council, *Submission 20*, p. 14.

31 *Submission 26*, p. 7.

32 Department's emphasis. *Submission 26*, p. 7.

potential victims of family violence. It suggested existing system had several advantages over the proposed PMH, including: the automatic right to legal representation; access to relevant trained personnel to recognise and support family violence; judicial officers who were able to best ensure the safety of parties; and a court system that was adaptable to the needs of vulnerable parties and witnesses. It expressed concern that:

...the [PMH] model contemplates victims and perpetrators of family violence participating in an informal adjudication process. Such a proposal is at odds with other reform proposals in family law which seek to protect victims of family violence from direct engagement with the alleged perpetrator in the court process (see for instance, the reform proposals regarding direct cross examination of vulnerable witnesses). It is the experience of [the Family Law Section of the Law Council] that procedural fairness of victims (and alleged perpetrators) of family violence is best achieved in formal legal settings.³³

2.30 This perspective was shared by other witnesses and submitters, including some who represented or worked with victims of family violence. For example, Ms Kajhal McIntyre, a Legal Researcher and Project Worker with R&DVSA, said:

We do note, of course, that there are several protections in this bill for people with family violence, but we suggest that they just don't go far enough...We would say that what we've ended up with is an uncomfortable compromise where there's a large amount of discretion in the panel as to whether or not they do hear family violence matters. We've heard a lot about what a complex versus a non-complex family violence matter looks like. We would say that almost all family violence matters are incredibly complex and it's not clear from the bill which matters are too complex for them to hear or how they'll be making that determination, so that's of great concern to us.³⁴

2.31 Ms Rathus, a law academic appearing in a private capacity, commented:

What we continue to know is that actually getting these cases right where there's been severe family violence is extremely difficult, in a way no matter what model you use. I'm not confident that the make-up of that panel, the two-hour hearing and the lack of legal representation are going to mean that victims of family violence can get their case across any better on the papers there quickly than happens in other situations. And I'm very afraid that they won't but that what will come out that is a binding order perhaps too quickly.³⁵

2.32 Some submissions were more favourable about the PMH being able to deal adequately with family violence.³⁶ For example, EDVOS submitted:

33 *Submission 20*, p. 13.

34 *Proof Committee Hansard*, 22 February 2018, p. 49.

35 *Proof Committee Hansard*, 22 February 2018, p. 36.

36 For example: RAV, *Submission 6*, p. 3 and EDVOS, *Submission 11*, p. 3.

We firmly support Parenting Management Panels hearing matters involving allegations of family violence, a history of family violence and intervention orders.

The present adversarial system has failed to keep people safe or address family violence. Typically, only 5% of matters reach a final hearing. Parties do not get in the witness stand and have their evidence tested until the final hearing. Due to the high cost of court proceedings and long delays, the vast majority of matters settle at interim hearings where Judges make orders 'on the papers' without listening to the parties' circumstances...

We envisage that the inquisitorial system will address allegations of family violence from the outset. Panel members will be able to ask questions and enter into discussions with the parents from the first hearing. The Panel member with expertise in family violence will be able to conduct a risk assessment by asking the parties questions and observing their behaviour. The member with expertise in child development will be able to assess the impact or likely impact of the violence on the children. Arrangements can be put in place from the outset addressing the parties' risk, safety and wellbeing. We anticipate family violence victim survivors will be more protected in the inquisitorial system.³⁷

2.33 The AGD acknowledged that the prevalence of family violence made it critical for any forum resolving family law disputes to be capable of identifying and responding effectively. It submitted that the PMH could not compel victims of family violence to participate in hearings, and that panels were bound to 'carefully consider each family's individual circumstances and make an assessment as to the appropriateness of the PMH forum', both for resolving the dispute and in managing the safety risks for all participants.³⁸

2.34 The AGD noted that preliminary work that had considered a range of views regarding family violence and parenting decisions, and that:

We consider that the approach taken in the bill strikes an appropriate balance for a pilot. The bill provides that in all cases where family violence presents as an issue, the panel will be required to turn its mind to whether or not it is appropriate for the panel to consider the matter. Supported by appropriately trained staff, risk-screening procedures and powers to compel and obtain information and with multi-disciplinary representation on the panel itself, the department considers that the panel will be well placed to assess whether a matter involves a level of complexity that renders it inappropriate for it to determine.³⁹

2.35 The AGD also drew the committee's attention to features of the PMH that would benefit victims of family violence:

37 *Submission 11*, p. 3.

38 *Submission 26*, pp. 11–12.

39 Ms Ashleigh Saint, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, 22 February 2018, p. 3.

- The inquisitorial model, which would allow the panel to ask questions directly to parties, as well as to seek other information from relevant individuals and organisations. This would avoid the need for direct cross-examination of parties, including the examination of a victim by a perpetrator as can occur in normal family court proceedings, which causes trauma and distress for victims;
- The multidisciplinary membership and qualifications of the panel required by the bill would mean the PMH is able to make decisions in complex cases, including family violence expertise being a mandated requirement for Principal Members of panels; and
- The provision of other services to participating parties through the PMH process, including specialist family violence expertise, and other support including drug and alcohol services.⁴⁰

Risk assessment

2.36 Some evidence questioned the risk assessment process that would be used by the PMH, noting that the bill and Explanatory Memorandum do not outline it fully.⁴¹ For example, although WLSA commended the inclusion of risk assessment process generally, it submitted that:

While reference is made to developing a risk assessment framework [in the bill and Explanatory Memorandum] it is not clear whether there will be ongoing risk assessment or risk assessment will be limited to risk assessment at intake. Risk in family violence matters is dynamic and may heighten or reduce over a given period. It should be made clear that the risk assessment will be ongoing whilst the parties are in the PMH process and that the person undertaking the risk assessment has the required professional skills to undertake this important task.⁴²

2.37 Ms Helen Matthews, Principal Lawyer and Director, Legal and Policy of WLS Victoria and WLSA, expanded on this at a hearing:

And when we talk about risk assessment...that needs to be dynamic. We don't know what the time frames are necessarily going to be in the parenting management hearings, whether or not the intake happens and there is then a time lag between the collection of the material that people might be required to get and then the actual hearings. Situations can very much change as far as the family violence risk over that period of time is concerned.⁴³

40 *Submission 26*, pp. 12–13.

41 For example, see DV Vic, *Submission 12*, p. 3 and WLSA, *Submission 17*, p.9.

42 *Submission 17*, p. 9.

43 *Proof Committee Hansard*, 23 February 2018, p. 6.

2.38 WLSA's submission commented that, should the bill proceed, the government should ensure:

...required assurances are obtained about the need for ongoing risk assessment and that the professional [intake officer] undertaking the risk assessment has the required experience and expertise in family violence, child abuse and trauma informed practice.⁴⁴

2.39 Ms Piccinini, EDVOS, outlined the way panels would go about recognising family violence, and ensuring appropriate risk assessment was undertaken:

Initially, there'll be a family violence risk assessment, but, on the panel, a professional from the social sciences should know how to continuously assess risk and manage risk. That's their expertise. I would be astonished if that's not the practice and if that won't be the practice. It just has to be. It's common sense that it will be, and it's good practice that it will be. In the mediation sphere, the family dispute resolution centres and the legislation that goes with those centres, it's actually legislated that a mediator must continuously assess risk. So it just makes sense that, on the panel, the social scientist will continuously assess risk, and they'll do that by asking the parents: 'How safe do you feel? What's happened recently? How were the children? Were they present? What was your observation of the children when that happened?' They have an understanding of the nature of family violence. Essentially, coercive controlling violence is the violence that kills. That's the really dangerous violence. They will be able to form an assessment as to whether or not that behaviour is escalating, and, if so, what needs to be put in place to keep this family safe and allow that child to thrive—and they'll do it continuously.⁴⁵

2.40 The department pointed to the ability of the Principal Member of the PMH to determine processes for managing risk:

It is preferable that the details about how, and at what stages of the process, a risk assessment is to be conducted and revisited, and which identification and assessment tools should be used, are left to the Principal Member to determine, rather than expressly set out in the legislation. This provides the necessary flexibility within the pilot to make sensible adjustments to operational processes.

The specification of operational processes for the Panel, though rules and other directions issued by the Principal Member, is an approach that is consistent with the case-management processes currently employed in the family law courts.⁴⁶

44 *Submission 17*, p. 6. See also a similar perspective voiced by Ms Rathus, *Proof Committee Hansard*, p. 34.

45 *Proof Committee Hansard*, 23 February 2018, p. 16.

46 *Submission 26*, p. 13.

Supporting diverse applicants

2.41 A number of submissions outlined the potential dangers of having panels that were not sufficiently trained to support families from diverse backgrounds, particularly for Aboriginal and Torres Strait Islander clients.⁴⁷

2.42 For example, the Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS (Qld)) noted the significant barriers that Aboriginal and Torres Strait Islander communities have in participating in the court or panel-based resolution forums, and commented that the bill was largely silent on these issues. It questioned whether panels would be able to adequately understand and address and potential cultural obstacles, behavioural difficulties and their own unwitting cultural biases.⁴⁸

2.43 People with Disabilities Australia (PWDA) stressed the need for the PMH to have appropriate training, awareness or experience in working with people with disabilities.⁴⁹

2.44 WLSA advised that all panel members should have cultural competency and ongoing training opportunities for working with a number of communities:

All Panel members and staff conducting risk assessments should be culturally competent, disability aware and have ongoing training in cultural competency; disability awareness; family violence, child abuse and trauma informed practice; and working with vulnerable clients.⁵⁰

2.45 The AGD addressed these comments in its submission:

The department agrees that cultural competency and diversity awareness is an important feature in providing family law services. The department expects that Panel members would have ongoing training and support to assist them in dealing with a range of issues including identifying and responding to family violence and child cultural competency.

The Bill specifically provides that the Panel must have regard to any kinship obligations, and child-rearing practices, of the child's Aboriginal or Torres Strait Islander culture (section 11JA) and that if the child is an Aboriginal child or a Torres Strait Islander child, then the child's right to enjoy his or her culture, and the likely impact any proposed parenting determination will have on that right, is one of the mandatory additional considerations the Panel must consider in determining the child's best interests (paragraph 11JB(4)(i)).

Parties will be entitled to have a support person with them in the hearing (section 11LJ). This provision will allow the Panel to accommodate the

47 For example, see ATSILS (Qld), *Submission 15*, p. 2; AWAVA, *Submission 9*, p. 1; WLSA, *Submission 17*, pp. 12–13; and National Family Violence Prevention Legal Services (NFVPLS), *Submission 19*, p. 1.

48 *Submission 15*, pp. 3–4.

49 *Submission 8*, p. 3.

50 *Submission 17*, pp. 12–13.

needs of applicants with disabilities who may require physical assistance when appearing before the Panel, or the needs of people from culturally and linguistically diverse backgrounds who, for example, may require an interpreter.

The Panel will be multi-disciplinary, with Panel members with a range of qualifications appointed on both a full-time and part-time basis. This approach will allow the Principal Member to ensure the constitution of the Panel is appropriate for the particular case, taking into account the particular needs and issues of the families involved.⁵¹

Consent

2.46 The PMH requires the positive written consent of both parties to submit their case for decision. A number of concerns regarding this were raised, including:

- The Law Council's concern that the panel has the discretion—rather than the obligation—to dismiss cases where consent is obtained by fraud, threat, duress or coercion;⁵² and
- The Law Council and Victorian Family Law Bar's concerns that parties could manipulate the system by withdrawing their consent at 'a time of perceived disadvantage in the Panel system'.⁵³

2.47 In response to the former concern, the AGD noted that the bill was consistent with the approach taken in the Family Law Act, citing the court's power to alter decisions in cases of fraud, duress or false evidence, including rescinding a divorce order under section 58, or varying a property order under section 79A.⁵⁴

2.48 Responding to the concerns of the VFLBA, the department noted that the decision to discontinue an application was contingent on this being requested by both parties. On potential manipulation, it commented:

...concerns that the requirement for consent may allow parties to manipulate the system—for instance, by consenting to the hearing and then alleging a matter that would require the Panel to dismiss the application (by for example, alleging child sexual abuse or seeking a relocation order). While this is a possibility, the department considers that the risk is low, given the serious nature of such allegations/orders which would require dismissal. Evidence of this kind of manipulation would be sought and assessed through the evaluation of the pilot.⁵⁵

51 *Submission 26*, pp. 8–9.

52 *Submission 20*, pp. 10–11.

53 Law Council, *Submission 20*, p. 11 and VFLBA, *Submission 23*, pp. 9–10.

54 *Submission 26*, p. 14.

55 *Submission 26*, p. 14.

PMH proceedings

2.49 A number of concerns were raised about the way PMH proceedings would be conducted, including that the bill:

- does not include an explicit provision for the Panel to provide affected children with an opportunity to provide their views, with some submissions arguing that an Independent Children's Lawyer (ICL) should be provided in every case;⁵⁶
- would empower a Panel under section 11R to require a person provides specified information or documents, and that failure to do so would be an offence, which would impermissibly allow the Panel to exercise judicial power;⁵⁷ [and]
- would not sufficiently protect sensitive information, including counselling records, and would fail to encourage the 'the need for family law professionals to commit to adopting victim-survivor centric practices which should include guidelines for seeking least intrusive forms of evidence first'.⁵⁸

2.50 Regarding opportunities for children to express their views, the National Children's Commissioner of the AHRC, Ms Meghan Mitchell, told the committee:

The amendments do not give children who are affected by a parenting matter that is before the proposed panel sufficient opportunity to express their views, in accordance with article 12 of the United Nations Convention on the Rights of the Child. Notably, the bill does not require the panel to provide an opportunity for a child to express their views but to consider any views that may be expressed through a family consultant or an independent children's lawyer. The commission is concerned that, without a requirement to seek the views of children, panel members, as with judges, will be hesitant to seek out the views of children using mechanisms available to them. Studies consistently show that children want to have more of a say in legal decisions affecting them.⁵⁹

2.51 The department submitted that the approach taken was to give discretion to the panel, and was consistent with the processes used by family courts. More specifically, it commented:

The Bill ensures the right of the child to be heard by requiring the Panel to consider the child's views in determining the best interests of the child to the extent that these views are available (paragraph 11JB(4)(a)). The Panel can seek the child's view in a number of ways, including by requesting a family consultant to ascertain the child's views or appointing a lawyer to

56 See, for example, the views expressed by the Commissioner for Children and Young People WA, *Submission 1*, p. 2; and the Commissioner for Children and Young People SA, *Submission 3*, p. 2. See also AHRC, *Submission 7*, p. 6.

57 WLSA, *Submission 17*, p.14.

58 WLSA, *Submission 17*, p.14; and R&DVSA, *Submission 10*, pp. 10–11.

59 *Proof Committee Hansard*, 22 February 2018, p. 57.

independently represent the child's interests (section 11LK). The Panel retains flexibility to give weight to a child's views in accordance with the age and maturity of the child...

It will be at the Panel's discretion to determine when it would be appropriate [an ICL to be appointed]. The department does not anticipate that an ICL would be appointed in simple matters, or where the Panel determines that a child is able to communicate their views via another means. Where that is the case, the Panel could ascertain the views of the child in the manner provided for in the Panel rules (paragraph 11JC(2)(c)).⁶⁰

2.52 On the risk of the PMH exercising judicial powers, the AGD commented that any offences would be prosecuted by courts, rather than the Panel itself, consistent with the practice of other Commonwealth bodies.⁶¹

2.53 The department commented that the Panel's handling of sensitive information would be addressed by Principal Member's Directions and general guidelines that will 'take into account these concerns, particularly in...the PMH's general approach to dealing appropriately with matters involving family violence'.⁶²

Legal advice before and during PMH processes

2.54 The committee received some evidence arguing that parties to PMH arbitration should clearly understand the legal issues affecting their case, and have full knowledge that decisions made by the Panel are final and only subject to limited legal review.⁶³ For example, Ms Matthews, WLSA, stated:

I think there needs to be opportunity for the potential participant in the panel to be able to explore what their legal issues are. If people were to self assess whether their matter was a simple matter or a complex matter—because they'll probably have confidence that their view on how it should turn out is pretty much the right view—they may not recognise the complexity of the issues that they would be bringing before the panel. I would also be concerned if people were offered, 'You could go to court and wait 2½ years for a final determination in your matter or you could go to court and have a few hours before a panel' They really need to have a bit more information before them about that, where the adviser has the opportunity to learn more about the potential participant situation.⁶⁴

2.55 WLSA submission's outlined these concerns in greater detail:

60 *Submission 26*, p. 15.

61 *Submission 26*, p. 16.

62 *Submission 26*, p. 17.

63 See the submission made by WLSA, *Submission 17*, pp. 9–10, which was supported by a number of other submissions, including: PWDA, *Submission 8*, p. 3; AWAVA, *Submission 9*, p. 1; R&DVSA, *Submission 10*, p. 2; safe steps, *Submission 18*, p.3; NfVPLS, *Submission 19*, p. 1; DVAC, *Submission 24*, p. 1.

64 *Proof Committee Hansard*, 23 February 2018, pp. 7–8.

Access to legal advice and representation will be vitally important to ensure vulnerable or disadvantaged parties (including women experiencing violence) understand their legal options in order. In the case of PMHs, it is important that parties understand the process, consider whether it is an appropriate forum in their circumstances and understand the consequence of a binding parenting determination prior to making or consenting to a parenting determination application. It will be important that parties referred to the PMH forum are also referred for legal advice.

Whilst we acknowledge that many people already navigate the family law system unrepresented, WLSA has significant concerns that matters involving complex factors, including family violence and some forms of child abuse, will be dealt with in a forum designed for self-represented litigants, where lawyers are not permitted except with leave.⁶⁵

2.56 WLSA recommended that, given these concerns, parties be able to access legal assistance before entering into a PMH process; that leave for legal representation is granted by the PMH when requested where any of the mandatory considerations are met; and that this legal assistance is funded, particularly in cases involving family violence or child abuse, including for a range of specialist legal services.⁶⁶

2.57 Evidence included divergent views on the bill's provision that legal representation would only be allowed with leave of the Panel, and subject to Panel directions. Some evidence supported this, as it indicated a new non-adversarial approach, whereas others suggested this may disadvantage some parties.⁶⁷

2.58 The Law Council stated that it:

...opposes the implementation of any system, be it a Panel or otherwise, that excludes the parties from the right to independent legal representation before it (see new s11LJ).

While a discretion rests in the Panel to permit a party to have legal representation, the Panel may also give directions limiting the role of the legal practitioner in the proceedings (s11LJ(3)) which may constrain the ability of a legal practitioner to discharge their professional and ethical duties and obligations to their client.⁶⁸

2.59 WLSA suggested that access to good legal representation was paramount for the safety of many participants in family law cases.⁶⁹

2.60 Some submissions noted that the Panel could approve legal representation in hearings, and recommended the bill provide that when one party is permitted

65 *Submission 17*, pp. 9–10.

66 *Submission 17*, p. 11.

67 Contrast, for instance, the perspectives voiced by RAV, *Submission 6*, p. 3 and the Law Council, *Submission 20*, p. 17.

68 *Submission 20*, p. 17.

69 WLSA, *Submission 17*, p. 9.

representation, then this right should also be extended to the other party. For example, Professor Parkinson and Mr Knox recommended that in the interests of procedural fairness, 'If leave to have legal representation is given to one party, the other must automatically have a right to legal representation as well'.⁷⁰

2.61 The department made the following points on legal advice and representation:

...while it is envisaged that parties will be unrepresented in the oral hearing stage of the Panel process (unless the Panel gives leave), section 11LJ does not preclude a party from seeking and obtaining advice in relation to, or connection with, their parenting matter. Seeking and obtaining such advice prior to making, or consenting to, an application to the Panel will be recommended.

The approach taken in the Bill in relation to legal representation is not unique. Requiring permission to be legally represented is a feature of other administrative bodies...

The Panel is a consent based forum; it is open to parties to choose to use the family law courts if they wish to be legally represented in the hearing stage of their family law parenting matter.⁷¹

2.62 Moreover, the AGD also commented:

The Panel is bound by the principal of procedural fairness. A party would be entitled to seek judicial review of a Panel decision on the basis that procedural fairness has not been observed.

The approach taken to the issue of legal representation is intended to strike the appropriate balance between preserving the benefits of an inquisitorial system designed primarily for self-represented litigants, and allowing for legal representation in the hearing when necessary, including where it would promote the safety of families utilising the Panel.⁷²

Determining relocation matters

2.63 The bill provides that, where an application is for the relocation of the child, the application must be dismissed (proposed subsection 11NA(2)). Some evidence supported the PMH being empowered to make decisions in relocation matters, whereas other perspectives suggested decision making should remain with family courts.

2.64 For example, RAV suggested that PMH proceedings should be able to consider relocation matters, given they were not grounds for exclusion in family dispute resolution processes.⁷³ And Professor Parkinson and Mr Knox suggested a

70 Professor Patrick Parkinson AM and Mr Brian Knox SC, *Submission 5*, p. 9. See also HVFLPA, *Submission 4*, p. 9.

71 *Submission 26*, p 18.

72 *Submission 26*, p 18.

73 *Submission 6*, p. 10.

test could be considered for inclusion in the bill, where a move of less than 100 km could be considered by the PMH, provided this move was not interstate.⁷⁴

2.65 The ADG responded to these suggestions in its submission:

Relocation matters have been excluded from the jurisdiction of the Panel on the basis of advice from the family law courts that these matters are typically complex in nature as a change in where the child lives may 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.⁷⁵

Commencement of determinations

2.66 Professor Parkinson and Mr Knox recommended that the bill specify that determinations made by a Panel commence on the day of determination, unless another day is specified. They justified this as follows:

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.⁷⁶

Review of PMH decisions

2.67 A number of concerns were raised to the committee about the right of review of the PMH process, including that Panel decisions can be appealed in the Federal Circuit Court only on a point of law, rather than merits.

2.68 Some submissions noted that the right of appeal afforded by the bill would be, in effect, much more limited than appeal of court decisions.⁷⁷ Moreover, it was also noted that the Federal Circuit Court is only able to set aside a PMH decision and refer the matter back to the Panel to be terminated or re-decided—rather than being able to make its own decision.⁷⁸

2.69 The AGD noted that, despite some limited similarities between family courts and the PMH in exercising Part VII of the Family Law Act, there were significant differences:

Parenting determinations will be made by an expert, multi-disciplinary Panel who will be well qualified to make determinations in the best interests of the child. Unlike the courts, the forum is consent-based, and parties cannot be compelled to participate. Appeal on a question of law only

74 *Submission 5*, p. 10.

75 *Submission 26*, p. 10.

76 *Submission 3*, pp. 10–11.

77 For example, Ms Rathus, *Submission 21*, p. 3; and Law Society, *Submission 20*, p. 19.

78 Law Society, *Submission 20*, p. 19.

is consistent with the approach to arbitration under the Family Law Act (section 13J)—which is another consent-based mechanism for resolving family law disputes.⁷⁹

2.70 The department also noted:

Subsection 11Q(5) enables the Federal Circuit Court to make findings of fact by providing it can only do so if they are not inconsistent with those made by the Panel. The Court can, however, make findings of fact overriding those of the Panel where the Panel's findings are the result of an error of law—for example, where the Panel did not make any findings in relation to relevant facts. In doing so, it would be appropriate for the Court to receive evidence.

The department considers it appropriate that the court be required to remit a decision back to the Panel if it sets aside a decision of the Panel. The intention is not for the Federal Circuit Court to be used as a forum to re-litigate the issues of the case. As such, the court is limited to hearing appeals on matters of law and limited findings of fact. In remitting a matter back to the Panel, it will be open to the court to issue directions to the Panel that it must adhere to in re-determining the matter.

The Bill allows for a parenting determination to be reconsidered by the Panel (subsection 11NA(6)), or a court (section 65DABA), if there has been a significant change in circumstances in relation to the child.⁸⁰

2.71 The bill provides that a party may request written reasons for a parenting determination within 28 days, when the Panel has only provided reasons orally. WLSA recommended that the Panel be given discretion to provide written reasons beyond this 28-day limit.⁸¹ The AGD commented that this provision is consistent with other administrative tribunal practice, and designed to ensure the efficient resolution of disputes.⁸²

Interaction with court or family violence orders

2.72 Some evidence raised concerns about the way PMH decisions would interact with prior court orders on parenting decisions, or family violence orders issued subsequently to Panel decisions.

Court orders

2.73 The Law Society's submission was concerned that the Panel would be able to 'vary or discharge orders made by a court in certain circumstances', and argued that this would be tantamount to the PMH having the power to review a judicial decision.⁸³

79 *Submission 26*, p. 20.

80 *Submission 26*, p. 20.

81 *Submission 17*, p. 14.

82 *Submission 26*, pp. 19–20.

83 Referencing the bill's proposed subsections 11NA(9), (10) and (11). *Submission 20*, p. 20.

2.74 The AGD conceded that the PMH would usually be required to dismiss applications where a court had already made a parenting order, unless there has been a 'significant change in circumstances in relation to the child'. The department expanded on this as follows:

This is intended to be consistent with the common law test applied by the family law courts when considering whether to change an existing parenting order. In *Rice and Asplund*, the court set out that a parenting order should only be varied if there is some changed circumstance sufficient to justify such a serious step or a new factor has arisen.

The intention is that families are not precluded from accessing the Panel, which may provide them with a quicker, cheaper and inquisitorial forum for resolving disputes, simply because they have an earlier parenting order in place. Parenting arrangements may need to be reconsidered and re-determined as the child gets older and circumstances change, and parents may prefer to seek an outcome through the Panel rather than a court. The consent-based nature of the PMH forum is also relevant.⁸⁴

2.75 The department further noted that this accords with the existing approach that families should be encouraged to seek to vary parenting orders by agreement, rather than through the courts, where possible. Moreover, it drew the committees' attention to existing safeguards in section 64D(2) of the Act, which:

...allows the court to, in exceptional circumstances, provide that an order of the court can only be varied by a subsequent order of the court (and not by a parenting plan) –thereby excluding this option. As noted in the relevant explanatory memorandum, this approach might be adopted by the court if the court has concerns that a later parenting plan would not be made in the best interests of the child.

A similar safeguard has been included in the Bill in relation to the ability of the Panel to deal with an application if a parenting order is already in force in relation to the child. Subsection 11NA(11) provides that the Panel must dismiss the application if the relevant parenting order contained a provision that the order must not be varied by a parenting determination. The Bill expressly empowers the court to include such a restriction in a parenting order (new section 64E(2)).⁸⁵

Family violence orders

2.76 The Explanatory Memorandum outlines that proposed section 11PY of the bill:

...would clarify that where there is an existing parenting determination, and a state or territory court makes a subsequent family violence order, the family violence order would be invalid to the extent of any inconsistency with the parenting determination.⁸⁶

84 *Submission 26*, p. 21.

85 *Submission 26*, p. 21.

86 Explanatory Memorandum, p. 84.

2.77 Some evidence argued that this may place children in unsafe situations, where a family violence order against one parent was lodged following a PMH decision.⁸⁷ Regarding this, the Law Council submitted that it was:

...concerned as to the appropriateness of giving paramountcy to a determination by a Panel over a later family violence order made by a Magistrate of a State/Territory court and is of the opinion that it undermines safety considerations.⁸⁸

2.78 Judge Graeme Henson, Chief Magistrate of the Local Court of New South Wales, suggested that primacy must be given to the findings of courts that are issued subsequent to PMH decisions:

It is essential that the proposed amendments to section 68R accompany the insertion of section 11PY to ensure a State court is not bound by the Panel's determinations when making family violence orders which post-date such determinations. There must be enough flexibility in the proposed interaction of these two areas to ensure that a State court is able make orders for the adequate protection of those persons who are the subject of a determination.⁸⁹

2.79 The AGD provided further detail about this in a submission:

The Bill provides state and territory courts with power to vary, suspend, or discharge a parenting determination when the state or territory court has evidence that was not before the Panel. That is, in being given the power to change pre-existing parenting determinations, the state and territory courts will be able to ensure that parenting determinations and family violence orders in respect of the same family are consistent (see amended section 68R).

This is consistent with the current approach for parenting orders made by the court, and ensures that the safety of parties will always be paramount.⁹⁰

2.80 The department further clarified this issue at a public hearing:

Under the bill, the parenting management hearings panel will not be able to make a determination that is inconsistent with a court order, including a state or territory family violence order. The bill also sets out that a state or territory court can't make a family violence order that is inconsistent with a parenting determination. However, it's important that this provision is read together with the power of the state and territory court to alter the parenting determination. So for the latter example, we are getting at ensuring that we don't have inconsistent arrangements in place.

87 Law Society, *Submission 21*, pp. 19–20; VFLBA, *Submission 23*; the Hon Peter Rose AM QC, *Proof Committee Hansard*, 22 February 2018, p. 27.

88 *Submission 20*, p. 12. See also National Legal Aid, *Submission 31*, p. 10.

89 *Submission 25*, p. 2.

90 *Submission 26*, p. 22.

I will take you through an example. There is a parenting determination in place made by a parenting management hearing, and there's a subsequent family violence incident responded to by the state or territory police. It lands in a state or territory court, and it's necessary, for example, to restrict access or contact between the two parents. What the state or territory court could do in making the family violence order, for example, would be to adjust the parenting determination to provide that changeover for the children is to occur in a particular contact centre or a police station and not person to person, which might have been what was provided for in the order before. So that's the way that those orders are to work together.⁹¹

2.81 The department also informed the committee that the Commonwealth was developing new programs of family law training for state and territory judicial officers, to assist them exercising family law jurisdiction.⁹²

Other concerns

Enforcement

2.82 The Law Society expressed some concerns with the enforcement of panel decisions, including:

- That a party who alleges a breach would be required to file an application in the Federal Circuit Court, and file evidence in accordance with the Rules of Court, which could lead to long delays in decisions; and
- That there would be no additional funding for courts to undertake this enforcement function.

2.83 Regarding these concerns, the department stated that all PMH determinations would be enforceable in the same way as court parenting orders, consistent with decisions of other Commonwealth administrative bodies. On individuals filing breaches, the department noted that 'the enforcement system used by the court is well established, and that issues related to enforcement of parenting determinations made in the pilot phase will be monitored and evaluated'.⁹³

2.84 Additionally, the AGD stated that it did not expect PMH processes to significantly increase the workload for the court system.⁹⁴

Dismissal

2.85 Ms Rathus questioned what recourses would be available to parties following the dismissal of an application, should the PMH find it was not suitable for

91 Ms Ashleigh Saint, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, 23 February 2018, pp. 52–53.

92 *Submission 26*, p. 22.

93 *Submission 26*, p. 22.

94 *Submission 26*, p. 22.

Panel determination, noting that the bill contains 'no apparent rights or recourses to be transferred to the more appropriate venue of a family court'.⁹⁵

2.86 The department agreed that in these cases, there would be a need for support for other forms of resolution. In particular, it stressed that this would be dealt with administratively, rather than through a legislative transfer mechanism.⁹⁶

2.87 The department stressed that the pilot site in Parramatta would be co-located with family law courts, and so have a range of free-to-access support services that would ensure dismissed families would be adequately supported. These would include Commonwealth-funded legal services staffed by specialists in family violence support services for both women and men. The department also stressed that the second trial site would also be chosen with regard to the availability of similar co-located support services.⁹⁷

Payment of Fees

2.88 Some submissions questioned the PMH's powers to dismiss an application if fees required by regulation have not been paid within the prescribed period (proposed subsection 11NA(15)). It was suggested that there could be waivers for certain types of participants, or discretion for a Panel not to dismiss applications in some cases where fees had not been paid, including due to hardship or other extenuating circumstances.⁹⁸

2.89 The department noted that no fees would be charged in the pilot program. Moreover, it also noted that the bill amends the Family Law Act to allow for particular exemptions of fees to be made.⁹⁹

Transcripts

2.90 WLSA also suggested that transcripts of hearings should be free or low cost.¹⁰⁰ The department noted that transcripts would be available through services linked to a particular court or tribunal, and that the bill did not provide for the cost of this service, consistent with standard administrative tribunal practice.¹⁰¹

Evaluation

2.91 The Family Court of Australia submitted that there was insufficient information in the bill about the process and criteria of the PMH evaluation. This submission advised that the bill could include details of evaluation, and pointed to

95 Ms Rathus, *Submission 21*, p. 5.

96 *Submission 26*, p. 19.

97 *Submission 26*, p. 19.

98 For instance, see RAV, *Submission 6* p. 6; and Western NSW Community Legal Centre Inc., *Submission 13*, p. 2.

99 *Submission 26*, p. 23.

100 *Submission 17*, p. 14.

101 *Submission 26*, pp. 19–20.

the model provided by the Exposure Draft of the Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2017.¹⁰²

2.92 The National Council of Single Mothers and their Children Inc. and The Council of Single Mothers and their Children (Victoria) Inc. recommended that the evaluation should include the experiences of litigants and children, and seek to include those participants 'who were least likely to volunteer their views'.¹⁰³

2.93 A number of submissions suggested that the Commonwealth should make the evaluation of the pilot program public, to ensure transparency and accountability in both the pilot and future rollout, should this occur.¹⁰⁴

2.94 On this, the AGD submitted that the evaluation of the PMH would commence with the launch of the pilots, and so early findings could inform the ongoing ALRC review. Regarding the findings, the department stated that any public release of the evaluation would be a matter for government.¹⁰⁵

Hosting by the Federal Court

2.95 The VFLBA questioned why the Federal Court was hosting the PMH, rather than the Family or Federal Circuit Court.

2.96 The AGD pointed out that the *Courts Administration Legislation Amendment Act 2016* had created a 'single federal court administrative entity', of which the PMH would be a part. The AGD stated that the Federal Court was merely providing funding and administrative arrangements for the pilots and:

...the Panel itself would not form part of the court. Decisions and parenting determinations made by Panel members would be administrative in nature (that is, these will not be an exercise of judicial power).¹⁰⁶

Funding and resourcing for courts and legal services

2.97 Some submissions and witnesses argued that there should be an increase in Commonwealth funding to the legal aid sector and/or to the courts, to drive efficiency and enhance the assistance made available to parties in parenting disputes.¹⁰⁷ In addition, some evidence pointed to potential diversion of scant funds for the sector into the Panel process, which could deplete courts and support services of badly needed funds.¹⁰⁸

102 *Submission 30*, p. 5.

103 *Submission 16*, p. 5.

104 See RDVSA, *Submission 10*, p. 4; NCSM&C and CSMS&C(V), *Submission 16*, p. 5; WLSA, *Submission 17*, p. 6

105 *Submission 26*, p. 24.

106 *Submission 26*, pp. 2–3.

107 See, for example: HVFLPA, *Submission 4*, p. 7; PWDA, *Submission 8*; WLSA, *Submission 17*, p. 6; and Law Council, *Submission 20*, p. 9.

108 See, for example: Ms Kylie Beckhouse, Director, Family Law, LA NSW; and Ms Rathus, *Proof Committee Hansard*, 22 February 2018, pp. 17–18 and p. 34 respectively.

Rule-making power

2.98 Some evidence noted the power of the Minister to make rules about Panel practice and procedure, which could represent a departure from the principle of separation of powers between the executive and judiciary.¹⁰⁹

2.99 The department observed that the bill contains only a standard legislative instrument making provision, which is a general feature across Commonwealth legislation. It further notes that more detailed procedures for the Panel to follow would be included in Principal Member Directions made under 11VA of the bill.¹¹⁰

Committee view and recommendations

2.100 Evidence received by the committee on this bill broadly agreed that Australia's family law system is in need of radical and comprehensive reform. The committee notes the ALRC is working on a review to inform broad Commonwealth systemic reform, to be handed to government in March 2019.

2.101 A number of witnesses and submitters noted that any systemic reform should include consideration of a shift away from the adversarial model that typifies many family court cases, toward models that encourage inquisitorial decision making or arbitration.

2.102 The committee understands that the effect of this bill will represent a significant shift in how disputes in parenting matters following separation are resolved, toward a more inquisitorial model that would assist many cases being decided without going to court. The department has made it clear that the findings of these pilots will inform not only the potential broader rollout of the PMH program, should it prove to be successful, but also the ongoing review of the family law system being undertaken by the ALRC and other future reform decisions made by the Commonwealth.

2.103 Regarding evidence recommending a delay in the trial of the program until after the ALRC's work is finished, the committee makes two comments. First, comprehensive reform of legal systems is a slow process, and it is important to look at ways the system can be improved for participants, their children, and wider families as soon as possible. Second, it is the government's intention that early findings of the PMH pilot will inform the ALRC's evidence base and deliberations, which will in turn assist the long-term goal of holistic reform of the entire family law system.

2.104 Some views expressed to the committee questioned the evidence base and consultation that underpinned the PMH pilots. However, the committee also heard that the model proposed in the bill has been successfully tested, not only through the inquisitorial-based model in Oregon, but also a wide range of multi-disciplinary tribunals used in Australia, and consultation undertaken by the department.

109 Law Council, *Submission 20*, pp. 9–10.

110 *Submission 26*, p. 22.

2.105 Some evidence questioned whether the Panel would be able to assess determine cases fairly, ensure procedural fairness and maintain independence in decision making, particularly in complex cases involving family violence. The committee heard and agrees that a multidisciplinary PMH would be more effective, efficient and procedurally fair in many cases that currently go to court, and that the proposal has sufficient safeguards to recognise and deal with cases of family violence that come before the Panel. This includes the flexibility for Panels to refer matters on to courts should they judge it necessary, including complex cases involving family violence.

2.106 Success will hinge on the PMH having a rigorous and well-defined risk management process, particularly around family violence issues, and the Principal and other Members having the experience and skills to manage risk appropriately for the safety of all parties to a hearing. The AGD submitted that the Principal Member would have some discretion in managing risk assessment appropriately for different cases, and that the multi-disciplinary nature of PMH would ensure the available skills and awareness of family violence were adequate.

2.107 Similarly, the committee considers that the expertise on Panels will enable effective recognition of cases where one party has been coerced into participation, allowing the Panel to refer the case on for resolution in court proceedings.

2.108 That said, the committee sees some merit in the argument made by some submitters, that risk assessment is not a 'one-off' activity undertaken at the beginning of a particular case being considered by a PMH, but an ongoing process that is continued and revisited until a decision is made. This could be done either by the Attorney-General issuing practice directions or by regulation.

2.109 The committee considers that the multidisciplinary nature of the Panel would ensure the process is able to support a diverse range of parties, including Aboriginal and Torres Strait Islanders, people with a disability, and applicants with culturally and linguistically diverse backgrounds. Additionally, the committee is satisfied that the views of children will be sought and represented appropriately and sensitively in cases being decided by the PMH.

2.110 On the processes of the PMH, the committee strongly supports the contention put by a number of submitters that all participants in PMH processes should be made fully aware of the legal ramifications of engaging in the PMH process, including that all decisions made by the Panel are final and only subject to limited legal review, before agreeing to proceed. The committee recommends that practices and procedures be put in place to ensure this happens.

2.111 The committee also supports the recommendation made in evidence that, should one party be granted leave for legal representation, the other party should have that right extended to them, and recommends accordingly.

2.112 The committee sees merit in further considering the recommendation that the Panel be given the authority to determine some relocation matters, where the distance is less than 100 km, and recommends accordingly.

2.113 Similarly, an amendment specifying that determinations come into effect on the day they are made, unless another date is specified by the Panel, is needed. The committee recommends that either amendment to the bill, or to the relevant regulations, be implemented to address this matter.

2.114 The committee notes the concerns raised in evidence about the interplay of court and family violence orders and decisions of the PMH, and strongly agrees that the safety of parties to PMH and their families should be paramount. The committee accepts the evidence provided by the AGD that these concerns have been appropriately considered and accounted for in the bill, and that the regime being proposed is consistent with other current practice.

2.115 On the rule making power of the Minister, the right of review of decisions, and the cost and availability of transcripts, the committee understands from the department that these provisions are in line with the standard practices of other Australian tribunals. The committee recommends that appropriate guidelines be developed around the use of sensitive records and evidence by a PMH.

2.116 Regarding the public release of evaluation of the pilot program, the committee sees merit in the proposal that the Commonwealth should publically release the findings of the evaluation. This would ensure that any rollout of the program would be transparent and accountable. The committee recommends accordingly.

2.117 The committee considers that the trials proposed by the bill represent a positive step forward for affected parties, and that the PMH trials will provide valuable experience and knowledge in the reform of the family law system in the future.

2.118 Generally the committee notes that the jurisdiction of the Panel to hear any matter requires the consent of all parties. Failing that consent, the existing system will apply, but the committee also notes that there is universal concern at some aspects of the current arrangements dealing with children and believes that the proposal in the bill is a positive step forward if it is taken with the necessary safeguards.

Recommendation 1

2.119 The committee recommends that practices and procedures be put in place to ensure that all parties to Parenting Management Hearings are made fully aware of the legal ramifications of engaging in the process.

Recommendation 2

2.120 The committee recommends that should one party be granted leave for legal representation, the other party should also be granted leave.

Recommendation 3

2.121 The committee recommends that the government consider giving the Panel authority to determine relocation matters where the distance of the relocation is less than 100 kilometres.

Recommendation 4

2.122 The committee recommends that amendments be made to either the bill, or to the relevant regulations, to ensure that Panel determinations come into effect on the day they are made, unless another date is specified by the Panel.

Recommendation 5

2.123 The committee recommends that appropriate guidelines be developed to govern the use and storage of sensitive records and evidence by a Parenting Management Panel.

Recommendation 6

2.124 The committee recommends that the government publicly release the evaluation of the Parenting Management Hearing pilot program.

Recommendation 7

2.125 On the basis that the government will seriously consider and, where appropriate, action the recommendations made, the committee recommends that the bill be passed.

Senator the Hon Ian Macdonald

Chair