

Opposition Senators' Dissenting Report

1.1 Opposition Senators oppose the Family Law Amendment (Parenting Management Hearings) Bill 2017.

Overview

1.2 Of all the decisions that judges are required to make, the heaviest burden arises when in the decision over how, when, where, and with whom a child will spend their childhood.

1.3 This Bill proposes, as a pilot program, an alternative radical departure from the current manner in which these important decisions are determined. The Bill provides for the creation of a non-judicial panel, comprised of lay persons without legal training or experience of the crucial decisions that are made in respect of children following family breakdown. This panel would be statutorily empowered to make binding decisions about parenting matters.

1.4 The Panel would have complete discretion over the procedure for the Parenting Management Hearing (PMH) and can inform itself in any way it thinks fit. There ordinary rules of evidence and procedural fairness will be departed from. The possibility that this could occasion prejudice or lead to outcomes based on erroneous evidence which would be accepted in a court called on to make the same determination is likely productive of gross unfairness.

1.5 The Panel's power, under proposed s 11ME, includes the ability to direct a party to give the Panel information or documents, whether or not the documents or information are relevant to the resolution of the dispute is an extraordinary departure from the proper processes that limit the evidence that can be adduced for the purpose of dispute resolution. In a fundamentally improper way, the Bill proposes that a failure to provide information sought by the panel under section 11ME, whether or not it is actually relevant, could lead to a criminal penalty being imposed of up to twelve months imprisonment.. Given that the purpose of this panel is to provide a setting in which family disputes may be resolved without proceedings commencing in court, it is extraordinary that a failure to abide by the direction of the panel may lead to a penalty that could be harsher than the punishment ordered by a court for contempt

1.6 Opposition Senators have other serious concerns about the PMH which include:

- Matters involving family violence will not be prevented from inclusion in the PMH pilot.
- Parties do not have the right to be legally represented when appearing before the PMH.
- There is no merits review available for a determination of a Parenting Management Panel.

A Radical Change to Family Law Proceedings

1.7 Family law proceedings can already be dealt with in a less adversarial manner under Division 12A of Part VII of the Family Law Act but Parenting Management Hearings would be a radical departure to even that less adversarial approach, they would be conducted in an inquisitorial manner.

1.8 The Women's Legal Services Australia submission stated in its submission to the Committee:-

While there is merit in considering an inquisitorial model (in contrast to the traditional adversarial model) it is important that any such model is developed with careful consideration and a particular focus on protections required for victims-survivors of family violence and in matters relating to child abuse. It is also important that any new model is accessible – for example, for Aboriginal and Torres Strait Islander communities, culturally and linguistically diverse (CALD) communities, people with disabilities, LGBTIQ+ communities, people in regional, rural and remote areas.¹

1.9 The Chief Justice of the Family Court, Chief Justice Pascoe, in his submission also raised some concerns about PMHs being conducted in an inquisitorial manner. He said:

...the Bill provides for the Panel to inform itself in any way it thinks fit in conducting a Parenting Management Hearing. A concern that the Court has consistently expressed is that this departs significantly from the principle of procedural fairness, and that is perplexing, given that a lack of procedural fairness is a prime circumstance allowing for an appeal to the Federal Circuit Court of Australia.²

1.10 While Opposition Senators recognise there is merit in looking at inquisitorial models of family law decision making we agree with key submitters that stakeholders have not been given sufficient input into the bill before the Parliament. As the the Hon. Peter Rose AM QC said in his opening statement to the Committee 'children and families are far too important to be made the subject of an experiment'.³

1.11 Ms Zoe Rathus AM in her submission said about the timing of the Bill:

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. 1 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.² 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

1 *Submission 17*, p. 7.

2 *Submission 30*, p. 3

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

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.⁴

1.12 Ms Zoe Rathus AM, like others before the Committee, argued that the Parliament should wait for the Australian Law Reform Commission (ALRC) to report on the Family Law System before considering legislating:

It worries me that the number of submissions received is not particularly reflective yet of an engaged family law community, so if this goes ahead then it's really going ahead without the benefit of the kind of discussion and debate that I would have thought should come before something as innovative—'innovative' is a very positive term, and maybe that's fine because it is innovative, but it's also new, untested and extremely different to our current ways of doing things. I'm not saying that we should never do anything differently; I'm saying if we are going to do it, let's involve more information about it, let's do better backgrounding before we start it.⁵

1.13 Former Family Court Justice, the Hon. Peter Rose noted that:

...the bill incorporates large portions of part VII of the Family Law Act which makes it compulsory—not a matter of discretion—to decide the best interests of the child by making various findings of fact about a whole host of factors and, in doing so, you have to apply legal principles that have been the subject of jurisprudence for quite some time. If a body charged with making some determination about children thinks, 'We're going to knock this over in a couple of hours and there'll be a quick decision,' if you place yourself in the position of a parent or someone else who has an interest in the care of a child, that's providing, in effect, a second-class system because you happen to be unrepresented and you can't afford legal aid.⁶

1.14 As the ALRC is already undertaking a comprehensive review of the family law system, Labor Senators believe that such a radical change would be better considered by the ALRC in their review before being implemented.

Impact on Victims of Domestic Violence

1.15 Opposition Senators are particularly concerned about the potential for unjust outcomes for victims and survivors of family violence and their children who participate in Parenting Management Hearings.

1.16 Opposition Senators also have regard for the views of the Women's Legal Services Australia, as Ms Liz Snell expressed to the committee:

...we recognise there are limitations to an adversarial system and that the current system is failing women and children who have experienced violence. However, when the outcomes of untested processes, such as the

4 *Submission 21*, p. 2.

5 *Proof Committee Hansard*, 22 February 2018, p. 31

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

introduction of parent management hearings, can have enormous ramifications on the safety of women and children, we advocate that any new model should be based on research and evidence and informed every step of the way by domestic and family violence experts.⁷

1.17 Ms Snell, went on to say that Women's Legal Services support reform in this area and await the conclusion of the Australian Law Reform Commission's comprehensive review of the family law system.

1.18 Opposition Senators note that a number of other key submitters also argued very strongly that they were in agreement with the position taken by Women's Legal Services Australia's submission.

1.19 Ms Annette Gillespie, Chief Executive Officer, of safe steps Family Violence Response Centre raised concerns that a lack of access to legal representation was a key concern for victims of violence and agreed that it should not proceed without further investigation:

Our position is one of support for the submission made by Women's Legal Services Australia, and we have reached that position by considering the feedback we received from the women and children who we provide service to across the state of Victoria, particularly through our family advocacy and support services program.

The feedback we receive from our clients frequently comes back to this: they feel they are best placed to receive a fair outcome and to feel supported within the court system where they have access to legal representation.

They find the courts foreign, adversarial and overwhelming to navigate, and legal representation assists them to manage this process. Whilst we support many of the recommended changes put forward within the family violence and other measures bill, we are concerned that others represent a shifting of the problem rather than a response to its root cause, which is a lack of access to professional legal representation and a lack of training across the court system in identifying and responding to family violence.

We're opposed to the parenting management hearings bill proceeding in its current form and recommend a more thorough investigation of the proposal's merits.⁸

1.20 Ms Karen Willis, Executive Officer, Rape & Domestic Violence Services Australia told the committee that that they weren't satisfied with the consultation, evidence base and research underpinning the development of the legislation:

...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'.

7 *Proof Committee Hansard*, 22 February 2018, p. 6.

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

There weren't actually any clients of 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 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.⁹

1.21 Opposition Senators agree with concerns that the original intention of the legislation was not designed from the outset to deal with family and domestic violence, and that these considerations should have been fundamental to its development. In this regard we also agree with Ms Wills who told the committee:

We also are concerned that the model tacked on concerns about domestic violence rather than being foundational. We are dealing overwhelmingly with domestic violence situations here; how are we going to work with parenting models? What we actually said with this model is, 'Let's figure out parenting models. Oh, yes, some might have domestic violence; we need to think about how we're going to manage that.' And I'm not sure that that was a good way of doing it.¹⁰

1.22 Ms Kajhal McIntyre, Legal Researcher and Project Worker, Rape & Domestic Violence Services Australia also argued that the protections for those who have experienced family violence were inadequate.

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. Because the model was originally designed not to deal with family violence and it was only at the last minute that the department made the determination that it would, in fact, cover family violence matters, the protections have been added on as an afterthought. 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.¹¹

No Right to Legal Representation

1.23 Opposition Senators are concerned about the lack of a right to legal representation for those parties appearing before a Parenting Management Hearing.

1.24 Ms Kajhal McIntyre, Legal Researcher and Project Worker, Rape & Domestic Violence Services Australia also raised concerns about the lack of legal representation:

9 *Proof Committee Hansard*, 22 February 2018, p. 43.

10 *Proof Committee Hansard*, 22 February 2018, p. 43.

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

I completely agree that the current system is not working. I think there are some really valuable points in this proposal. We're completely in support of the multidisciplinary nature of the panel. We're completely in support of the inquisitorial format. What we do have a significant issue with is the lack of legal representation, and I think that that is an incredible difference from the current system. That's not to say that legal representation is going to fix violence or to mean that none of those issues exist anymore—we know that that's not the case—but at the same time, when you put somebody in a room without an advocate and you have only two hours to deal with incredibly complex issues, there's just no way that you can guarantee that those issues.¹²

No Right to a Merits Review

1.25 Opposition Senators are concerned that there is no avenue for a merits review of a determination of a Parenting Management Hearing Panel. The only avenue of appeal from a determination is on a question of law. As the process of hearing is inquisitorial and parties will be unrepresented, parties may be unaware of their rights and when those rights will crystalise.

1.26 The Law Council of Australia's submission noted:

This is a more limited right of appeal than lies from a decision of a judicial registrar or senior registrar of the Family Court (which proceeds by way of review on a hearing de novo) or even on appeal from a parenting decision by a single judge of either the Federal Circuit Court or Family Court to the appeal division of the Family Court.¹³

1.27 The Bar Association of Victoria also express their concerns about the appeal provisions in the bill:

Briefly, the Association also has concerns in relation to the appeal provisions of the Bill. Section 11Q provides that a party may appeal to the Federal Circuit Court on a question of law only. However, subsection (5) provides that the Federal Circuit Court may make findings of fact. In circumstances where cross examination is to be the exception, it is unclear how the Federal Circuit Court is to make such findings. Further, an appeal as to law only appears to be contrary to subsection (6) which provides that the Court may generally receive evidence. It is submitted that these appeal provisions ought be reconsidered.¹⁴

Consent to Submit to Parenting Management Hearing

1.28 Opposition Senators are concerned that unrepresented parties will be in a position to give fully informed consent before submitting themselves to a Parenting Management Hearing.

12 *Proof Committee Hansard*, 22 February 2018, p. 47.

13 *Submission 20*, p.19.

14 *Submission 20*, p. 9.

1.29 The Law Council of Australia in their submission also expressed concerns around consent.

The simple conundrum or internal contradiction is that very few unrepresented litigants will be in a position to properly weigh up the advantages and disadvantages of the Panel and make an informed consent. The promise, or hope, of an earlier final hearing will be a powerful motivator in many cases. In most cases 'consent' will be a mirage and a consent in form only.¹⁵

Constitutionality

1.30 Opposition Senators are also concerned that Parenting Management Hearings may not be capable of withstanding constitutional challenge.

1.31 The proposed coercive power of direction in s 11ME may have the ultimate result of a penalty being imposed by a Court. The exercise of such a directions power is quasi-judicial in nature and may be problematic in light of the separation of judicial and executive power set out in Chapter III of the Constitution. The lack of a review mechanism by way of a merits review is also likely to bring it outside of its constitutional authority.

1.32 The Victorian Bar Association briefly touched on the constitutionality of Parenting Management Hearings in their submission:

Owing to the limited time in which to consider and respond to the Bill, this submission does not consider the constitutional validity of the Bill or various provisions within it including its the very broad delegation of powers (see s 11WB). However, the Association holds concerns in this regard, particularly in Family Law Amendment (Parenting Management Hearings) Bill 2017 Submission 23 2 light of the High Court decisions of (for example) *Harris v Caladine* [1991] HCA 9 and *Lane v Morrison* [2009] HCA 29.¹⁶

Conclusion

1.33 The Attorney-General's Department estimated that 500 families would submit themselves to Parenting Management Hearings during the proposed pilot. It would be likely that more than one thousand children may have determinations made about their lives.

1.34 As Zoe Rathus AM said in her evidence to the committee:

I suppose the problem for people who go through that is that it doesn't matter to them that it was a pilot. They get orders. Whatever happens to them is as permanent to them as though it were an order of the High Court, in a way. There's nothing pilot about the outcomes for them. They are real outcomes that they then have to live with.¹⁷

15 *Submission 20*, p. 9.

16 *Submission 23*, p. 1.

17 *Proof Committee Hansard*, 22 February 2018, p. 31.

1.35 Opposition Senators believe that we should not be subjecting children to an experiment. The decisions made by a Parenting Management Panel may seriously change the emotional wellbeing of those children.

Recommendation 1

1.36 Opposition Senators recommend that the bill not be passed.

Senator Louise Pratt

Deputy Chair