Law Council
OF AUSTRALIA

Family Law Amendment (Parenting Management Hearings) Bill 2017

Senate Legal and Constitutional Affairs Committee

7 February 2018

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The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges that this submission has been prepared by the Family Law Section of the Law Council of Australia. Since its inception in 1985, the Family Law Section has developed a strong reputation as a source for innovative, constructive and informed advice in all areas of family law reform and policy development. With a national membership of more than 2600 it is committed to furthering the interests and objectives of family law for the benefit of the community.

The Law Council is also grateful to the Law Society of South Australia, the Law Society of New South Wales, the Queensland Law Society, the Victorian Bar and the Bar Association of Queensland, for their assistance with the preparation of this submission.

Introduction

1. The Family Law Section (**FLS**) of the Law Council of Australia welcomes the opportunity to provide comments on the Family Law Amendment (Parenting Management Hearings) Bill 2017 (Cth) (**the Bill**). The Bill sets out amendments proposed to the *Family Law Act 1975* (Cth) (**the Act**) to establish the Parenting Management Hearings Panel (**'Panel'** or **'PMH'**), which is intended to be a forum for resolving less complex family law disputes between self-represented litigants.

Establishment of a Panel by the Bill

2. The FLS regards the making of decisions about matters such as where a child lives, with whom a child spends time, and how a child communicates with a parent, let alone questions of parental responsibility, as each being matters that are and should remain within the remit of judicial decision-making power of judges.

3. The Bill proposes a radical departure from the established position under Australian law. The FLS strongly opposes the purported investiture of judicial power in the PMH and queries the ability to do so as proposed in the Bill. To describe the Panel as an administrative body operating in the manner in many respects of other Tribunals, does not in the view of FLS necessarily remedy these deficiencies. The Bill also contains in new s 11WB, a very broad delegation of powers, the validity of which may be open to question.[1]

4. The changes proposed by the Bill, and the radical steps they seek to implement, must be viewed with even greater concern, in the context of the ongoing Australian Law Reform Commission (**ALRC**) *Review of the Family Law System* (**the Review**). The ALRC has appointed its Commissioner and two part-time Deputy Commissioners for the Review and established an advisory body of Judges, academics, lawyers and other professionals within the family law and social sciences field to assist.

5. 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*'.[2]

6. It could not reasonably be suggested, the FLS submits, that the proposed introduction of the PMH is other than a matter of key importance to Australian families.

7. The FLS submits that consideration of changes of the nature proposed by the Bill, properly fall within the remit of the ALRC review and are entirely consistent with the Government's interest in:

> *ensuring the family law system prioritises the best interests of children, best addresses family violence and child abuse, and supports families, including those with complex needs to resolve their family law disputes quickly and safely while minimising the financial burden*.[3]

[1] See, eg, *Harris v Caladine* [1991] HCA 9; *Lane v Morrison* [2009] HCA 29.
[2] Senator the Hon GGeroge Brandis QC, 'First comprehensive review of the Family Law Act' (Media Release, 27 September 2017).
[3] Ibid.

8. It is notable that in the past, the Government could have also sought the advice of the Family Law Council, although that body does not presently have any members appointed to it and lies dormant.

9. To the best of the knowledge of the FLS, the Bill and the Panel it seeks to introduce, is modelled on a system implemented in Oregon, USA.

10. The FLS is not aware of any statistically significant review carried out of the Oregon model, nor of any review or study having been conducted of the appropriateness of that Oregon model to the Australian circumstance. Further, it is to be noted that the proposal by the Government in the Bill has substantial important differences to the Oregon model, the most critical of which are that the simplified trial in the Oregon model is held before a Judge, and each party retains the right of legal representation at the trial.

11. The Explanatory Memorandum (**EM**) at paragraph 11, suggests that an independent review and evaluation of the operation of the PMH pilot programme will occur, with a reporting date of three years after commencement of the pilot. It is unclear if the cost of the review is included in the announced funding commitment.

12. Despite the comprehensive and expert review of the family law system already underway, it appears to be contemplated that the PMH pilot will commence at the earliest possibility, in the face of informed opposition (including from the Law Council and those acknowledged on page 4 of this submission), and without the benefit of the views of the ALRC. The serious deficiencies in the model presently being proposed (and addressed further below) highlight the real benefits to be gained from awaiting the outcome of the ALRC Review.

13. The FLS also expresses concern that the implementation of the PMH pilot is to be administered by the Federal Court of Australia, rather than either the Family Court of Australia or Federal Circuit of Australia, both of which have experience and specialisation in the family law jurisdiction.

Allocation of funding

14. The FLS notes that the Government has committed $12.7 million over the next 4 years to establish and operate the Panel. The FLS is of the view that the Government could achieve a far better outcome both for children and parents involved in family law disputes and for Australian taxpayers generally, by instead:

    (a) undertaking a simplification of Part VII of the Act and adopting the Chisholm model[4] to enable a simplified parenting decision framework to be applied by Judges of the Family Court and the Federal Circuit Court (thus saving money and promoting better understanding of decision making); and

    (b) allocating the $12.7 million in extra funding over the next 4 years to improve resourcing of the existing court system, as well as counselling and support services such as contact centres. The FLS notes that funding of this magnitude could make a significant improvement to the capacity of the Family Court and the Federal Circuit Court to triage and hear cases more quickly. If the aim of the proposal is to respond more quickly to the needs of unrepresented litigants with less complex disputes, then FLS submits that both

[4] Prof Richard Chisholm AM, 'Rewriting Part VII of the Family Law Act: A modest proposal' (2015) 24(1) *Australian Family Lawyer* Volume 1 <https://www.familylawsection.org.au/images/documents/australian-family-lawyer/AFL_Vol24_3_ModestProposal.pdf>.

Courts would be in a position to respond appropriately to those needs by, for instance, funding for the recruitment of registrars.

Complexity of the family law legal system

15. The key principles underpinning the proposed establishment of the Panel by the Bill are outlined at paragraph 4 of the EM and include:

    - *To provide a forum for resolving less complex family law disputes between self-represented parties.*
    - *To resolve matters in a fair, just, economical, informal, less-adversarial and prompt way.*
    - *To ensure the best interests of the child is the paramount consideration.*
    - *To ensure parties are assisted by support services, integrated with the Panel, where appropriate.*
    - *To ensure that the outcomes of the Parenting Management Hearings will be binding on parties, and enforceable by a court.*

16. The Objects of the PMH are set out in the proposed new s 11J of the Act.

17. In 1999, when the Federal Magistrates Court (also known as the Federal Magistrates Service) was introduced, the Explanatory Memorandum to the *Federal Magistrates Act 1999* (Cth) stated:

    The Federal Magistrates Court will be composed of Federal Magistrates, who will be justices, as required under the Constitution. Federal Magistrates will be selected for their expertise in federal matters, including family law. The jurisdiction to be exercised by the Federal Magistrates Service will generally be matters of a less complex nature that are currently dealt with by the Federal Court and the Family Court. It is intended to provide a quicker, cheaper option for litigants and to ease the workload of both the Federal Court and the Family Court. [emphasis added]

    The Federal Magistrates Service will be as informal as possible consistent with the discharge of judicial functions. It will be up to the Federal Magistrates Service itself to make its own Rules, which will largely determine issues of practice and procedure. However, the Bill includes provisions designed to assist the Federal Magistrates Service to develop procedures that are as simple and efficient as possible, aimed at reducing delay and costs to litigants. [emphasis added] Some examples of these are:

    - *the Court will have the power to set time limits for witnesses and to limit the length of both written and oral submissions;*
    - *discovery and interrogatories will be permitted only if the Court considers that they are appropriate in the interests of the administration of justice;*
    - *if the parties consent, the Court can make a decision without an oral hearing;*
    - *there will be more emphasis on delivering decisions orally in appropriate cases, rather than parties having to wait for reserved judgments; and*

- *there will be the power to make Rules to allow Federal Magistrates to give reasons in shortened form in appropriate cases.*

The Federal Magistrates Service will complement the Government's initiatives aimed at encouraging people to resolve family law disputes through primary dispute resolution, rather than through litigation.

The Federal Magistrates Service will place emphasis on using a range of means to resolve disputes. There will be no automatic assumption that every matter will end in a contested hearing, and the use of conciliation, counselling and mediation will be strongly encouraged in appropriate cases. Parties will be encouraged to take responsibility for resolving their dispute themselves, where this is practical. This is more likely to result in more a enduring resolution of a dispute because the parties are more likely to accept agreed outcomes.[5]

18. There is considerable evidence that the navigation of the legal system for people with family law disputes is already disjointed, and that gaps in the interaction between different jurisdictions, courts and other services can place children and other family members at risk. The FLS is concerned that the introduction of a Panel creates yet another layer of complexity to the navigation of the family law legal system, and increases, rather than reduces, the risk to children and adults involved in family law disputes.

19. The Victorian Family Law Bar Association, as part of their submission on the Bill which was provided to the FLS, made the following observations:

The interaction between State and Commonwealth law already provides for the multiplicity of Courts to deal with children's welfare. Those are;

1. *The Family Court of Australia (or the Family Court of Western Australia in W.A.)*
2. *The Federal Circuit Court of Australia*
3. *The state children's courts in a criminal or protective or supervisory capacity.*
4. *The state Local or Magistrates Courts which may (but usually do not) hear applications pursuant to the Family Law Act.*
5. *The state Local of Magistrates Courts dealing with Family Violence orders that frequently do vary temporarily, and on an urgent or emergency basis, existing Family Law Act Court orders.*

Notwithstanding the issues surrounding the two-tiered approach to family law (which is too the subject of the ALRC's review), the Bill creates a third (or potentially a fourth, if the state courts are included) Federal Court/Tribunal or level of adjudication of the living arrangements of children (albeit that the Bill refers to a 'Panel' and the process is not presided over by a Judge or Justice). The Association submits that the Bill fails to take into account the important lessons of the past and recent past as to how to deal with conflict about the best interests of children in an efficient, just and reliable manner.

[5] Explanatory Memorandum, *Federal Magistrates Bill 1999* (Cth) 1.

It is submitted that there needs to be a most powerful and substantial reason to add yet another tier, and that no such reason exists that could not be cured by a reallocation of resources within the existing system.

…

The question immediately arises as to why should there be another level or tier of Court like adjudication of children's living arrangements. The Association queries what the new Panel will actually, in substance, add or remove from the existing model that should not be added to or removed from the existing model. If there is to be an advantage or disadvantage to a particular process, it is unclear why the parties before one process and their children have a superior or inferior process to determine their disputes. If the new Panel process is considered to be superior, why is it only available to consenting (but legally unrepresented) clients? If it is inferior, then why have it?[6]

20. The FLS has long advocated that Part VII of the Act requires simplification and promoted the adoption of the model put forward by Professor Richard Chisholm.[7] The FLS maintains that position and argues that nothing in the Bill addresses those matters.

21. Indeed, large slabs of the Bill seem to merely replicate and duplicate existing provisions in Part VII of the Act, lengthening the size of the Act but not assisting those reading it and trying to understand it.

22. What is an already convoluted maze of legislation in Part VII of the Act, reaches new levels of logistical difficulty in navigation, when self-represented participants before a Panel have to work through an Act where, for example, the numbering would include under the Bill even a "*s70NBAB*".

23. The FLS contends that if there is a willingness by Government to invest in improving access to justice for people with family law problems, then investing in the courts that already exist to enable them to innovate their case management processes, would produce a better outcome for children and families, as would proper funding and resourcing of Legal Aid services.

Comments on specific provisions in the Bill

Rule making power

24. The Bill gives to the Minister by the new s 11SB the power to make rules for the Panel (and which will no doubt include those matters of practice and procedure as to how proceedings are instituted and in what manner evidence comes before the Panel, noting of course that under the Bill the rules of evidence do not apply by virtue of the new s 11LD(1)(b)).

25. This represents a significant departure from the separation of powers in the determination of family law disputes, and gives the Executive arm of government an

[6] Victorian Family Law Bar Association, submission to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Family Law Amendment (Parenting Management Hearings) Bill 2017*, February 2018, [11]-[15].
[7] Prof Richard Chisholm AM, 'Rewriting Part VII of the Family Law Act: A modest proposal' (2015) 24(1) *Australian Family Lawyer* Volume 1 <https://www.familylawsection.org.au/images/documents/australian-family-lawyer/AFL_Vol24_3_ModestProposal.pdf>.

unprecedented level of control compared to the existing system of Judges making rules about the rules and procedures in family law cases.

Process in the Panel and the appointment of Independent Children's Lawyers

26. The FLS had understood the original intention to be that the Panel would try, hear and dispose of cases on a first return date, rather than through multiple appearances or hearings.

27. Whilst the FLS does not have the benefit of draft rules of the PMH that may make more plain how cases will progress, the Bill appears to indicate that the practical reality will be that multiple appearances will be required in many cases (noting the new s 11KD provision for pre-hearing conferences). This will be particularly acute where a family report or other expert witness report is commissioned (leaving aside issues of the cost of those services, the paucity of experts available to fulfil those roles and the time taken to receive expert reports already in family law matters in the Family Court and Federal Circuit Court) let alone when an Independent Children's Lawyer (**ICL**) is appointed (per new s 11LK).

28. The FLS notes that the guidelines for when an ICL may be appointed, as set out by the Full Court of the Family Court in *Re K (1994) FLC 92-461*, include cases where neither party is legally represented.[8] This suggests that an ICL may be appointed in a significant number of cases before the Panel.

The consent process

29. The FLS has concerns as to how the consent process in the new s 11KC will operate. For example, if a father files an application for a determination in the Panel, and the mother does not respond after been served with the application, can the father then proceed with the application on an undefended basis, or is positive consent required by the mother? The FLS notes that positive consent appears to be required by virtue of s 11KC(2)(b) which mandates consent to be in writing and therefore suggests (although it is not clear at present) that silence or acquiescence (without more) cannot be seen as consent.

30. Subdivision D (Dismissing applications), provides for circumstances in which a Panel *must* dismiss an application for parenting determination (s 11NA), and other circumstances where it *may* consider dismissing the application (ss 11NB - 11NF). The grounds for discretionary dismissal of an application are broad and may require nuanced consideration of complex considerations (including, for example, the capacity of parties to effectively participate in the PMH having regard to power imbalances between the parties and other 'relevant factors' – s 11NB(2)(d)). The FLS submits that it is discretionary assessments of this nature which are best undertaken by experienced judges with a thorough understanding of the principles of natural justice and procedural fairness.

31. The FLS notes the concerning allocation of discretion to the dismissal of an application even in circumstances where the Panel is satisfied that the consent of a party was obtained by fraud, threat, duress or coercion (s 11NC). It is accordingly contemplated in this Bill, that a (nominally) less complex parenting dispute, where the consent of a party has been obtained by fraud, might still proceed in that forum. The FLS suggests that the existence of fraud in relation to the consent of a party must at all times be an

[8] *Re K* (1994) FLC 92-461.

indicator of ‘complexity’ and an absolute bar to the continuation of the application before the Panel.

32. The Victorian Family Law Bar Association also raise the following concerns in respect of the consent process as drafted:

> *A lacunae and (it is respectfully submitted) a naivety exists as to ‘consent’ in the Bill. The Bill as currently proposed requires both parties to ‘consent’ to the Panel process. The Association holds concern in relation to this ‘opt-in’ approach.*
>
> *The choice of Court or adjudicator and the management of a parties’ participation in the resolution of conflict about children with a former partner is a complex matter. It is axiomatic, and should be unquestioned, that any consent involved in any part of any legal process should be real consent and informed 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.*
>
> *Moreover, it is not clear on the face of the Bill what is to occur if, after both parties’ ‘opt in’ to the process, one of the parties withdraws their consent. In other words, once the parties opt in, can one of them opt out and if so at what point of the process? Delay frequently suits one party, usually the party with some sort of perceived status quo advantage or the party with greater de facto control of children’s living arrangements. Experience teaches Family Law practitioners that the party with the perceived delay advantage, or conflict-oriented personality will not consent to the process of the Panel or if they do, will withdraw that consent at a time of perceived disadvantage in the Panel system.*
>
> *The perception to the other party will be a system that aids or empowers the difficult or manipulative personality to delay and to choose the adjudicator of his or her choosing ie: the Panel or the Federal Circuit Court. This will simply add another layer of conflict to parties in conflict.*
>
> *Even if the intention of the Bill is to ensure that once parties ‘opt in’ they are bound by the Process and are unable to ‘opt out’, s 11NA of the Bill would make such a requirement illusory. It is foreshadowed that a party unhappy with the Panel process will simply (for example) make allegations of sexual abuse, and/or make an application for relocation, so that the Panel must dismiss the application and end the Panel process. A party, not content with the manner of the hearing, will by raising an allegation of sexual abuse, be able to veto the panel determining a matter. Another hearing, with further delay, will be necessary in one of the other Family Law Act Courts. This can only harm the system overall.*
>
> *It is also noted that s 11KC(1) requires all relevant persons to consent ‘to the application’ rather than consent to the jurisdiction. A strict reading of this subsection would require all relevant persons to consent to the orders sought*

in the application, rather than the jurisdiction. The section ought be revised accordingly.[9]

Family violence

33. The FLS is concerned about the ability of the Panel to provide and ensure both protection and procedural fairness to parties, particularly in circumstances of family violence.

34. The FLS submits that the Bill (see new s 11VA(2)) contains a simplistic and ineffective mechanism for identifying people who have been victims of family violence or are at risk of being a victim of family violence. These mechanisms are also in conflict with the assumption that matters before the Panel will be 'less complex'. The existence of a family violence order, for example, is an unreliable indicator of risk, and the Bill and EM provide relatively modest information about the investment that is to be made in risk assessments. The supposed jurisdictional boundaries in the Bill work on the hypotheses that family law disputes can be divided into 'simple' and 'complex' - they cannot; and that the issues in dispute in family law litigation remain static during the process – they do not.

35. The proposed new s 11PY provides that a subsequent family violence order is invalid to the extent of inconsistency with an earlier parenting determination. The FLS is 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.

36. The Panel is empowered to determine that the existence of family violence in a matter means that the parties are exempt from engaging in primary dispute resolution (new s 11KB(3)) and in some cases, that the matter should not be dealt with by the Panel (see for example new s 11NB). The complex risk assessment process and treatment of family violence allegations is at odds with the stated expectation that only 'less complex' matters will be heard by the Panel. Assumptions about complexity cannot safely be made in family law matters where the use of influence, power and control is rarely admitted, where self-report about experience is fraught and where allegations of family violence are regularly disputed.

37. While it is suggested the Panel will undertake necessary 'risk assessment' (s 11NB(3)), the nature of this process (how or when it occurs and by whom it is undertaken) is not known to FLS and the EM at paragraphs 328 and 329 provides little more than broad concepts and endorsement of the 'expertise' of the Panel members. The underlying assumption that all social sciences provide relevant expertise to identify, understand and respond to allegations of family violence (or to look for indicators of it, when no allegation has been made) is challenged further below (in consideration of s 11UA(4)).

38. The Panel is empowered to make directions about the personal protection of a party or a child (proposed s 11MF) and may consider other necessary safeguards (proposed s 11PB). It is respectfully submitted that the inclusion of these powers goes against the suggestion that the matters before the Panel will only be those 'less complex' family law disputes and will be determined absent legal representation.

[9] Victorian Family Law Bar Association, submission to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Family Law Amendment (Parenting Management Hearings) Bill 2017*, February 2018, [32]-[37].

39. The EM at paragraph 328 argues that the automatic exclusion of matters involving family violence would create a 'risk' of vulnerable parties withholding information about family violence, in their desire to access the Panel. No research in support of that hypothesis is offered.

40. The other possibility, if matters involving family violence were excluded from the Panel, is that people who have experienced family violence would have their matters dealt with in specialist family law courts, and would have:

    (a) the automatic right to legal representation;

    (b) access to personnel with relevant expertise and training to recognise and respond to allegations of family violence;

    (c) access to judicial officers with the relevant expertise and powers to best ensure their safety and that of their children; and

    (d) when properly resourced, a court system that can adapt to the particular needs of vulnerable parties and witnesses, while at all times, addressing the best interests of the children.

41. FLS is concerned that the 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 FLS that procedural fairness of victims (and alleged perpetrators) of family violence is best achieved in formal legal settings.

The adjudicators for the Panel

42. The Bill grants to the Panel the power to make determinations changing for example where a child primarily resides (new s11JG(3)(a)).

43. By way of contrast, it is important to note that when the Federal Magistrates Court was first established in 1999, the power of Judges of that Court to make orders about changes to primary residence of a child, was excluded *unless* both parties consented to the Judge making that judicial decision and the case otherwise had to be heard in the Family Court.

44. The FLS is concerned that such a fundamental decision making power about with whom a child lives (including the power to remove a child from the primary care of one parent) is proposed to be invested in people who are not legally qualified and is to be determined in a process in which the parties are not legally represented (save with the leave of the Panel member per new s 11LF).

45. The Victorian Family Law Bar Association, in their submission on the Bill provided to the FLS, made the following observation on the issue:

    Proposed s 11UA(4) sets out who may be appointed a Panel member. It is a wide and vague list.

    Pursuant to s 11UA, panel members must have 5 years experience. The list of potential panel members can be conveniently described in two parts. First, subsection 4(b)(i) to (iii) can be described as social scientists (that is persons with skill in (i) psychology, (ii) counseling and (iii) social work).

The second category is wide and very vague. It is persons who have skills in the following;

(iv) family dispute resolution;

(v) community work;

(vi) family violence;

(vii) mental health;

(viii) drug or alcohol addiction;

(ix) child development;

(x) any other field relevant to the duties of a Panel member

The intention to include this wide and vague category of qualifications is contradicted by the intended limited range of matters before the Court (ie: not complex and not involving sexual abuse or child abuse or family violence). This wide category is simply a 'what if' approach. The study and training involved in being a qualified and experienced psychologist cannot be compared to the second category of the community and health workers. 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. By and large, they are. Almost all are now burdened by insufficient resources. They would be greatly assisted by the resources intended to be applied to the Panel system (and its consequent drain on the resources of the Federal Circuit Court sitting as the appellate court) being applied to their Courts, whether to more Judicial appointments, or to more Counsellors.

The Association is of the view that the social scientists of the counselling section of the Court have made a wonderful contribution by providing unique expert evidence. The existing Courts need more social scientists to assist the Court with expert evidence not to have them as adjudicators in a third tier of the Family Law Courts.

It is axiomatic that actual and perceived independence of adjudication that includes fair and impartial consideration of all relevant evidence is essential to the resolution of disputes concerning matters as important as the welfare of children. In this context, the provisions of proposed s 11VA (maintain public confidence) is troubling. Public confidence must be earned. The party or parties that feel they 'lost' the determination or adjudication will always be critical of the system. That is the nature of conflict and those within it. Self-reflection by parents in conflict, at the time of relationship breakdown such that the conflict requires an external determination, is a rare ability. Unhappy litigants cannot provide a balanced and informed opinion of the Court or of the Panel.

A direction to 'maintain public confidence' would appear be to a misunderstanding of two things:

1. *First, the importance of actual and perceived independence of adjudication.*

2. *Second, the nature of many conflicts of parties following relationship breakdown and the nature of external regulation of family relationships. Which part of the 'public' confidence is to be considered? What is the measure of 'public confidence'? How is it to be measured? By reference to social media? By reference to the unhappiest litigants? Or the friends and family of the unhappy litigants? By press headline? By television 'current affairs' type entertainment or by 'reality' television.*[10]

46. In making determinations that go to the heart of what is in the best interests of a child, it is essential that procedural fairness is afforded to both parents and any other party to the proceedings. The FLS hold significant concerns about the capacity of non-legally qualified members of the Panel (new s 11UA(4)) to provide that fundamental protection. The importance of decision-making about family law matters and the qualifications of those on whom that responsibility rests in the Family Court, is made clear by s 22 of the Act:

(2) A person shall not be appointed as a Judge unless:

(a) the person is or has been a Judge of another court created by the Parliament or of a court of a State or has been enrolled as a legal practitioner of the High Court or of the Supreme Court of a State or Territory for not less than 5 years; and

(b) by reason of training, experience and personality, the person is a suitable person to deal with matters of family law.

47. Whilst section 22 of the Act applies only to the appointment of Judges to the Family Court it reflects the intention of the Parliament that decision makers in this area of the law (that affects ordinary Australians on a daily basis more so than any other area of the law), should be both legally qualified and be otherwise qualified by reason of training, experience and personality, to carry out this essential role. In *Gronow v Gronow* it was noted that:

Reasons for judgment, necessarily in many cases, especially in a finely balanced case, are a rationalisation of a largely intuitive judgment based on an assessment of the personalities of the parties and the child. To this end, the Family Law Act *states that 'A person shall not be appointed as a Judge unless … by reason of training, experience and personality, he is a suitable person to deal with matters of family law'.* [11]

48. The Victorian Family Law Bar Association raised the following concern in respect of the proposed use of social scientists in the role as adjudicators, both as a concept and having regard to the resource implications of such a move:

[10] Victorian Family Law Bar Association, submission to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Family Law Amendment (Parenting Management Hearings) Bill 2017*, February 2018, [38]-[45].
[11] *Gronow v Gronow (1979) 144 CLR 513*

The inclusion of independent social scientists employed by the Court in children's disputes was a hallmark of the Family Court of Australia process since 1976. It was until the mid 1990's unusual for a children's dispute to be dealt with at an interim or final hearing without the Court and the parties having the benefit of evidence from a social scientist, usually referred to as a 'Counsellor' or 'Family Reporter' and later as a 'Family Consultant'. They were invariably highly skilled, highly trained and experienced. Most disputes resolved with the assistance of the views and/or evidence of the expert report writer who had usually observed the child or children with each parent or party to the dispute and examined the nature and quality of the children's relationship with each parent and the dynamics underlying the parental dispute. Timely expert evidence of those matters was and remains crucial to resolving disputes in a fair and just manner with the best interests of children paramount. Expert evidence of those matters, although not determinative, was and remains simply 'gold' to the children's interests and the just resolution of the dispute/s. The authorities held that while there is no 'magic' to a family report, such a report was usually a most useful resource for a Court making parenting orders.

By the mid 1990's the demand for the services of the Court employed social scientists so exceeded the resources that there was a substantial delay in a family getting to see a counsellor or report writer. Rather than increase the available resources for counselling the service was effectively outsourced and privatised and the resource of available employed counsellors dramatically reduced. Delays in access to the expertise of report writers and to the time of a Justice increased and then increased further. Delays were and always will be entirely unsatisfactory and a blight upon our society and the manner in which our society provides for children caught up in parental relationship breakdown and conflict. With delay conflict grows and scarce resources were and are used up managing the 'queue' of cases waiting either an interim or a final hearing.

However, when more resources were needed, the opposite occurred. Per head of population, the resources applied to the Family Court and in particular to the social scientist or counsellor part of the Court continued to be reduced.

Amidst this unsatisfactory state of affairs, an understandable government motivation arose to provide Family Law Act litigants, and particularly those with less complex disputes, with a more efficient and speedy but just parenting determination process. The intentions were to avoid undue delay, expense and technicality, to operate as informally as possible, to use streamlined processes and to consider the use of primary dispute resolution as early as possible. The Federal Circuit Court, initially called the Federal Magistrates Court, was created and effectively divided the bulk of the Family Law Act process into two Courts.

For a short time the Federal Circuit Court was highly successful. Resolution of conflict or uncertainty by interim or final hearings and assisted by largely privately retained social scientists, for a time provided a more timely and efficient, but still by and large, just process. Parents, represented and unrepresented, voted with their feet and filed applications in the Federal Circuit Court because they were more likely to have a resolution sooner than the Family Court of Australia.

The number of cases filed in the Federal Circuit Court gradually grew by a far greater rate than the resources available to deal with them did. The inevitable

result was not enough Judges and not enough social scientists employed to provide reports for those families that could not retain a private facility. Delays to hearings both interim and final became greater and greater and have reached entirely unacceptable levels. Scarce resources are applied to managing the 'queue' and the additional conflicts directly related to delay and uncertainty. The number of cases listed before an individual Judge on first return is such that, save for crisis management of the most difficult cases, for represented and unrepresented, there is almost no Judicial time available to look at individual families underlying issues. The Judge performs 'triage' and lists cases for actual hearing far into the future and frequently more than a year away. A year is a long time in the life of a child or a parent dealing with conflict and uncertainty. At the eventual 'final' hearing 3 or 4 cases are listed before one Judge who can only hear the most urgent. The legal profession is expected to, and usually does, massage the other cases that cannot have Judicial attention into a settlement. The other cases are adjourned to another day usually months away.

Again amidst this unsatisfactory state of affairs, an understandable government motivation has arisen to provide unrepresented Family Law Act litigants, and particularly those with less complex disputes, with a more efficient and speedy but just parenting determination process. In the words of proposed s 11J, a process that is 'fair, just, economical, informal and prompt' and 'has the best interests of the child as the paramount consideration'.

However, it is submitted that the Bill will not achieve these very proper objectives. Without the resources of sufficient adjudicators, staff support and social scientists or counsellors, the third tier or Panel will simply be beset with same delay and 'queue' managing use of resources as the existing two Family Law Act Courts.

The irony is deep. Two problems beset the existing Family Law Act Courts: insufficient Judicial resources and lack of available Court employed or retained counsellors to provide timely expert evidence crucial to identify the best interests of children. To deal with that problem another Court-like 'Panel' is to be created. More social scientists will be involved, not as conciliators and expert witnesses where they can bring unique and crucial evidence but as another layer of adjudicators. And this new tier of adjudicators will draw on the same insufficient pool of social scientist expert witness as the existing Family Law Act Courts.[12]

Legal representation on fundamental matters going to the best interests of a child

49. The FLS 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 s 11LJ).

50. 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 (s 11LJ(3)) which may constrain the ability of a legal practitioner to discharge their professional and ethical duties and obligations to their client.

[12] Victorian Family Law Bar Association, submission to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Family Law Amendment (Parenting Management Hearings) Bill 2017*, February 2018, [17]-[25].

51. Similar rules apply when the Administrative Appeals Tribunal exercises jurisdiction in *Child Support (Assessment) Act 1989* (Cth) matters. It is the experience of FLS that the AAT rarely grants leave for a party to have legal representation in those matters, even where one party may be a victim of family violence. It is widely acknowledged that the AAT child support jurisdiction has come to be used by perpetrators of family violence as a means of committing further family violence by exploiting the opportunity to take legal proceedings against the victim, knowing that they are unlikely to be given the protection of leave to be legally represented.

52. The situation is further exacerbated by new s 11LK of the Bill that provides that an ICL may be appointed in some cases, which will see a lawyer involved in the process but in circumstances where obviously they cannot provide legal advice to any party to the proceedings. The appointment of an ICL usually occurs in parenting matters of some complexity - again, this power sits oddly with the stated expectation that the matters proceeding before the Panel would be 'less complex'.

53. This power to appoint an ICL also raises further questions about resourcing to follow in the wake of the creation of the Panel – potentially creating further demand upon the resources of legal assistance providers (such as Legal Aid Commissions), with no apparent allocation of additional funding.

54. The Victorian Family Law Bar Association, in their submission on the Bill provided to the FLS, made the following observation on the problems that may also arise by virtue of the s11LJ(4) 'assistant' provisions:

> *Section 11LJ(4) provides that a party may have another person 'present when appearing before the Panel to assist him or her'. In contradistinction to the provision concerning legal practitioners, where leave must be granted by the Panel, the 11LJ assistant appears to be as of right to a party, subject to any other directions made by the Panel.*
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> *The common law has long permitted, with the leave of the Court and in limited circumstances, an unrepresented litigant to have assistance in the presentation of a case. This was known as a 'McKenzie Friend'. The case law provides that a person will be entitled to seek assistance from any person providing that in so doing the orderly and expeditious conduct of proceedings is not interrupted. Whether to permit the inclusion of a McKenzie friend is at the discretion of the Court.*
>
> *The Association has concerns in relation to the statutory inclusion of this 11LJ assistant within the Family Law Act. The experience of the Courts of those assisting litigants is that the 'assistant', usually well meaning, invariably has his or her own agenda within the dispute or disputes of that type, has no obligation of candour with the Court, attempts to be an amateur lawyer and usually makes the situation worse if not impossible. See for example, MG & MG [2000] FamCA 893.*[13]

55. The ability for parties to make decisions in the best interests of their children, to be informed of their own rights and obligations, to engage in meaningful settlement discussions, to have their legal rights protected, to protect victims of family violence from power imbalances and intimidation in negotiations and communications and in appearances before a Panel, and to enable parties to give informed and ongoing

[13] Victorian Family Law Bar Association, submission to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Family Law Amendment (Parenting Management Hearings) Bill 2017*, February 2018, [46]-[48].

consent to participation in the process, will all be promoted in the submission of the FLS, by legal representation.

Appeals

56. The new Subdivision F (see new s 11Q) provides for a right of appeal to the Federal Circuit Court limited to a '*question of law*' from a Panel determination.

57. 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. Similarly, appeals to the Family Court from a decision of a Magistrate in a Local Court exercising family law jurisdiction are *hearings de novo*.

58. The FLS does not understand the basis upon which it could be maintained that there should be a more difficult test to succeed on an appeal from a parenting determination from a Panel, than on an appeal from a judicial decision of a judge of a Chapter III court.

59. Restraint is also imposed upon the court having heard the appeal, as to the future management of the matter (proposed s 11Q(4)(b)) and appears to prevent the court from making its own determination (other than affirming the decision of the Panel per new s 11Q(4)(a)) and must if the appeal succeeds remit the matter to the Panel if the determination is set aside.

60. The Federal Circuit Court can make findings of fact in specific circumstances (see new ss 11Q(5) and (6)). In circumstances where cross-examination is to be the exception, the Victorian Family Law Bar Association has noted that 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.

61. The FLS is also not aware of additional resourcing to the Federal Circuit Court to deal with this appellate obligation.

The rule in Rice & Asplund

62. The Bill appears to incorporate a form of the existing rule against repeated parenting applications under the Act known as the 'rule in *Rice & Asplund*'. The Victorian Family Law Bar Association, in their submission, made the following observations:

> *Section 11NA provides that the Panel must dismiss an application where there are already final parenting orders or determination in place, unless there has been a 'significant change in circumstances'. This would appear to reflect a 'shorthand' summary of the 'rule in Rice & Asplund'. The Full Court of the Family Court specifically warns against such a formulation. In SPS & PLS [2008] FamCAFC 16, Warnick J stated that "'shorthand' statements of the rule may contribute to its misapplication.' The Full Court in Marsden & Winch (2009) 42 Fam LR 1 summarised the test to be followed in applying the rule in Rice & Asplund as a two question test:*
>
> 1. *for a prima facie case of changed circumstances to have been established; and*

2. *for a consideration as to whether that case is a sufficient change of circumstances to justify embarking on a hearing.*

Further, the Full Court has held that the rule in Rice & Asplund is merely a manifestation of the best interests principle. Section 11NA does not reflect this fact and would appear to create a different, stricter standard for the Panel which is distinct from the otherwise nuanced approach to the Rice & Asplund test. Furthermore, as currently drafted, s 11NA would stand in conflict with the Full Court's authority that the rule in Rice & Asplund is not necessarily a threshold question. As such, as currently drafted s 11NA does not meet the intention reflected at para 305 of the EM that the 'provision does not intend to modify the common law test'.[14]

Enforcement

63. The Bill provides that courts are empowered to deal with applications about alleged contraventions of determinations of the Panel (see amendments proposed regarding s 70NAA and the following sections that deal with contravention). While there *may* be a reduction in 'less complex' matters commencing in the Federal Circuit Court as a consequence of the creation of the Panel, it is clear that the Court will accrue *additional* jurisdiction and obligations, with no additional resourcing.

64. The Panel has no enforcement powers of its own in respect of breaches of its determinations. The proposed system, where a parent who alleges a breach would need to file an enforcement application in the Federal Circuit Court, is likely, in the opinion of the FLS, bound to fail. Evidence will need to be filed in the Federal Circuit Court, in accordance with its Rules of Court, to substantiate the existence of the determination and of the breach. Leaving aside the potential differences in forms and documents between the court and the Panel, litigants seeking to prosecute an enforcement or contravention claim will likely be confronted with extended court delays in the Federal Circuit Court which may render nugatory the benefits otherwise conferred by the Panel determination.

65. However, the Panel is to be empowered to vary or discharge orders made by a court in certain circumstances (proposed new s 64E and see also new ss 11NA(9), (10) and (11)). This is an extension of power to the Panel effectively (subject to s 64E(2)) to undertake a review of a judicial determination, which is troubling on a number of levels and the power to do so remains unclear.

Final comments

66. The ALRC Review provides a timely opportunity to examine the family system and the structure within which it operates.

67. The FLS does not view the Bill or the additional tier of decision making which it seeks to implement, as being appropriate legislative measures, nor the most appropriate use of the $12.7million in funding that has been allocated to what amounts to an untested *social experiment*.

[14] Victorian Family Law Bar Association, submission to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Family Law Amendment (Parenting Management Hearings) Bill 2017*, February 2018, [29]-[30].

68. The Family Law Section welcomes the opportunity to be further consulted about this far-reaching Bill and the radical changes it seeks to make to the family laws of Australia.