



Women's Legal Services Australia

Submission to the Senate
Legal and Constitutional
Affairs Committee in
response to the Family Law
Amendment (Parenting
Management Hearings) Bill
2017

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No to Violence

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Women's Health NSW

Women's Legal Centre (ACT & region)

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About WLSA

Women's Legal Services Australia ('WLSA') is a national network of community legal centres specialising in women's legal issues, which work to support, represent and advocate for women to achieve justice in the legal system. We seek to promote a legal system that is safe, supportive, non-discriminatory and responsive to the needs of women, particularly those who have lived with domestic and family violence. Some of our centres have operated for over 30 years.

Our members provide free and confidential legal information, advice, referral and representation to women across Australia in relation to legal issues arising from relationship breakdown and violence against women. Our legal services are directed to vulnerable and disadvantaged women, most of whom have experienced family violence. Therefore, our primary concern when considering any proposed legal amendments is whether they will make the legal system fairer and safer for our clients – vulnerable women.

Our members' principal areas of legal service work are family violence (family violence intervention orders), family law, child protection and crimes compensation. Our members also deliver training programs and educational workshops to share our expertise regarding effective responses to violence and relationship breakdown.

Both WLSA and its individual member services work to contribute to policy and law reform discussions, primarily focused on family violence, to ensure that the law does not unfairly impact on women experiencing violence and relationship breakdowns. We are informed by a feminist framework that recognises the rights of women as central.

Introduction and summary of recommendations

1. WLSA is concerned about the model for Parent Management Hearings ('PMHs') set out in the Family Law Amendment (Parenting Management Hearings) Bill 2017 ('the Bill') and in particular the potential impacts on the safety of victims-survivors of domestic and family violence, and child abuse.
2. When initially proposed in the 2017-18 Budget, PMHs were described as "a fast, informal, non-adversarial dispute resolution mechanism" which would be "given powers to make binding determinations on **simple** family law matters, which would otherwise require consideration by the family law courts".¹ (emphasis added)
3. The Bill proposes that PMHs will be determined by a multi-disciplinary Panel made up of legal and non-legal experts and is designed for unrepresented parties. The Bill proposes Panel members will have the power to fully displace the parental responsibility of one parent.
4. We note that matters in which family violence and some forms of child abuse are alleged are not automatically excluded from the PMH forum. It is our experience that such matters are generally complex.
5. Legal representation will only be allowed by leave of the Panel.
6. PMHs are proposed as a pilot in two sites – Parramatta and a second site yet to be confirmed.
7. The proposed PMH model is a large shift away from any current approach in Australia for resolving family law disputes. Innovative practice, new ideas and a culture of continuous improvement should be encouraged in any court system. However, when the outcomes of untried and untested processes can have enormous ramifications on the safety of women and children, such as the introduction of PMHs, we advocate any new model should be based on research and evidence and informed at every step by domestic and family violence experts.
8. Although not explicitly explained the PMH model as proposed is based at least in part on an approach in Oregon. As discussed below the only evaluation of this model that we were able to find is very limited. The model was also quite different to what is proposed in the PMHs as it still involved the use of judges in decision making in a more informal environment.
9. On 27 September 2017, the Commonwealth Attorney-General commissioned the Australian Law Reform Commission ('ALRC') to undertake the most comprehensive review of the family law system in Australia that has ever been undertaken. In our view, it makes sense that the PMH model be delayed and its implementation be specifically considered by the ALRC in their review before piloting such an untested model.
10. We acknowledge the Bill does seek to provide some protections in matters relating to family violence and child abuse. However, as outlined in more detail below WLSA believes there are insufficient protections. WLSA therefore does not support the Bill in its current form.

¹ Budget 17-18 – Budget Measures Budget Paper No. 2 2017-18 p69
http://parlinfo.aph.gov.au/parlInfo/download/library/budget/2017_15/upload_binary/bp2.pdf;fileType=application%2Fpdf#search=%22library/budget/2017_15%22

11. In summary, we recommend:

11.1. That the PMH be referred to the ALRC for specific consideration in their current review of the family law system in Australia.

11.2. If Parliament proceeds with the PMH:

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

11.2.2. Given the PMH forum can make binding determinations in matters relating to family violence and some forms of child abuse, including fully displacing the parental responsibility of one parent, it is essential and in the interest of the safety of victims-survivors of violence and their children that:

11.2.2.1. Parties are referred and able to access legal assistance before entering a PMH process.

11.2.2.2. When seeking leave for legal representation where any of the mandatory considerations in such an application are met, leave is granted.

11.2.2.3. Legal assistance and representation is funded, particularly in matters involving family violence and child abuse. This should include additional funding for family law and family violence duty services; specialist women's legal services and programs; and specialist Aboriginal and Torres Strait Islander controlled legal service providers (including both Family Violence Prevention Legal Services and Aboriginal and Torres Strait Islander Legal Services) (No funding has been allocated for legal representation of parties).

11.2.3. At least one Panel Member on each Panel should have extensive knowledge and experience in family violence, child abuse and trauma informed practice from a victim's-survivor's perspective (While the Principal (Panel) member is required to have expertise and experience in matters relating to family violence and family law they are not required to sit on each Panel. This means some Panels may be constituted without expertise in matters relating to family violence, for example, in circumstances where family violence is not identified at intake).

11.2.4. 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.

11.2.5. There be ongoing training for Panel members and other staff associated with the PMH process in cultural competency, disability awareness, family violence, child abuse and trauma informed practice and working with vulnerable clients.

11.2.6. Diversity in the composition of Panels.

11.2.7. The development of guidelines about the use of sensitive records.

11.2.8. There be discretion to provide written reasons beyond 28 days.

11.2.9. The independent evaluation report must be published and publicly available in a timely manner.

Referral to the ALRC Review of the family law system

12. WLSA acknowledges that the family law system is in crisis – there are lengthy delays in the courts hearing matters; there are significant numbers of self-represented litigants many of whom cannot afford legal representation and are traumatised as a result of family violence and the abuse of children and find it challenging to navigate the family law system; there is an urgent need for early risk assessment and response to family violence and child abuse upon filing applications; and the fear of direct cross-examination by an alleged abuser is leading women to settle on terms that are often not in the best interests of the child and do not prioritise the safety of their children and themselves.
13. 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.
14. We welcome the Government’s commissioning of the Australian Law Reform Commission to undertake the first comprehensive review of the family law system since the commencement of the *Family Law Act* in 1976. We note this inquiry is due to report in March 2019. Given this significant inquiry is underway, WLSA strongly recommends that the proposed PMH reforms be referred to the ALRC inquiry for consideration prior to implementation. The terms of reference relevant to a review of the proposed model include (but are not limited to):
 - the appropriate, early and cost-effective resolution of all family law disputes;
 - the protection of the best interests of children and their safety;
 - family law services, including (but not limited to) dispute resolution services;
 - family violence and child abuse, including protection for vulnerable witnesses;
 - the best ways to inform decision-makers about the best interests of children, and the views held by children in family disputes.
15. It appears the PMH model is based on a model proposed by Professor Parkinson and others which draws in part on the Informal Domestic Relations Trial (‘IDRT’) in Oregon.² The IDRT adopts an inquisitorial approach where rules of evidence do not apply and even if a party is legally represented only the judge can ask the parties questions.³ The information brochure about IDRT suggests choosing this option when “*your case is relatively simple*” and “*you are comfortable explaining your circumstances and the facts to the judge*”.⁴
16. Some argue that “Cases involving domestic violence where both parties are self-represented are viewed as particularly well suited for the IDRT process”.⁵ However, the evaluation to which this comment relates was limited to only a few legal practitioners and judiciary and no litigants as “The litigant satisfaction survey failed to generate a sufficient number of responses from IDRT litigants and was therefore abandoned”.⁶ This assertion should therefore be treated with caution. This lends further

² Commonwealth Attorney-General’s Department *Supplementary Submission to the Parliamentary inquiry into a better family law system to support and protect those affected by family violence* p14-15.

³ Informal Domestic Relations Trials:

<http://www.courts.oregon.gov/forms/Documents/Informal%20Domestic%20Relations%20Brochure%20Statewide.pdf>

⁴ *Ibid*, p2

⁵ Howe, W. and Hall, J, “Oregon’s Informal Domestic Relations Trial: A new tool to efficiently and fairly manage Family Court Trials” (2017) *Family Law Review* Vol 55(1) p76.

⁶ *Ibid*, p75

weight to the value in the ALRC considering the proposed PMH reforms as part of its review prior to the implementation of these reforms.

Recommendation 1

That the PMH be referred to the ALRC for specific consideration in their current review of the family law system in Australia.

Protections for victims-survivors of family violence

Power of the Panel to dismiss applications for parenting determination

Mandatory dismissal

17. Some of the circumstances in which the Panel must dismiss an application for a parenting determination include if:

- All relevant parties do not consent to the process;
- An application is for relocation of the child;
- There is a risk of child sexual abuse or allegations of child sexual abuse;
- When the child is under the care of a person under a child welfare law⁷

18. We support these grounds.

Discretion to dismiss

19. Proposed s11NB(1) enables the Panel to dismiss an application for a parenting determination if it is satisfied *“that it is appropriate in all the circumstances to do so.”*

20. In deciding whether or not to dismiss such an application the Panel must consider if the Panel has reasonable grounds for suspecting child abuse or family violence or the risk of child abuse or family violence.⁸ The form of evidence is not stipulated. We welcome inclusion of this provision.

21. The Panel may also consider: the complexity of the matter; the capacity of the Panel to manage any risks relating to the safety of the child or parties; the capacity of the Panel to determine matters for consideration consistent with the objective of the Panel; the capacity of parties to effectively participate; family violence orders.⁹

22. The Panel also has discretion to dismiss an application for a parenting determination if it is satisfied the application was obtained *“by fraud, threat, duress or coercion”*.¹⁰ This is an important inclusion as it recognises, as stated in the Explanatory Memorandum, that victims-survivors may agree to participate in the PMH forum *“because they are intimidated by or fearful of the perpetrator”*.¹¹ However, the identifying of fraud, threat, duress or coercion is reliant on:

- appropriate and ongoing risk assessment undertaken by staff with expertise in family violence and trauma informed practice, cultural competency and disability awareness;

⁷ Proposed s11NA

⁸ Proposed s11NB(3)

⁹ Proposed s11NB(2)

¹⁰ Proposed s11NC

¹¹ Family Law Amendment (Parenting Management Hearings) Bill 2017 Explanatory Memorandum (‘Explanatory Memorandum’) p71

- the expertise of Panel members in family violence and trauma informed practice, cultural competency and disability awareness;
- and would be aided through legal representation of parties in matters relating to family violence and child abuse by specialist family violence and trauma informed, culturally competent and disability aware legal practitioners who understand the impacts of trauma and the effects the dynamics of family violence can have on a victim's-survivor's ability to disclose family violence.

23. Proposed s11SB(2)(b) refers to the Minister having the power to make rules to transfer matters which have been dismissed to a court. However, these rules are yet to be developed.

Risk assessment process

24. Specialised and ongoing risk assessment is a key requirement for victims-survivors of family violence to be able to safely participate in the PMH process.

25. Proposed s11VA(1) and s11VA(2)(c) provides that a Principal Member may give written directions on risk assessment.

26. The Explanatory Memorandum states:

It is envisaged that a comprehensive intake and risk assessment process would be completed for all applications to the Panel, during which the intake officer would assess whether the parties were able to participate safely in the proceedings, and whether any protections or procedures needed to be put in place. If the parties were not able to safely participate in the Panel process, the Panel would dismiss the application under section 11NB.¹²

27. We commend the recognition of the need for a comprehensive intake and risk assessment process.

28. While reference is made to developing a risk assessment framework 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.

Recommendation 2

If Parliament proceeds with the PMHs, that required assurances are obtained about the need for ongoing risk assessment and that the professional undertaking the risk assessment has the required experience and expertise in family violence, child abuse and trauma informed practice.

The need for legal representation in matters relating to family violence and/or abuse and funding for legal assistance

29. WLSA members are concerned about the limitations on legal representation in the proposed PMH model, particularly as matters relating to family violence and child abuse can be considered. We note that access to appropriate and timely legal advice and representation is essential to safety.

30. 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

¹² Explanatory Memorandum, p51-52.

to make informed decisions about the best approach for them and their children and that all relevant issues are before the Panel.

31. 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.
32. 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.¹³
33. We acknowledge in an application seeking leave for legal representation the Bill requires the Panel to consider family violence and the *“capacity of a party to effectively participate in the hearing without legal representation”*.¹⁴
34. The Explanatory Memorandum states:

*Consideration of these factors is important to ensure victims of family violence are not re-traumatised by the parent management hearing process, and to achieve a fair hearing.*¹⁵
35. However, there is no requirement to grant leave for a person to have legal representation once either of these grounds is established.
36. WLSA recommends leave be granted for legal representation where any of the mandatory considerations in such an application are met.
37. Women who have experienced violence face enormous difficulty in advocating for themselves or their children, especially if they are in the same room or in the vicinity of the perpetrator of violence.
38. Consideration must also be given to the space provided for the PMH and how to try and ensure participants feel comfortable to participate.
39. Legal assistance for parties must be funded, particularly for applications involving family violence and child abuse. This is necessary to ensure victims-survivors are safe and protected. This is particularly important given the gap between those who are eligible for legal aid and those who can afford to pay a private lawyer. As WLSA stated in the parliamentary inquiry into a better family law system to support and protect those affected by family violence, this *“missing middle”* is a *“big gap and it is widening”*.¹⁶
40. While the granting of leave for legal representation is important in the circumstances proposed, it may have little practical effect if parties are unable to afford legal representation.
41. WLSA also supports the National Family Violence Prevention Legal Services Forum recommendation of adequate funding of culturally safe, Aboriginal and Torres Strait Islander community controlled specialist legal services to assist Aboriginal and Torres Strait Islander women through the family law system. This is particularly important given Aboriginal and Torres Strait Islander victims-survivors of

¹³ Proposed s11LJ

¹⁴ Proposed s11LJ(2)

¹⁵ Explanatory Memorandum, p 54

¹⁶ Women’s Legal Services Australia cited in House of Representatives Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence final report*, December 2017, paragraph 4.160

family violence often face complex barriers to safely disclosing violence, obtaining support and utilising the family law system.

42. Legal assistance services have experience and expertise in non-adversarial forums such as lawyer assisted family dispute resolution, which with the necessary safeguards can be used appropriately in family violence matters.¹⁷ Women's Legal Service Queensland helped to develop the Co-ordinated Family Dispute Resolution model - a model specifically designed for parenting matters involving family violence. Further, several WLSA members and Associate members, including Women's Legal Service NSW, Women's Legal Service Victoria, Women's Legal Service Queensland, North Queensland Women's Legal Service, Central Australian Women's Legal Service and Family Violence Prevention Legal Services provide representation in lawyer assisted family dispute resolution with particular expertise in matters relating to family violence and child abuse.

If Parliament proceeds with the PMHs:

Recommendation 3

Parties are referred and able to access legal assistance before entering a PMH process.

Recommendation 4

When seeking leave for legal representation where any of the mandatory considerations in such an application are met, leave is granted.

Recommendation 5

Legal assistance including legal representation in PMHs for parties must be funded, particularly for applications involving family violence or child abuse. This should include additional funding for family law and family violence duty services; specialist women's legal services and programs; and specialist Aboriginal and Torres Strait Islander controlled legal service providers (including both Family Violence Prevention Legal Services and Aboriginal and Torres Strait Islander Legal Services).

Panel member qualification requirements

43. The Principal (Panel) Member is required to be enrolled as a legal practitioner for at least 5 years¹⁸ and have "*extensive specialist knowledge and skills*" including "*knowledge and experience*" in family law and in dealing with "*matters relating to family violence.*"¹⁹
44. Other Panel members are either legal practitioners with expertise in family law²⁰ or non-legal practitioners who have "*at least 5 years' experience working with families or children*" and expertise in one or more fields such as psychology, counselling, social work, family dispute resolution, community work, family violence, mental health, drug or alcohol addiction or child development.²¹

¹⁷ Rae Kaspiew, R. De Maio, J. Deblaquiere J. and Horsfall B. *Evaluation of a pilot of legally assisted and supported family dispute resolution in family violence cases*, (AIFS) December 2012

¹⁸ Proposed s11UA(2)(a)

¹⁹ Proposed s 11UA(2)(b)

²⁰ Proposed s11UA (3)

²¹ Proposed s11UA(4)

45. The Bill provides that each Panel should be made up of at least two Panel members, one of whom must be a qualified legal practitioner and one of whom is not a qualified practitioner.²²
46. We support Panels being constituted with multidisciplinary expertise.
47. We commend the requirement that the Principal Member has specialist knowledge skills and experience relating to family law and family violence. Family violence is widely under reported but an extremely common dynamic in families that utilise family law processes. However, there is no requirement that the Principal Member sits on all PMHs.²³ This may mean a Panel for a PMH is constituted without family violence expertise. This is of concern given it is possible that family violence is not identified during early risk assessment and prior to the constitution of a Panel for a particular matter.
48. WLSA believes it is a necessary requirement that each Panel has at least one Panel Member with extensive expertise in family violence, child abuse and trauma informed practice from a victim's-survivor's perspective.
49. It is also essential that all Panel members and staff conducting risk assessments are culturally competent in relation to:
- working with Aboriginal and Torres Strait Islander people, including having an understanding of the multiple and diverse factors contributing to the high levels of family violence in Aboriginal and Torres Strait Islander communities and an understanding of Aboriginal and Torres Strait Islander family structures and child rearing practices as well as maintaining appropriate referral procedures, policies and relationships with Aboriginal Community Controlled Organisations;
 - working with people of a culturally linguistically and diverse background (including working with interpreters);
 - working with lesbian, gay, bisexual, transgender and queer (LGBTIQ+) families
50. It is also essential that all Panel members and staff conducting risk assessment are disability aware.
51. We recommend ongoing training in cultural competency, disability awareness, family violence, child abuse and trauma informed practice and working with vulnerable clients.
52. It is also important that there is diversity in the composition of Panels.

If Parliament proceeds with the PMHs:

Recommendation 6

At least one Panel Member on each Panel should have extensive knowledge and experience in family violence, child abuse and trauma informed practice from a victim's-survivor's perspective.

Recommendation 7

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.

²² Proposed s11VB(1)

²³ Proposed s11VB

Recommendation 8

There be ongoing training for Panel members and other staff associated with the PMH process in cultural competency, disability awareness, family violence, child abuse and trauma informed practice and working with vulnerable clients.

Recommendation 9

That there is diversity in the composition of Panels.

Role of Assistants

53. Proposed section 11LJ(4) provides parties to a PMH are entitled to have another person present at the hearing. In exceptional circumstances the “assistant” may address the Panel. The Explanatory Memorandum notes the purpose of this is to provide support for parents who may find the PMH “an intimidating prospect”.²⁴
54. We express concern about the potential misuse of a support person in the context of family violence.
55. We note the entitlement to a support person is subject to proposed s11LF(3)(b) – the Panel can make directions about who may be present at the PMH. Further, the Explanatory Memorandum states this power may be exercised “if the assistant is intimidating another party, or adversely affecting their ability to participate in the process”.²⁵ However, the ability of the Panel to make this assessment is reliant on their expertise in family violence and trauma informed practice and not all Panels are required to have expertise in “matters relating to family violence”. Further, a victim-survivor may not feel confident in raising concerns about an alleged perpetrator’s support person directly with the Panel. A legal representative could do this. This again highlights the importance of legal representation, particularly in matters involving family violence and child abuse.

Role of family consultants

56. We note one of the functions of family consultants is to “assist and advise parties to parent management hearings”.²⁶ It is unclear what is meant by this. However, we believe it is important that parties are able to access independent advice from a legal practitioner.

Process of gathering evidence

57. Proposed s11ME provides powers for the Panel to obtain information and documents. It is not clear what procedures will require to be followed, for example, regarding objections to providing such information and documents.
58. We note proposed s11R provides it is an offence to fail to comply with a notice to give information or produce documents with a penalty of imprisonment for 12 months or 60 penalty units or both. Proposed s11R(2) states this “does not apply to the extent that the person has a reasonable excuse”.
59. We note s70NFB(2)(e) and s70NFG of the *Family Law Act* give the court the power to punish a contravention of an order with up to 12 months imprisonment. We also note the *Family Law Rules* and

²⁴ Explanatory Memorandum, p54

²⁵ Explanatory Memorandum, p54

²⁶ Proposed s 11A(2)(a)

the *Family Law Act* give the court the power to punish failure to disclose information with imprisonment.²⁷ We further note the court has the power to punish a contravention of an order with a fine up to 60 penalty units.²⁸ However, these powers are exercised by a judicial officer and are subject to the procedures and protections provided by a court making such a decision.

60. We further acknowledge Note 2 within proposed s11R which states that “Grounds that the information or documents might tend to incriminate the person is not a reasonable excuse”.
61. We express concern that the PMH forum is an untested decision-making body which seems to want to exercise judicial power without the necessary oversight. This again highlights why it would be beneficial to refer the issue of PMHs to the current ALRC inquiry.
62. We refer to the report produced by Women’s Legal Service NSW - *Sense and Sensitivity: Family Law, Family Violence and Confidentiality*. This report discusses 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. This would acknowledge that improving responsiveness to victims-survivors of family violence includes preserving therapeutic relationships. Such guidelines should also apply in the PMH forum.

Recommendation 10

The development of guidelines about the use of sensitive records.

Accessing transcripts

63. Questions arise about how parties will be able to access transcripts of their hearings. Such transcripts should be free or available at very low cost.

Written reasons for parenting determination

64. Where written reasons for a parenting determination are not provided, a party to the PMH only has 28 days after receiving a written copy of the parenting determination to request written reasons for the determination.²⁹ There should be discretion to provide written reasons beyond the 28 days.

If Parliament proceeds with the PMHs:

Recommendation 11

There be discretion to provide written reasons beyond the 28 days.

²⁷ *Family Law Rules* 13.14(a)(ii) and *Family Law Act* s112AP

²⁸ *Family Law Act* s70NFB(2)(d)

²⁹ Proposed s11PB(7)(a)

Independent review

65. We refer to proposed s11Z and strongly support an independent evaluation of the PMH process. In the interests of good governance, including transparency and accountability, there should be a requirement that the report is published and publicly available in a timely manner.

If Parliament proceeds with the PMHs:

Recommendation 12

The independent evaluation report must be published and publicly available in a timely manner.