



**Australian
Human Rights
Commission**

Family Law Amendment (Parenting Management Hearings) Bill 2017

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION
TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS
LEGISLATION COMMITTEE**

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Table of Contents

1	Introduction.....	3
2	Summary	3
3	Recommendations.....	3
4	Australian Law Reform Commission review.....	4
5	National Children’s Commissioner’s work on child rights and the family law system	5
6	Children’s views	5
7	Panel expertise on children	7
8	Dismissing applications when child abuse is of a serious nature	8

1 Introduction

1. The Australian Human Rights Commission (the Commission) welcomes the opportunity to make this submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Family Law Amendment (Parenting Management Hearings) Bill 2017.
2. The Commission is broadly supportive of the aim of the Family Law Amendment (Parenting Management Hearings) Bill 2017 to provide self-represented litigants with a more flexible and inquisitorial alternative to the court process for resolving parenting disputes. However, the Commission has some concerns relating to children's rights.
3. This submission addresses specific issues relating to children's rights only. It does not provide comments on all of the provisions of the Bill.

2 Summary

4. The Commission is broadly supportive of the aim of the Family Law Amendment (Parenting Management Hearings) Bill 2017 to provide self-represented litigants with a more flexible and inquisitorial alternative to the court process for resolving parenting disputes. However, the Commission has some concerns relating to children's rights
5. The amendments do not give children who are affected by a parenting matter before the Panel sufficient opportunity to express their views in accordance with article 12 of the United Nations *Convention on the Rights of the Child* (CRC).
6. The Commission also notes that while the Bill proposes that the main Panel Member must have family violence expertise, this may not include knowledge of child development, the impacts of violence on children or childhood trauma. The Commission considers that it is vital that judicial decision-makers have a comprehensive understanding of family violence, and specifically about the impact of family violence and child abuse on children, including the impacts on children of being exposed to family violence.
7. While the Commission supports the view that matters involving child sexual abuse can be complex and serious, it is certainly the case that other forms of child abuse can also be complex and involve allegations of a very serious nature. The Family Court's Magellan Program is designed to deal with both serious physical and sexual child abuse cases.¹ This initiative is equipped with a multidisciplinary team and resources to address the complexity of concerns raised in these types of cases.

3 Recommendations

Recommendation 1: Panel Members be required to both seek and consider the views of children who are affected by a parenting matter before the Panel. This may be by appointing an Independent Children's Lawyer or a family consultant, who should be required to provide children with the opportunity to express their views

about any decisions which affect them, or through other means as the Panel thinks appropriate. A child should not be compelled to express a view, but should be provided with the opportunity to do so in a manner appropriate to their age and maturity.

Recommendation 2: Panel Members, Independent Children’s Lawyers and family consultants be provided with specific training and resources on how to effectively communicate with children of various ages and maturity, and seek their views about family law matters that concern them.

Recommendation 3: The independent review of the Parenting Management Hearings Panel, proposed in section 11Z of the Bill, be required to consider the views of children who have been affected by decisions of the Panel during the pilot program, in order to evaluate the effectiveness of the pilot.

Recommendation 4: All Panel Members be provided with training prior to commencement of the pilot on the effects of family violence and child abuse, including exposure to violence, on children.

Recommendation 5: Panel Members be provided with training and information on child inclusive practice, as applied in many family dispute resolution services.

Recommendation 6: The independent review of the Parenting Management Hearings Panel, proposed in section 11Z of the Bill, be required to evaluate whether the Panel as a whole has sufficient expertise on issues related to child abuse and child development to perform its functions effectively.

Recommendation 7: The Inquiry consider whether proposed section 11NA(3) of the Bill, which requires the Panel to dismiss an application which alleges child sexual abuse or a risk of child sexual abuse, be expanded to include serious physical abuse of a child.

4 Australian Law Reform Commission review

8. As the Committee will be aware, in September 2017, the former Attorney-General, the Hon George Brandis QC, commissioned the Australian Law Reform Commission (ALRC) to undertake a comprehensive review of the family law system.² The ALRC is due to report to the Attorney-General by 31 March 2019.
9. While there have been a number of inquiries into family violence and family law over the past decade, the Commission considers that the ALRC review provides a unique opportunity to address a broad range of concerns about the implementation of children’s rights across the whole family law system.
10. The Parent Management Hearings proposed in the Bill are to be established as a pilot program operating in one location initially and at a second location late in 2018. An independent statutory review of the pilot must be completed within three years of commencement.³

11. The operation of the Parent Management Hearings may raise complex issues that will benefit from a consideration by the ALRC in its review of the family law system.

5 National Children’s Commissioner’s work on child rights and the family law system

12. Since the beginning of her term in March 2013, the issue of family and domestic violence in the context of the family law system has been raised with the National Children’s Commissioner by children, by adults on behalf of children, and by adults reflecting on their childhood experiences. This includes numerous representations from children and young people, and their advocates, about failures by courts and agencies within the family law system to solicit their views in the context of decision-making, and to provide them with accessible information about processes and outcomes.
13. In 2015, the Commissioner conducted a national investigation into how Australian children under 18 years of age are affected by family and domestic violence. This included consideration of children affected by family and domestic violence who are involved with the family law system. The findings and recommendations of this investigation are contained in the *Children’s Rights Report 2015*.⁴ The types of concerns raised with her during this examination included: a lack of understanding and inappropriate responses to family and domestic violence by those working in the family law system, court decisions which do not fully reflect the amendments to the *Family Law Act 1975 (Cth)*(Family Law Act) in 2012; and conflict between the right of parental contact and the rights and best interests of the child and their non-violent parent.⁵
14. In January 2017, the Commissioner made a submission to the Australian Government on the exposure draft of proposed legislative amendments to the Family Law Act in relation to family violence.⁶

6 Children’s views

15. Article 12 of the United Nations *Convention on the Rights of the Child* (CRC) sets out a child’s right to express their views on all matters affecting the child, and to have those views given due weight in accordance with the age and maturity of the child.⁷ Children’s right to express views is also one of the four ‘Guiding Principles’ of the CRC, which provide the means by which all the articles of the CRC are interpreted and achieved.
16. The Commission is concerned that the proposed amendments do not give children who are affected by a parenting matter before the Panel sufficient opportunity to express their views in accordance with article 12.
17. The provisions of the Bill require the members of the Parent Management Hearings Panel to consider any views expressed by the child in determining what is in the child’s best interests (s 11JB(4)(a)). Under the Bill, the Panel may inform itself of views expressed by the child by:

- a. having regard to anything contained in a report by a family consultant
 - b. giving a direction under section 11LK for the child's interests in the parenting management hearing to be independently represented by a lawyer
 - c. having regard to the matters prescribed by the Panel rules.⁸
18. The Commission notes that the Bill's approach to considering the views of the child is consistent with the approach for judicial decisions on parenting matters in the Family Court. However, the Commission has a number of concerns about this approach.
19. Notably, the Bill does not *require* the Panel to provide an opportunity for a child to express their views, but to consider any views that may be expressed through a family consultant or an Independent Children's Lawyer (ICL). However, not all children will have access to these mechanisms for expressing their views. The Panel has discretion both on whether to request a report from a family consultant,⁹ or direct that a child's interests are to be represented by a lawyer.¹⁰ Further, whereas a family consultant must ascertain the views of the child in relation to a matter directed by the Panel, an ICL is not required to provide a child with an opportunity to express a view.
20. Research shows that there is a reluctance, and lack of skills, among some Australian judges in the Family Court to engage with children.¹¹ The Commission is concerned that, without a requirement to seek the views of children, Panel Members, as with judges, will be hesitant to seek out the views of children using the mechanisms available to them.
21. Despite the key role that family consultants and ICLs play in relaying children's views to the Family Court, there are also some concerns about whether they are sufficiently child-centred in their approach. An Australian Institute of Family Studies study revealed there is diversity of practice among ICLs about meeting with children, with some lawyers not meeting with children and relying only on sources of information such as family or expert reports.¹² A recent House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry into a better family law system to support and protect those affected by family violence concluded that the Family Court must be better informed of children's views, concerns and matters affecting their welfare. It recommended that the Australian Law Reform Commission, in its review of the family law system, examine and propose alternative mechanisms that would ensure children's perspectives are heard in court.¹³
22. Studies consistently show that children want to have more of a say in legal decisions affecting them.¹⁴ Providing children and young people with the opportunity to make their thoughts and preferences known in court proceedings helps ensure they are satisfied with final decisions around living arrangements and contact with parents¹⁵ and contributes to their overall psychological wellbeing.¹⁶

Recommendation 1: Panel Members be required to both seek and consider the views of children who are affected by a parenting matter before the Panel. This may be by appointing an Independent Children’s Lawyer or a family consultant, who should be required to provide children with the opportunity to express their views about any decisions which affect them, or through other means as the Panel thinks appropriate. A child should not be compelled to express a view, but should be provided with the opportunity to do so in a manner appropriate to their age and maturity.

Recommendation 2: Panel Members, Independent Children’s Lawyers and family consultants be provided with specific training and resources on how to effectively communicate with children of various ages and maturity, and seek their views about family law matters that concern them.

Recommendation 3: The independent review of the Parenting Management Hearings Panel, proposed in section 11Z of the Bill, be required to consider the views of children who have been affected by decisions of the Panel during the pilot program, in order to evaluate the effectiveness of the pilot.

7 Panel expertise on children

23. The Commission welcomes the provisions of the Bill which aim to establish an expert, multidisciplinary Panel, with the Bill requiring Panel Members to have specialist skills and expertise in relevant fields.¹⁷
24. Under proposed section 11UA(2), a Principal Member’s expertise must include knowledge and experience in matters of family law and knowledge and experience in dealing with matters relating to family violence. Other Panel Members must either be qualified legal practitioners with knowledge and experience in family law, or have at least five years of experience working with families or children, with specialist knowledge and skills in one or more of the fields, including psychology, social work, family violence, mental health and child development.
25. The Commission considers that a multi-disciplinary Panel will have greater capacity to respond to the complexities that arise in parenting matters, in particular matters involving family violence. The Commission notes that the Bill’s focus on creating a multidisciplinary Panel in the pilot program may offer an advantage over cases heard in the Family Court, as judges in the Family Court and Federal Circuit Courts are not required to have expertise in family violence, child development or other social sciences related to family law.
26. However, the Commission notes that while the Bill proposes that the main Panel Member must have family violence expertise, this may not include knowledge of child development, the impacts of violence on children or childhood trauma. The Commission considers that it is vital that judicial decision-makers have a comprehensive understanding of family violence, and specifically about the impact of family violence and child abuse on children, including the impacts on children of being exposed to family violence.
27. Further, other Panel Members are not required to have such training if they have been appointed either as a qualified legal practitioner only, or have

experience in some of the areas listed in the Bill but working exclusively with adults. The Commission recommends that all Panel Members be provided with training prior to commencement of the pilot, including training on the effects of family violence and child abuse, including exposure to violence, on children.

28. The pilot provides an opportunity to test a child inclusive approach in family dispute resolution. Child inclusive practice is an approach to family dispute resolution gaining prominence in Australia.¹⁸ It is designed to enhance collaboration between parents and keep the best interests of children at the forefront of mediation. It also helps separated parents develop co-operative parenting strategies for the future. The Commission considers that Panel Members would benefit from training and information about this approach.

Recommendation 4: All Panel Members be provided with training prior to commencement of the pilot on the effects of family violence and child abuse, including exposure to violence, on children.

Recommendation 5: Panel Members be provided with training and information on child inclusive practice, as applied in many family dispute resolution services.

Recommendation 6: The independent review of the Parenting Management Hearings Panel, proposed in section 11Z of the Bill, be required to evaluate whether the Panel as a whole has sufficient expertise on issues related to child abuse and child development to perform its functions effectively.

8 Dismissing applications when child abuse is of a serious nature

29. Under proposed section 11NA(3), the Bill provides that a Panel must dismiss an application for a parenting determination when the application alleges child sexual abuse or a risk of child sexual abuse. The rationale for this is that matters involving child sexual abuse involve allegations of a very serious nature, are typically complex and are more appropriate for court resolution.¹⁹
30. While the Commission supports the view that matters involving child sexual abuse can be complex and serious, it is certainly the case that other forms of child abuse can also be complex and involve allegations of a very serious nature. While the Panel has the power, under section 11NB(3), to dismiss an application if there has been abuse or risk of abuse of the child by one of the parties, the Commission considers that there is benefit in expanding the matters that must be dismissed under 11NA during the pilot to include all serious physical and sexual child abuse.
31. One reason for this is that the Family Court's Magellan Program is designed to deal with both serious physical and sexual child abuse cases.²⁰ This initiative is equipped with a multidisciplinary team and resources to address the complexity of concerns raised in these types of cases. Cases in this list also adhere to a strict timeline.²¹

32. The Family Court of Australia’s Annual Report 2013-2014 states that:

Magellan cases involve allegations of serious physical abuse or sexual abuse of a child and undergo special case management. When a Magellan case is identified, it is managed by a small team consisting of a judge, a registrar and a family consultant. Magellan case management relies on collaborative and highly coordinated processes and procedures. A crucial aspect is strong interagency coordination, in particular with state and territory child protection agencies. This ensures that problems are dealt with efficiently and that high-quality information is shared. An independent children’s lawyer is appointed in every Magellan case, for which legal aid is uncapped ... not all notices will necessarily result in the case being classified as a Magellan matter. The Court assesses and determines from the issues raised the matters that are managed under the Magellan program.²²

33. In 2007, the Australian Institute of Family Studies evaluated the Magellan Program and found that it has been successful in responding to allegations of serious child abuse.²³ In her *Children’s Rights Report 2015*, the National Children’s Commissioner recommended that consideration be given to expanding the Magellan program to incorporate the broader definitions of family violence and abuse as reflected in the 2012 amendments.²⁴ Similarly, the House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry into a better family law system recommended that the Magellan program be extended to all parenting matters where there are allegations of family violence.²⁵

34. As the establishment of the Parenting Management Hearings is a pilot program, and the expertise and resources available to the Panel on issues of child abuse are as yet undetermined, all cases involving serious child abuse may be better managed through the successful Magellan Program.

Recommendation 7: The Senate Committee consider whether proposed section 11NA(3) of the Bill, which requires the Panel to dismiss an application which alleges child sexual abuse or a risk of child sexual abuse, be expanded to include serious physical abuse of a child.

¹ Family Court of Australia, *Child abuse allegations* (1 April 2015). At <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/family-violence/child-abuse-allegations/> (viewed 5 February 2018).

² Attorney-General, ‘First comprehensive review of the Family Law Act’ (Media Release, 27 September 201) 1. At https://www.alrc.gov.au/sites/default/files/170927_-_mr_-_family_law_review_terms_of_reference.pdf (viewed 16 January 2018).

³ Explanatory Memorandum, Family Law Amendment (Parenting Management Hearings) Bill 2017 (Cth) 2.

⁴ Australian Human Rights Commission, *Children’s Rights Report 2015* (2015). At <https://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2015> (viewed 10 January 2018).

⁵ Australian Human Rights Commission, *Children’s Rights Report 2015* (2015). At <https://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2015> (viewed 10 January 2018) 147.

⁶ Megan Mitchell, National Children’s Commissioner, Submission to the Commonwealth Attorney-General’s Department on proposed amendments to the *Family Law Act 1975* to respond to family violence, 2017. At <https://www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-Family-Law-Act-1975-to-respond-to-family-violence.aspx> (viewed 16 January 2018).

- ⁷ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), article 12.
- ⁸ Family Law Amendment (Parenting Management Hearings) Bill 2017, sch 1 item 22, s 11JC.
- ⁹ Family Law Amendment (Parenting Management Hearings) Bill 2017, sch 1 item 22, s 11M.
- ¹⁰ Family Law Amendment (Parenting Management Hearings) Bill 2017, sch 1 item 22, s 11LK.
- ¹¹ Michelle Fernando, 'Children's direct participation and the views of Australian judges' (2013) 92 *Family Matters* 40. At <https://aifs.gov.au/publications/family-matters/issue-92/childrens-direct-participation-and-views-australian-judges> (viewed 16 January 2018).
- ¹² Rae Kaspiew et al, Attorney General's Department, *Independent Children's Lawyers Study: Final report (2nd ed.)* (2014) 121-123, 132-139. At <https://www.ag.gov.au/Publications/Pages/IndependentChildrensLawyersStudy.aspx> (viewed 16 January 2018) Australian Institute of Family Studies, *Independent Children's Lawyers Study – Final Report*, 2014 58.
- ¹³ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A better family law system to support and protect those affected by family violence* (2017) xxxv, Recommendation 23. At https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Report (viewed 16 January 2018).
- ¹⁴ Michelle Fernando, 'Children's direct participation and the views of Australian judges' (2013) 92 *Family Matters* 40, 42. At <https://aifs.gov.au/publications/family-matters/issue-92/childrens-direct-participation-and-views-australian-judges> (viewed 16 January 2018); Rae Kaspiew et al, Attorney General's Department, *Independent Children's Lawyers Study: Final report (2nd ed.)* (2014) 121-123, 132-139. At <https://www.ag.gov.au/Publications/Pages/IndependentChildrensLawyersStudy.aspx> (viewed 16 January 2018); ACT Children and Young People Commissioner, *Talking with children and young people about participation in family court proceedings* (2013) 17-28; Judy Cashmore & Patrick Parkinson, 'Children's participation in family law disputes: The views of children, parents, lawyers and counsellors' (2009) 82 *Family Matters* 15, 17-18. At <https://aifs.gov.au/publications/family-matters/issue-82/children-s-participation-family-law-disputes> (viewed 16 January 2018).
- ¹⁵ ACT Children and Young People Commissioner, *Talking with children and young people about participation in family court proceedings* (2013) 17.
- ¹⁶ Joan Kelly, 'Legal and educational interventions for families in residence and contact disputes' (2001) 15(2) *Australian Journal of Family Law* 92.
- ¹⁷ Explanatory Memorandum, Family Law Amendment (Parenting Management Hearing) Bill 2007 (Cth), 1 [5].
- ¹⁸ Commonwealth Attorney-General's Department, Child inclusive practice in family and child counselling and family and child mediation, June 1998. At <https://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/child-inclusive-practice-in-family-and-child-counselling-and-family-and-child-mediation-0?HTML> (viewed 16 January 2018).
- ¹⁹ Explanatory Memorandum, Family Law Amendment (Parenting Management Hearings) Bill 2017 (Cth), 66 [300].
- ²⁰ Family Court of Australia, *Child abuse allegations* (1 April 2015). At <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/family-violence/child-abuse-allegations/> (viewed 16 January 2018).
- ²¹ 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* (2017) 204. At https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Report (viewed 16 January 2018).
- ²² Family Court of Australia, *Annual Report 2013-14* (2014) 74.
- ²³ 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* (2017) 204. At https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Report (viewed 16 January 2018).
- ²⁴ Australian Human Rights Commission, *Children's Rights Report 2015* (2015) 150. At <https://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2015> (viewed 10 January 2018).
- ²⁵ 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* (2017), xxxiv, Recommendation 21. At https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Report (viewed 16 January 2018).