

7 February 2018

Mr Tim Watling
Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Mr Watling

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

1. Introduction

- 1.1. Rape and Domestic Violence Services Australia (R&DVSA) thank the Legal and Constitutional Affairs Legislation Committee for the opportunity to comment on the *Family Law Amendment (Parenting Management Hearings) Bill 2017* (the Bill).
- 1.2. R&DVSA is a non government organisation that provides a range of counselling services to people whose lives have been impacted by sexual, family or domestic violence¹ and their supporters. Our services include the NSW Rape Crisis counselling service for people in NSW who have experienced or have been impacted by sexual violence; Sexual Assault Counselling Australia for people who have been impacted by the Royal Commission into Institutional Responses to Child Sexual Abuse; and Domestic and Family Violence Counselling Service for Commonwealth Bank of Australia customers who are seeking to escape domestic or family violence.

¹ R&DVSA prefer the term *people who have experienced sexual assault and/or domestic and family violence* to describe individuals who have suffered this type of violence, rather than the terms survivors or victims. This is in acknowledgement that, although experiences of sexual assault and/or domestic and family violence are very significant in a person's life, they nevertheless do not define that person.

- 1.3. This submission is based on the experiences of our clients. As such, it focuses on the potential impacts that the Bill may have on the safety and wellbeing of people who have experienced, or are at risk of, sexual, family or domestic violence.
- 1.4. R&DVSA recognise there is a critical need for reform to the family law system to respond to the needs of people who have experienced, or are at risk of, domestic or family violence. Family violence and other safety concerns arise in over half of all parenting matters which come before family courts.² However, according to research undertaken by the Australian Institute of Family Studies (AIFS) in 2015, less than one third (32 per cent) of separated parents perceived the family law system as addressing family violence issues.³ The number was even lower for parents who held current safety concerns in relation to themselves and their child (26 per cent), indicating that the needs of this group are not currently being met.
- 1.5. Further, R&DVSA acknowledge the need to explore alternatives to traditional court processes. As the Victorian Royal Commission into Family Violence recognised, the court process is often “intimidating, confusing and unsafe” for people who have experienced family violence.⁴ R&DVSA supports the shift towards non-adversarial and multi-disciplinary approaches as desirable within the context of family violence.
- 1.6. However, R&DVSA hold serious concerns regarding the model of Parent Management Hearings (PMHs) proposed in the *Family Law Amendment (Parenting Management Hearings) Bill 2017*.
- 1.7. R&DVSA endorse the submission made by Women’s Legal Services New South Wales (WLSNSW) to this inquiry.
- 1.8. In particular, R&DVSA shares WLSNSW’s concerns that:
 - The proposed model of PMHs is not evidence based.
 - The barriers to legal representation for people who have experienced domestic or family violence create a significant risk that power imbalances may be perpetuated throughout the hearing process and that any resultant orders may not adequately take into consideration family violence or safety concerns.
 - The eligibility requirements for Panel Members are not sufficient to ensure that every Panel is equipped to handle the complexities of domestic and family violence.
 - The Bill does not provide adequate protection for confidential counselling records.
- 1.9. On the basis of these concerns, which are outlined in more detail below, R&DVSA does not support the Bill in its current form.

² Family Law Council. (2016). Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report, 22, referring to: R. Kaspiew, R. Carson, J. Dunstan, L. Qu, B. Horsfall, J. De Maio, S. Moore, L. Moloney, M. Coulson and S. Tayton. (2015) *Evaluation of the 2012 family violence amendments: Synthesis Report*. Melbourne: Australian Institute of Family Studies, 16-17.

³ Kaspiew, R., Carson, R., Dunstan, J., De Maio, J., Moore, S., Moloney, L. et al. (2015). *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)*. Melbourne: Australian Institute of Family Studies, 117.

⁴ State of Victoria (2014-16) Royal Commission into Family Violence: Report and recommendations, Vol III, Parl Paper No 132, Ch 16, 117.

2. Full List of Recommendations

- **Recommendation 1:** R&DVSA recommends that the proposed introduction of PMHs is referred to the Australian Law Reform Commission for consideration in their current Review of the Family Law System, prior to the establishment of any pilot program.
- If Parliament determines to proceed with PMHs, R&DVSA recommends that:
 - **Recommendation 2:** Parties should be afforded a right to legal representation in PMHs, without any requirement to seek leave. Alternatively, if Parliament decides to maintain the requirement for leave, R&DVSA recommends that the Panel be required to grant leave wherever any of the mandatory considerations in proposed section 11LJ are met.
 - **Recommendation 3:** Specialised, free and timely legal assistance should be made accessible to parties involved in PMHs. The government should prioritise the provision of and access to legal services for people who have experienced domestic and family violence, including enhanced support for women in high risk and vulnerable groups. This should be achieved by increasing funding to family law and family violence duty services; specialist women's legal services and programs; and specialist Aboriginal and Torres Strait Islander community controlled legal service providers.
 - **Recommendation 4:** At least one Panel Member on each Panel should have extensive knowledge of, and experience in dealing with, matters relating to sexual assault, domestic and family violence.
 - **Recommendation 5:** All Panel Members and staff conducting risk assessments must demonstrate a thorough understanding of sexual assault, domestic and family violence and trauma informed practice.
 - **Recommendation 6:** All Panel Members and staff conducting risk assessments should receive specialised and ongoing training in relation to family violence, which covers topics including:
 - The dynamics, complexities and impacts of sexual assault, domestic and family violence;
 - Identifying family violence risk factors and responding appropriately;
 - The intersection of family law and child protection;
 - Trauma informed practice;
 - Cultural competency in relation to working with Aboriginal and Torres Strait Islander people;
 - Cultural competency in relation to working with people from a culturally and linguistically diverse (CALD) background;
 - Working with lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) families;
 - Working with people with a disability; and
 - Working with other people made vulnerable by their circumstances.
 - **Recommendation 7:** There should be diversity in the composition of Panels.
 - **Recommendation 8:** There should be greater protections for the use of counselling records in PMHs, subject to the paramount consideration of the best interests of the child.

- **Recommendation 9:** Guidelines should be developed regarding the use of sensitive records in family law matters, including PMHs.
- **Recommendation 10:** The independent, evaluation report must be published and be made publicly available in a timely manner.

3. Evidence based practice

- 3.1. R&DVSA is committed to the principle of evidence based practice. We believe that any service being delivered to people who have experienced or are at risk of sexual assault, domestic and family violence must be underpinned by the latest evidence of best practice due to the vulnerabilities experienced by this group.
- 3.2. Where practice is not supported by evidence, there are significant risks that people who have experienced family violence may be re-traumatised or that their safety may be compromised.
- 3.3. R&DVSA is concerned that the proposed PMHs model is not supported by comprehensive research or expertise in the field of domestic and family violence.
- 3.4. We understand the PMHs model is based on a proposal by Professor Patrick Parkinson and others which reflects the model of Informal Domestic Relations Trial (IDRT) adopted in Oregon.⁵
- 3.5. In his paper titled 'The Family Law System – A new Reform Agenda', Professor Parkinson recommended a Families Tribunal be adopted and that this model should "draw upon the successful initiatives in Oregon."⁶ However, R&DVSA note that very little evaluation has been conducted in relation to the IDRT Oregon model.
- 3.6. While one evaluation rated IDRT highly,⁷ noting its appropriateness for matters involving family violence, R&DVSA caution against reliance on this study due to the small pool of research participants.⁸ The evaluation was based entirely on conversations with three Deschutes County judges and a single conversation with three practicing attorneys who represented clients in IDRT proceedings.⁹ Significantly, litigants views were excluded altogether as "[t]he litigant satisfaction survey failed to generate a sufficient number of responses from IDRT litigants and was therefore abandoned."¹⁰ From a client-centred perspective, R&DVSA believes that any evaluation must centre the views of people accessing the service.
- 3.7. Thus, R&DVSA consider that little research exists to support the proposed model of PMHs.

⁵ 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*, 14-15.

⁶ Ibid 9.

⁷ Howe, WJ and Hall, JE (2017) 'Oregon's Informal Domestic Relations Trial: A New Tool to Efficiently and Fairly Manage Family Court Trials', *Family Court Review* 55(1), 81.

⁸ Ibid 75.

⁹ Ibid.

¹⁰ Ibid.

- 3.8. R&DVSA note that PMHs will operate initially as a pilot program in two locations, with an independent review to be conducted within three years post-commencement. While this is preferable to rolling out the program without pilot, R&DVSA holds significant concerns for the safety of those women and children accessing the pilot program.
- 3.9. Where safety concerns exist, it is critical to ensure that new programs are supported by rigorous research and expert knowledge prior to any pilot program being established.
- 3.10. As such, R&DVSA proposes that the implementation of PMHs should be delayed until a more thorough evidence base for the model can be established.
- 3.11. We note the Australian Law Reform Commission has recently been engaged by the Attorney General to undertake a comprehensive review of the Australian family law system. This represents a unique opportunity for the proposed model of PMHs to be evaluated by a broad range of stakeholders, including experts in family and domestic violence and importantly, people who have experienced family violence and accessed the family law system themselves.

Recommendation 1: R&DVSA recommend that the proposed introduction of PMHs is referred to the Australian Law Reform Commission for consideration in their current Review of the Family Law System, prior to the establishment of any pilot program.

4. Legal representation

- 4.1. R&DVSA hold significant concerns regarding the barriers to legal representation in PMHs for people who have experienced sexual assault, domestic and family violence by the other party in the hearing.
- 4.2. Legal advice and representation are essential to ensure the safety of people who have experienced family violence when accessing a PMH. Legal assistance can assist parties to understand the process, consider whether PMHs are an appropriate forum in their circumstances, and understand the consequences of a binding parenting determination. Legal representation at PMHs can assist parties to ensure that all relevant issues are put before the Panel and protect people who have experienced violence from having to deal directly with their perpetrator.
- 4.3. Where people who have experienced family violence access PMHs without legal representation, there is a significant risk that power imbalances may be perpetuated throughout the hearing process and that any resultant orders may not adequately take into consideration family violence or safety concerns.
- 4.4. We commend the Government for recognising these risks in the Explanatory Memorandum to the Bill. The Memorandum acknowledges that where one party has been the subject of family violence by the other party, there is a risk they will be disadvantaged where they do not have legal representation. This risk arises as a result of power imbalances between the parties and the potential for intimidation during the hearing process.¹¹ The Explanatory Memorandum states that consideration of these factors by the

¹¹ Explanatory Memorandum, Family Law Amendment (Parenting Management Hearings) Bill 2017, 9.

Panel is “important to ensure victims of family violence are not re-traumatised by the parenting management process, and to achieve a fair hearing.”¹²

- 4.5. However, while the Government has suggested that proposed section 11LJ is sufficient to counteract these risks, R&DVSA believe this provision does not provide adequate protection for people who are experiencing family violence.
- 4.6. Section 11J(1) provides the Panel with discretion to allow (by leave) a party to have legal representation in a PMH. When considering whether to grant leave, the Panel must have regard to whether there are reasonable grounds to believe that there has been family violence, or a risk of family violence, by a party to the hearing; and the capacity of a party to effectively participate in the hearing without legal representation, having regard to any power imbalances between the parties to the hearing or any other relevant factors.
- 4.7. R&DVSA submit that section 11LJ is inadequate for the following reasons:
 - Section 11LJ treats family violence as an exception to the norm, which fails to recognise the prevalence and seriousness of violence permeating the family law system. The Family Law Council noted in its 2016 final report on *Families with Complex Needs and the Intersection of Family Law and Child Protection* that family violence and other safety concerns arise in over half of all parenting matters that come before family courts.¹³ Given the prevalence of family violence within the system, it is critical that family law processes are designed around the vulnerabilities experienced by this group, rather than treating their needs as exceptional.
 - The requirement to seek leave for legal representation is onerous and legally complex and may discourage people who have experienced family violence from accessing legal representation, which the Government has acknowledged is essential to a fair hearing.
 - The requirement to seek leave for legal representation seems to require that family violence be disclosed and/or identified prior to the commencement of the PMHs hearing. However, AIFS found in their 2015 evaluation that the family law system regularly fails to identify safety risks for parents and children.¹⁴ Of parents who had experienced family violence and resolved their matter through family dispute resolution, only 1 in 3 disclosed the violence to a professional during negotiations.¹⁵ Of parents who proceeded through court, around 2 in 3 disclosed family violence.¹⁶ Given these low rates of disclosure, it is likely that many parents experiencing violence may feel unable to disclose violence and therefore unable to seek leave to access legal representation.

¹² Ibid 54.

¹³ Family Law Council. (2016). *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report*, 22, referring to: R. Kaspiew, R. Carson, J. Dunstan, L. Qu, B. Horsfall, J. De Maio, S. Moore, L. Moloney, M. Coulson and S. Tayton. (2015) *Evaluation of the 2012 family violence amendments: Synthesis Report*. Melbourne: Australian Institute of Family Studies, 16-17.

¹⁴ Kaspiew, R. Carson, J. Dunstan, L. Qu, B. Horsfall, J. De Maio, S. Moore, L. Moloney, M. Coulson and S. Tayton. (2015) *Evaluation of the 2012 family violence amendments: Synthesis Report*. Melbourne: Australian Institute of Family Studies.

¹⁵ Kaspiew, R., Carson, R., Dunstan, J., De Maio, J., Moore, S., Moloney, L. et al. (2015). *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)*. Melbourne: Australian Institute of Family Studies, 94-95.

¹⁶ Ibid.

- Section 11LJ affords inappropriate discretion to Panel Members, who may not have specialist knowledge of matters relating to family violence (see section 5 for further discussion of eligibility requirements). Although section 11LJ(2) requires Panel Members to have regard to whether there are reasonable grounds to believe that there has been family violence, the Panel retains the discretion to deny leave where a finding of family violence is made. R&DVSA submits that where there are reasonable grounds to believe that there has been family violence, the party who experienced that violence must always have a right to legal representation.

4.8. In addition, R&DVSA hold significant concerns regarding the accessibility of legal advice and legal representation for people who have experienced domestic or family violence. Proposed section 11LJ may have little practical effect if parties are not able to access specialised, free and timely legal assistance.

4.9. The Victorian Royal Commission into Family Violence noted that the high cost of legal services and the limited availability of free or subsidised services are “perennial concerns” for the family law system. The Final Report further stated:

Limited [legal] services are particularly concerning in the context of family violence, when the parties may have unequal access to resources and legal processes can be used by the perpetrator to continue dominating the victim. Victims may also endure significant financial hardship to engage legal representation, including depleting their savings, incurring debt and selling or mortgaging property and assets. Yet these assets and resources may be a protective factor, and their depletion may inhibit a victim’s autonomy and increase their vulnerability to further violence.¹⁷

4.10. R&DVSA are concerned that no funding has been allocated for legal assistance or representation of parties in PMHs. Increased funding is essential to ensure that people who have experienced domestic or family violence have access to justice.

4.11. Further, it is critical that funding be distributed across a number of services to ensure that clients have access to specialised and culturally appropriate services, and access to a range of services to choose from where a conflict of interest arises.

4.12. In particular, it is essential that the Government prioritise funding to community controlled Aboriginal and Torres Strait Islander specialist legal services. Aboriginal and Torres Strait Islander women and children experience domestic and family violence at dramatically higher rates than their non-Indigenous counterparts. Moreover, Aboriginal and Torres Strait Islander people experience additional, complex barriers to disclosing violence, accessing support services, and utilising the family law system. Specialised, culturally appropriate legal services are the first step to overcoming these barriers.

Recommendation 2: Parties should be afforded a right to legal representation in PMHs, without any requirement to seek leave. Alternatively, if Parliament decides to maintain the requirement for leave, R&DVSA recommends that the Panel be required to grant leave wherever any of the mandatory considerations in proposed section 11LJ are met.

¹⁷ State of Victoria (2014-16) Royal Commission into Family Violence: Report and recommendations, Vol III, Parl Paper No 132, Ch 16, 169.

Recommendation 3: Specialised, free and timely legal assistance should be made accessible to parties involved in PMHs. The government should prioritise the provision of and access to legal services for people who have experienced domestic and family violence, including enhanced support for women in high risk and vulnerable groups such as Aboriginal and Torres Strait Islander women. This should be achieved by increased funding to family law and family violence duty services; specialist women’s legal services and programs; and specialist Aboriginal and Torres Strait Islander community controlled legal service providers.

5. Specialist Family Violence Knowledge – Eligibility and Training

- 5.1. R&DVSA are concerned that the requirements concerning eligibility for Panel Members and composition of Panels are not sufficient to ensure that every Panel is equipped to handle the complexities of domestic and family violence.
- 5.2. The attitude, knowledge and skills of Panel Members are critical to the success of this model. We support the multi-disciplinary composition of the Panel. However, it is important to ensure that each Panel Member has the relevant expertise to understand and respond to complex risks and safety concerns.
- 5.3. The importance of judicial education on family violence has been a consistent theme emerging from recent inquiries, including the Victorian Royal Commission into Family Violence. In their Final Report, the Commission stated that judicial officers’ skills and approach are “critical” to “the outcome of a hearing, the victim’s safety, and a perpetrator’s level of accountability.”¹⁸ Further, as Women’s Legal Service Victoria stated in their submission to the Commission:

Magistrate interaction with victims can have a real impact on whether victims feel empowered or disempowered in the court process.¹⁹

- 5.4. Several other inquiries have also recommended the need for specialised knowledge and training to ensure the family law system is equipped to respond to domestic and family violence, including:
 - The 2016 Victorian Royal Commission into Family Violence Report – Recommendations 215 and 216.
 - The 2016 FLC Final Report on Families with Complex Needs and the Intersection of Family Law and Child Protection – Recommendations 11 and 12.
 - The 2015 Federal Senate Finance and Public Administration References Committee inquiry report titled Domestic violence in Australia – Recommendations 9.71 and 9.72.
 - The 2009 report of Professor Richard Chisholm titled Family Courts Violence Review report – Recommendations 4.3, 4.4 and 4.6.

¹⁸ State of Victoria (2014-16) Royal Commission into Family Violence: Report and recommendations, Vol VI, Parl Paper No 132, Ch 40, 210.

¹⁹ Ibid182.

- 5.5. In light of this consensus, R&DVSA is concerned that the proposed Bill does not guarantee minimum competencies for Panel Members or the need for ongoing professional development. As a result, Panel Members may not have adequate knowledge or skills to respond effectively to the dynamics and complexities of domestic and family violence.
- 5.6. Proposed section 11UA(2)(ii) requires the Principal Member as a condition of eligibility to have “knowledge of, and experience in dealing with, matters relating to family violence.” However, no such requirement exists in relation to ordinary Panel Members.
- 5.7. Rather, section 11UA(3) provides that Panel Members who are legal professionals need only have “specialist knowledge and skills relevant to the duties of a Panel Member, including knowledge of, and experience in, matters of family law.” Similarly, section 11UA(4) provides that non-legal Panel Members need only have specialist knowledge and skills in regards to one or more of the following fields: psychology; counselling; social work; family dispute resolution; community work; family violence; mental health; drug or alcohol addiction; child development; any other field relevant to the duties of a Panel Member.
- 5.8. Proposed section 11VB provides that a Panel may be comprised of any two Panel Members. Thus, it is entirely possible that some Panels may be constituted without any expertise in relation to domestic and family violence.
- 5.9. We recognise that the Principal Member, who has expertise in dealing with family violence, may give directions in relation to the practice, procedure and conduct of PMHs. However, this oversight function cannot guarantee that Panels will be equipped with the skills and expertise necessary to identify and respond to dynamic safety concerns which may emerge or shift throughout the hearing process.
- 5.10. Given the prevalence of family and domestic violence in matters which reach legal determination, R&DVSA consider that all Panels must be equipped with specialist knowledge in this field.
- 5.11. Further, specialised and ongoing training on family violence issues is critical to ensure an up-to-date, shared understanding of family violence by all Panel Members and any other staff conducting risk assessments.
- 5.12. In addition, the establishment of PMHs represents a unique opportunity to respond to the ‘diversity deficit’ among judicial officers.²⁰ Numerous submissions to the Victorian Royal Commission raised concerns about the ability of magistrates to understand and respond to diverse applicants and respondents in family violence matters, such as Aboriginal and Torres Strait Islander peoples, lesbian, gay, bisexual, transgender and intersex people, older people and people with disabilities.²¹ R&DVSA believe that diversity in Panel composition, in addition to training for all Panel Members, is essential to overcoming the barriers faced by these groups.

Recommendation 4: At least one Panel Member on each Panel should have extensive knowledge of, and experience in dealing with, matters relating to sexual assault, domestic and family violence.

²⁰ Ibid 183.

²¹ Ibid 183.

Recommendation 5: All Panel Members and staff conducting risk assessments must demonstrate a thorough understanding of sexual assault, domestic and family violence and trauma informed practice.

Recommendation 6: All Panel Members and staff conducting risk assessments should receive specialised and ongoing training in relation to family violence, which covers topics including:

- The dynamics, complexities and impacts of sexual assault, domestic and family violence;
- Identifying family violence risk factors and responding appropriately;
- The intersection of family law and child protection;
- Trauma informed practice;
- Cultural competency in relation to working with Aboriginal and Torres Strait Islander people;
- Cultural competency in relation to working with people from a culturally and linguistically diverse (CALD) background;
- Working with lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) families;
- Working with older people;
- Working with people with a disability; and
- Working with other people made vulnerable by their circumstances.

Recommendation 7: There should be diversity in the composition of Panels.

6. Confidential counselling records

- 6.1. R&DVSA is concerned that the Bill does not provide adequate protection for confidential counselling records.
- 6.2. R&DVSA has consistently advocated for the preservation of the integrity of counselling and therapeutic relationships, recognising that counselling records do not have an investigative or forensic purpose.
- 6.3. Where counselling records are produced against the client's wishes, this may have negative impacts not only on the subject of those records, but also on other people who have experienced sexual assault, domestic and family violence, and support services more broadly. For example:
 - The client may feel violated or traumatised and experience heightened trauma impacts including feelings of shame, guilt, fear or disconnection from community;
 - There may be damage to the relationship of trust and confidence between the counsellor and client and consequently, to therapeutic outcomes;
 - There may be a risk of further harm to the client, where an offender obtains access to sensitive information about the client, which may enable ongoing abuse or retribution through emotional blackmail or threats;
 - Information obtained from the notes may be used to damage a child's relationship with one or both parents;

- Where there are current police investigations, production may prejudice future criminal proceedings and circumvent protections provided by Sexual Assault Communications Privilege; and
 - Other people who have experienced sexual assault, domestic or family violence may be less willing to report to service providers and access counselling services.
- 6.4. As such, R&DVSA submits that there should be greater protections for the use of counselling records in PMH, subject to the paramount consideration of the best interests of the child.
- 6.5. Moreover, R&DVSA endorses the recommendation by WLSNSW for the development of guidelines about the use of sensitive records, in line with their 2016 Report 'Sense and Sensitivity: Family Law, Family Violence and Confidentiality'.²²

Recommendation 8: There should be greater protections for the use of counselling records in PMHs, subject to the paramount consideration of the best interests of the child.

Recommendation 9: Guidelines should be developed regarding the use of sensitive records in family law matters, including PMHs.

7. Independent Review

- 7.1. R&DVSA supports the inclusion of a provision guaranteeing an independent review be conducted within three years post-commencement of the pilot program.
- 7.2. In line with principles of transparency, accountability and evidence-based practice, R&DVSA consider that the report should be published and made publicly available in a timely manner.

Recommendation 10: The independent, evaluation report must be published and be made publicly available in a timely manner.

Thank you for the opportunity to comment.

Yours faithfully,

Rape and Domestic Violence Services Australia

Karen Willis

Executive Officer

²² Jones, C. (2016). Sense and Sensitivity: Family Law, Family Violence and Confidentiality, Women's Legal Service NSW.