

Submission to the Senate Legal and Constitutional Affairs Committee on the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

The Benevolent Society
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1 Introduction

Thank you for the opportunity to contribute to the Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 [the '2011 Bill'].

Domestic violence is endemic in our society, inflicting trauma and long-term damage on women and their children.

The Benevolent Society strongly supports the changes proposed in the Bill. The Benevolent Society also recommends some additional changes to ensure that the Act will be effective in protecting victims of family violence and their children, and that the revised Act will not have any unintended negative consequences.

This submission is an updated version of the submission by The Benevolent Society in January 2011 in response to the Exposure Draft Family Law Amendment (Family Violence) Bill 2010 (the 'Exposure Draft Bill'). The original submission can be accessed at The Benevolent Society's *Speak Up for Kids* campaign website at <http://www.bensoc.org.au/director/campaigns/speakupforkids.cfm>.

1.1 About The Benevolent Society

The Benevolent Society is Australia's first charity. We are a secular, non-profit organisation working to bring about positive social change in response to community needs.

Our purpose is to create caring and inclusive communities and a just society. We deliver leading edge programs and services, find innovative solutions to complex social issues and advocate for a more just society. The Benevolent Society helps the most vulnerable people in society, and supports people from all backgrounds including Aboriginal and Torres Strait Islanders and people from culturally and linguistically diverse communities. We believe that building stronger communities will lead to a more inclusive Australia.

Snapshot of The Benevolent Society

- The Benevolent Society is a secular non-profit organisation with 800 staff and 700 volunteers who, in 2010, supported more than 31,000 children and adults in New South Wales and Queensland.
- We deliver 122 programs in 55 locations with support from local, state and federal government, businesses, community partners, trusts and foundations.
- Our revenue in 2010 was \$65 million. Approximately 85% is spent directly on our services. A further 8% is spent on our leadership programs, social initiatives and research.
- In 2010, 76% of our income came from government sources. Private fundraising, trust and foundation grants provided another 4%, client fees generated 9% and investment income contributed 6%.
- The Society is a company limited by guarantee with an independent Board.

1.2 The Benevolent Society's role in supporting women and children experiencing domestic violence

The Benevolent Society has a long history of supporting women and children affected by domestic and family violence. Research shows that women with children are three times more likely to be subjected to domestic violence than women without children.¹ We also know that exposure to domestic violence has negative effects on children's mental health, self-esteem and social competence.²

The Benevolent Society works with children and families along the child protection continuum from prevention and early intervention at one end of the spectrum through to out-of-home care at the other. Many of the families we work with are affected by domestic violence. For example, in NSW The Benevolent Society supports vulnerable families as part of the Brighter Futures early intervention program. A recent evaluation of the program, undertaken by the Social Policy and Research Centre at UNSW, found that there was domestic violence in 53% of the families entering the program. In Aboriginal and Torres Strait Islander families the incidence was 59.5%.³

Our Centre for Women's Health in Campbelltown, NSW, has provided specialist services to women affected by domestic and family violence for the past 14 years. The Benevolent Society also runs programs specifically for children who have experienced domestic violence. An example is *Kids Create Tomorrow* which helps children address and recover from their experiences of domestic violence.

The Benevolent Society also runs programs specifically for men, including workshops for new fathers, as part of its early intervention programs for vulnerable families.

The Benevolent Society has a strong commitment to research and advocacy and has led or partnered with other organisations to undertake research exploring domestic violence. In 2009, The Benevolent Society published *Moving forward*⁴ which presents the results of research into the experiences of women who had left an abusive relationship, the challenges they experienced in trying to rebuild their lives and the type of support that they found helpful, or not helpful, in doing so.

More recently, The Benevolent Society partnered with Dr Lesley Laing at the University of Sydney and a number of other organisations to produce the report *No*

1 Humphreys, C.F (2007), *Domestic violence and child protection: challenging directions for practice, Issues Paper 13*, Australian Domestic and Family Violence Clearinghouse, Sydney.

2 Evans, I. (2007). *Battle scars: Long-term effects of prior domestic violence*. Centre for Women's Studies and Gender Research, Monash University.

3 Social Policy Research Centre (2010), *The Evaluation of Brighter Futures, NSW Community Services' Early Intervention Program*.

4 The Benevolent Society (2009), *Moving forward*. www.bensoc.org.au

*Submission on the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 way to live*⁵, which explores women's experiences of negotiating the family law system in the context of domestic violence.

2 Comments on changes proposed in the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

2.1 Taking children's rights into account

We commend the inclusion of the UN Convention on the Rights of the Child (CRC) as an additional object and principle in children's matters under Part VII of the Family Law Act.

2.2 A broader definition and understanding of family violence

We welcome the proposed broadening of the definition of 'family violence' in Section 4AB), bringing the definition into closer alignment with the recommendation by the Australian Law Reform Commission.⁶

Family violence can take many forms. The proposed definition recognises a range of behaviour that covers but is not limited to physical abuse, sexual abuse, coercion, intimidation, harassment, domination, control, torment, damage to property, threats, including threats of self-suicide, economic and financial abuse.

Importantly, the new definition removes the objective test of 'reasonableness' so that the law will require only that the victim actually fears for their safety. Further, the categories of people included as family members has been expanded. These changes are very welcome.

2.3 Concerns with proposed definition of family violence

While the broader definition is a positive step, it omits 'child abuse' and 'exposure to family violence' as forms of family violence.

The Benevolent Society recommends that the definition of 'family violence' be further broadened to include 'child abuse' (which includes 'exposure to family violence') in line with the recommendations of the Australian Law Reform Commission.

2.4 A broader definition and understanding of child abuse

The proposed broadening of the definition of child abuse in Section 4(1) is a positive change. It recognises that causing a child to suffer serious psychological harm is a form of child abuse and this harm can arise from being subjected to, *or exposed to*, violence directed by one family member at other family members.

⁵ Laing, L. University of Sydney (2010), *No way to live*.

⁶ ALRC Report 114, NSWLRC Report 128, p.55

The new definition of when a child is 'exposed to family violence' in s.4AB(3) is directly linked to the best interests of the child considerations in s.60CC(2):

- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

2.5 Concerns with the proposed definition of child abuse

The Benevolent Society welcomes the recognition of children's exposure to family violence in the context of child abuse, and in the primary considerations of the best interests factors. However, by retaining separate definitions of 'family violence' and 'child abuse', the 2011 Bill fails to recognise that 'child abuse', including 'exposure to family violence', in itself constitutes a form of 'family violence'. The ALRC Report emphasised the need for 'child abuse' and 'exposure to family violence' to be recognised as forms of family violence:

*Child abuse is an element of family violence and family violence may be an important factor in child neglect. For the victims it is therefore difficult to separate these experiences.*⁷

*The Family Law Act distinguishes between 'family violence' and abuse of a child. The same conduct in relation to a child, however, may constitute both family violence and child abuse.*⁸

*Further, family violence towards a parent may affect the ability of the victim to parent effectively.*⁹

The Benevolent Society also recommends that the proposed definition of exposure to violence should make it clear that it refers to exposure by the person who *perpetrates* the violence, to avoid unintended consequences that a victim of violence is seen as exposing a child to violence. It must be clear in the *Family Law Act* that victims of violence cannot be held responsible when they are unable to remove children from the violent situation.

2.6 Best interests of the child

While The Benevolent Society commends the proposal to give greater weight to consideration (b) when there is conflict between the two considerations,

- (a) the benefit to the child of having a meaningful relationship with both of the child's parents, and

⁷ ALRC Report 114 Vol 2, p.895

⁸ ALRC Report 114 Vol. 1, p.265

⁹ ALRC Report 114 Vol 2, p.895

(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence, we believe that the child's safety, welfare and wellbeing should be the *paramount* consideration, regardless of whether there is conflict between the two provisions, and taking into account the circumstances of each individual case.

The emphasis in consideration (b) is on protecting children from *future* harm. While past family violence is likely to inform that consideration, it is The Benevolent Society's view that the relevance of past family violence and its impact should be specifically referred to in the primary consideration about protection. The different and individual needs of children that have experienced family violence must be taken into account in this consideration.

Further, the impact on the parenting capacity of a victim of family violence is not addressed in the proposed changes. As the Australian Law Reform Commission has recognised:

...family violence towards a parent may affect the ability of the victim to parent effectively¹⁰

It is imperative that the complex and far-reaching impact of family violence on a parent and their children is addressed in the considerations of the best interests factors. A failure to do this will lessen the impact of the broader definition of family violence and child abuse.

Overall, The Benevolent Society believes the legislation should promote a clear message that family violence has an impact on children's best interests in a wide range of ways, whether or not it is directed towards them and whether or not they directly witness it.

2.7 The friendly parent provision

We support the removal of the friendly parent provision (Sections 60CC(3)(c) and (k) and Section 60CC(4)). This recognises the fact that the friendly parent provision has had the undesirable consequence of discouraging some women who are victims of family violence from disclosing violence to the Family Law Courts.

The 2011 Bill retains the elements of s.60CC(4)(a) and (c) which deal with the requirement of the court to consider the participation of each parent in decision-making in relation to the child; communicating and spending time with the child and maintaining the child. The 2011 Bill includes these requirements in proposed s.60CC(3)(c) and (ca).

¹⁰ Australian Law Reform Commission (2010), *Family Violence - A National Legal Response*, Report 114 Vol. 2

The retention of these clauses in the 2011 Bill differs from the Exposure Draft Bill, which proposed to repeal all of section 60CC(4).

The Benevolent Society recognises that the elements of the friendly parent provision that will be retained in sections 60CC(3)(c) and (ca) may be useful as they require the court to consider parents' participation in the lives of their children. However, we are concerned that these clauses may be used as a de facto friendly parent clause in cases where the primary caregiver limits the participation of a violent parent to protect the child, and the perpetrator attempts to use this clause to argue that the primary caregiver failed to facilitate a relationship, even though the requirement for consideration of facilitation has been removed from the legislation.

2.8 Removal of mandatory cost order provision

The changes proposed to Section 117AB of the *Family Law Act* are welcome. As indicated in the *Family Courts Violence Review (2009)*, Section 117AB needs to be repealed because it carries with it:

*...the suggestion that the system is suspicious of those who allege violence*¹¹

Section 117 is already sufficient to deal with any false allegations or denials of violence.

3 Additional recommendations to strengthen the Act

As already discussed, The Benevolent Society welcomes the intention to place safety and protection of children and family members at the forefront of the Family Law Act and the proposed amendments (with some changes). However, there are some important issues highlighted in reports by the Australian Institute of Family Studies¹², Professor Richard Chisholm and the Family Law Council¹³ that have not been addressed in this Bill.

3.1 Equal Shared Parental Responsibility (ESPR)

There should be no presumption of ESPR. While the presumption is meant to be rebutted by family violence, in practice family violence may not be given its due weight to negate the presumption, especially at an interim stage.

As the court is often not properly resourced to undertake risk assessments and other risk screening measures from the outset, and it cannot properly determine allegations of family violence and/or abuse, there should not be a presumption of ESPR. This is particularly important as orders made at an interim stage can last for up to two years.

¹¹ Chisholm, R (2009), *Family Courts Violence Review*

¹² Australian Institute of Family Studies (2009), *Evaluation of the 2006 Family Law Reforms*.

¹³ Family Law Council (2009), *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*

The Benevolent Society believes that it is important to remove the presumption altogether, rather than just clarifying that it does not apply in situations where there is family violence.

The Benevolent Society supports Professor Chisholm's recommendation that there should be no presumption that one form of parenting arrangement have precedence over all others:

*In considering what parenting orders to make, the court must not assume that any particular parenting arrangement is more likely than others to be in the child's best interests, but should seek to identify the arrangements that are most likely to advance the child's best interests in the circumstances of each case*¹¹

If the presumption is retained, The Benevolent Society recommends that the Act be amended so that the presumption of equal shared parental responsibility (Section 61DA) does not trigger a requirement for the court to consider (under Section 65DAA) equal time or substantial and significant time (shared care) in relation to children less than four years of age.

This could be done by adding an exception to Section 65DAA(1), such as:

Except in the case of children under the age of four years.

This would address the research evidence that shows that moving between two households is linked to negative developmental outcomes for children from birth to four years, even those in well-resourced, low conflict and low risk families. Studies commissioned by the Attorney-General also found that shared parenting is not in the best interests of *all children, and particularly infants and toddlers*¹⁴. The Family Law Act should differentiate between a one year old and a 16 year old when determining what is in a child's best interests.

In summary, The Benevolent Society recommends:

- the removal of the presumption of Equal Shared Parental Responsibility
- if the presumption is retained, it should exclude the application of the presumption at interim stages and to children under four years.

3.2 Equal time or substantial and significant time

Section 65DAA states that if ESPR is ordered, then the court is mandated to consider equal time or substantial and significant time, if it is in the best interests of the child and is workable. There has been confusion and misinterpretation of this part of the law and, as a result, equal time has been the starting point of negotiations, even

¹⁴ Social Policy and Research Centre (2010), *Shared care parenting arrangements since the 2006 family law reforms*.

though the law states that ESPR only relates to parental responsibility (and does not include a presumption about the amount of time spent with the child).

The Benevolent Society believes that the word 'equal' is inappropriate when determining what arrangements are best for children, including decision-making under parental responsibility. We recommend the term 'shared parental responsibility' be used and that there be no link between shared parental responsibility and the time children spend with their parents.

The Act currently operates on a 'one-size-fits-all' basis. This is inappropriate given the many and varied situations of families and needs of children. The Benevolent Society supports Professor Chisholm's recommendation¹⁵ that the best interests factors include the following provision:

In considering what parenting orders to make, the court must not assume that any particular parenting arrangement is more likely than others to be in the child's best interests, but should seek to identify the arrangements that are most likely to advance the child's best interests in the circumstances of each case

As mentioned above, if shared time remains this should not apply in matters involving very young children or matters involving high parental conflict or family violence, unless there are exceptional circumstances.

In summary, The Benevolent Society recommends:

- that reference to time considerations be repealed
- removal of the link between time considerations and parental responsibility
- removal of the requirement on the court to consider any particular arrangement for time children spend with their parents.

In *No way to live*, one woman summed up the problem with the current law's emphasis on shared responsibility and shared care in the context of domestic violence:

.....for 50/50 to work you need to have a respectful relationship with the other parent and be able to communicate. Now if there was respect and communication in my household then I wouldn't have got divorced. So, I don't know where they're coming from with this 50/50. See why would you leave someone that you could communicate with and live respectfully and happily, like a normal adult relationship? Domestic violence people are leaving because they can't do that and then you've got to go back into the situation and communicate for the rest of our lives. Doesn't make sense..... My cousin

¹⁵ Chisholm, R. (2009), *Family Courts Violence Review*.

is before the court as well, and she is able to do that but she doesn't come from a domestic violence situation.

3.3 Risk assessment

In addition to changes to the Act, there needs to be a well-resourced and comprehensive risk assessment framework implemented in all parts of the family law system. This framework must interact with and be complemented by state governments and all other relevant government agencies. Without this, the 2010 Bill will not achieve the intended protection of women and children.

Given that domestic violence is a factor in a majority of cases before the court, the Chisholm Review states that:

...it would be better to have a system of risk identification and assessment that applies to all parenting cases. This approach would reflect the best available thinking about these issues, and would reinforce a lot of measures that are already being taken by the courts to identify and deal with issues of violence as early as possible.

Unless the Government strengthens the capacity of the family law courts to engage in risk assessment and improve the quality of the evidence available regarding ongoing abuse and violence, little will change.

The Benevolent Society strongly recommends that where there are allegations of family violence and/or abuse, interim orders should be reviewed within three months during which time a risk assessment is undertaken.

3.4 Training on family violence and child abuse

It is imperative that judicial officers, family consultants, family dispute resolution practitioners and all advisors in the family law system (including lawyers) undertake comprehensive and regular training on the dynamics of family violence. The 2010 Bill does not provide for this training. It is essential that the Government, the Family Law Courts and relevant professional bodies ensure that this training is mandatory.

A lack of understanding of family violence was a key theme identified in Dr Lesley Laing's research, *No way to live*. The research found that many professionals lacked knowledge of the dynamics of domestic violence and child abuse, their interconnection and their effects on women and children.

4 Concluding comments

The Benevolent Society welcomes the changes proposed in the 2010 Bill. However, to ensure that these changes protect victims of violence and their children and do not have any unintended negative consequences, it is imperative that some additional changes are made to the proposed amendments, as recommended above.

In summary, The Benevolent Society recommends the following changes to further strengthen the Family Law Act :

1. In considering the best interests of the child, the safety of the child must be paramount. Therefore protection of the child from harm should, in *all* cases, be given priority over the facilitation of a meaningful relationship with both parents.
2. The definition of 'family violence' should be expanded to include 'child abuse' and 'exposure to family violence'.
3. The definition of 'exposure to family violence' should be limited to exposure by the perpetrator.
4. There should be no presumption that substantial and significant time arrangements are best for all children, nor that 'shared parental responsibility' must be 'equal'.