Supplementary 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 extending the opportunity for The Benevolent Society to add additional information to our original submission 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'].

As stated in our original submission, 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 to ensure that the revised Act will not have any unintended negative consequences.

We wish to present additional information regarding the presumption of equal shared parental responsibility in the context of the best interests of the child.

We also wish to address the following two issues that were not raised in our original submission:

a) the myth that parents routinely fabricate allegations of family violence and child abuse; and

b) the need for improved integration and coordination between the federal Family Law Court and state-based criminal courts and child protection authorities.

The Benevolent Society would also welcome the opportunity to participate in the hearing process.

2. The presumption of equal shared parental responsibility

The 2011 Bill does not propose to repeal the presumption of Equal Shared Parental Responsibility (ESPR) as defined in section 61DA(1) of the Act, which states that the court "*must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child".* Thus ESPR assumes that shared parental responsibility is *inherently in the best interests of the child,* and the court is directed to rebut ESPR only when issues of domestic and family violence and risk of harm exist.

The 2011 Bill also retains the two primary considerations in section 60CC(2) directing how the Court must determine the 'best interests of the child':

(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,

In our original submission, The Benevolent Society commended the proposal to give greater weight to primary consideration (b) in cases where there is an inconsistency between the two provisions, but stated that our position is that the child's safety, welfare and wellbeing should be the *paramount* consideration in all cases, regardless of whether there is conflict between the two provisions, and always taking into account the circumstances of each individual case. We reiterate this position.

We argued in our original submission that evidence exists to suggest that ESPR is not in the best interests of the child in all cases and that the provision should be removed. We also noted the distinction between ESPR, and equal time or substantial and significant time with each parent (section 65DAA). Consideration of the court to consider equal time or substantial and significant time with each parent is only mandated in cases in which the presumption of ESPR prevails. Therefore, in cases where which ESPR does not apply, the court is not mandated to consider time with each parent.

However, available evidence demonstrates that, despite the existing legislation stating that ESPR does not apply in cases where family violence and/or child abuse exists, in practice the court effectively puts children at risk of harm by continuing to make orders for shared parental responsibility, and/or substantial and significant time arrangements, in such cases.

We direct the Inquiry's attention to the comprehensive evaluation of the 2006 family law reforms undertaken by the Australian Institute of Family Studies (AIFS) in 2009. The Benevolent Society finds it very disturbing that since the introduction of the 2006 amendments, more than three-quarters of cases in which both family violence and child abuse were alleged, the outcome of family court proceedings was shared parental responsibility. In cases where family violence alone was alleged, the outcome of shared parental responsibility was even higher, at 80%, and in cases where child abuse alone was alleged more than 70% cases resulted in shared parental responsibility[1].

The expectation that the Court will make orders which will have the effect of continuing children's exposure to violence, is supported by the Family Court of Australia's 2009 *Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged*[2]. The Principles set out "*Matters that may be*

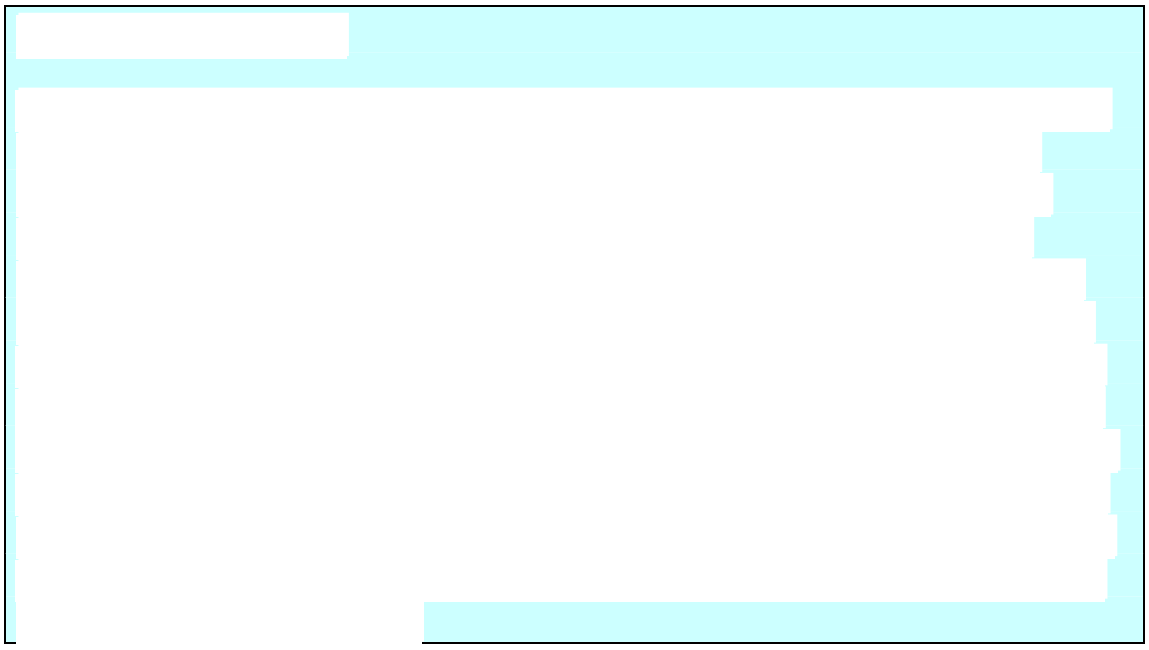
[1] Kaspiew, R. M Gray, R Weston, L Moloney, K Hand and L Qu, (2009), Evaluation of the 2006 Family Law Reforms, Australian Institute of Family Studies, p. 189, accessible at http://www.aifs.gov.au/institute/pubs/fle/evaluationreport.pdf

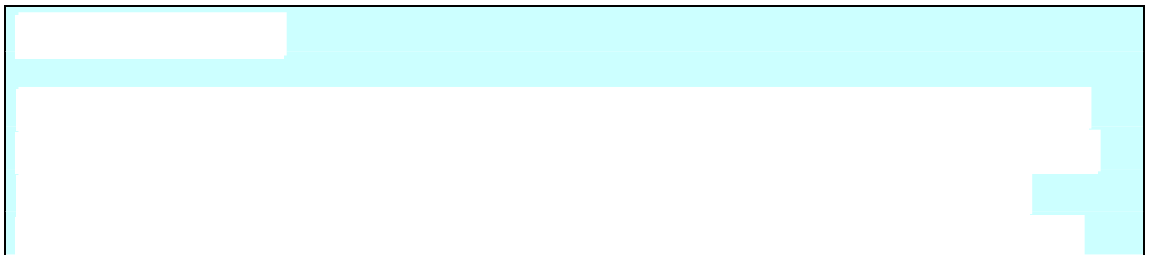
[2] Family Court of Australia (2009) *Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged, available at*

considered where the Court orders that a child spend time with a parent against whom findings have been made that allegations of family violence or abuse are proven, or against whom findings have been made that the parent presents an unacceptable risk of behaving violently or abusively". The matters to be considered include whether the time is to be supervised by whom, and the time and place where the visits are to take place.

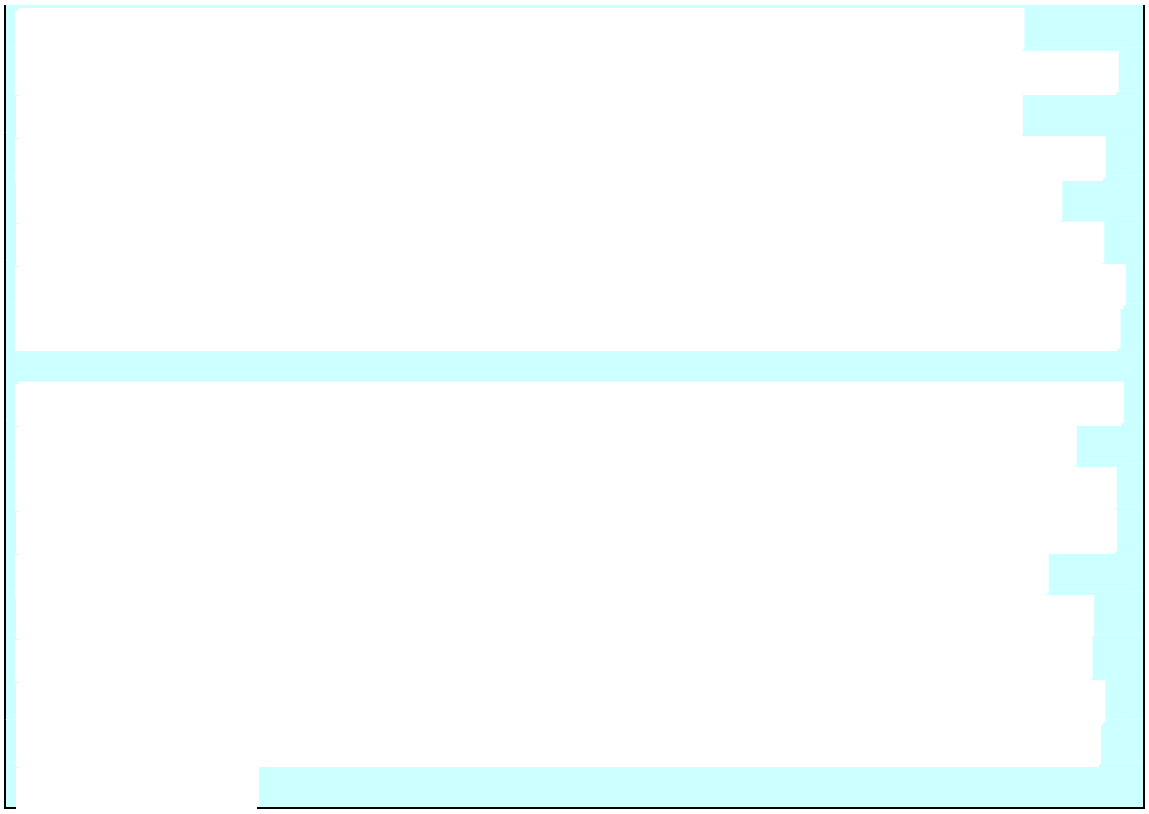
Given that equal time or substantial and significant time is only relevant where ESPR is presumed, and that ESPR does *not* apply in cases of violence and abuse, The Benevolent Society questions why the Family Court would make orders for a child to spend time with a parent who "presents an unacceptable risk of behaving violently or abusively", and is of the view that the existence of such directions may reinforce the presumption of ESPR and substantial and significant time in cases of family violence and child abuse.

The following two case studies are examples where children were placed at risk by the presumption of ESPR and shared time arrangements in situations of family violence:





http://www.familylawcourts.gov.au/wps/wcm/resources/file/eb8a7103be775fb/FVBPPApril2009_V2.pdf



The Benevolent Society believes that such outcomes are unacceptable, and recommends the removal of the presumption of ESPR. Its removal will lessen the likelihood of shared parental responsibility outcomes in cases of family violence and child abuse.

3. The myth that parents routinely fabricate allegations of family violence and child abuse

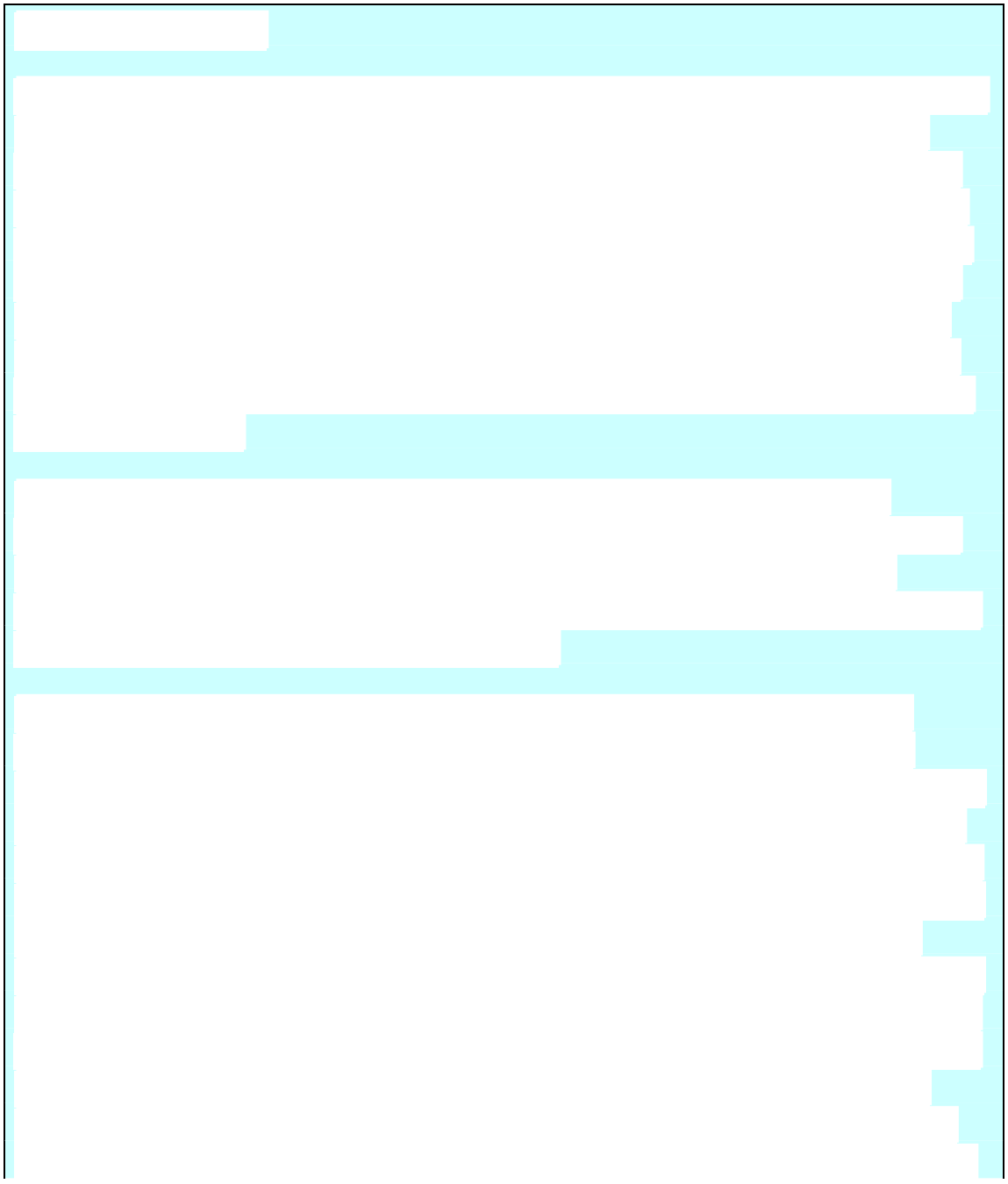
We note that the 2009 AIFS study mentioned above in Section 2 refers to alleged rather than proven cases of family violence and/or child abuse, and we understand that this distinction is important.

However, the widespread belief that parents fabricate allegations of domestic and family violence and child abuse in parenting disputes before the Family Court as a tactic to prevent contact with the child's other parent is not supported by evidence. In fact, there is a growing body of research which indicates that most allegations of violence are genuine and false allegations are rare. Indeed, much more common are false denials of violence and abuse by perpetrators.

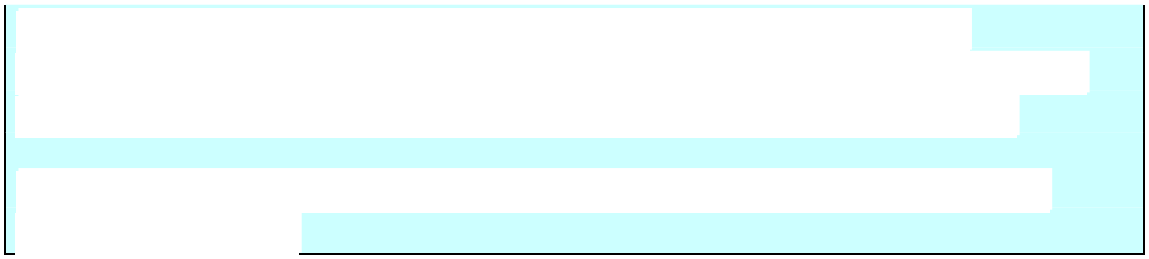
We direct the Inquiry's attention to recent research by Dr Michael Flood, an expert in male violence, which reported the following finding:

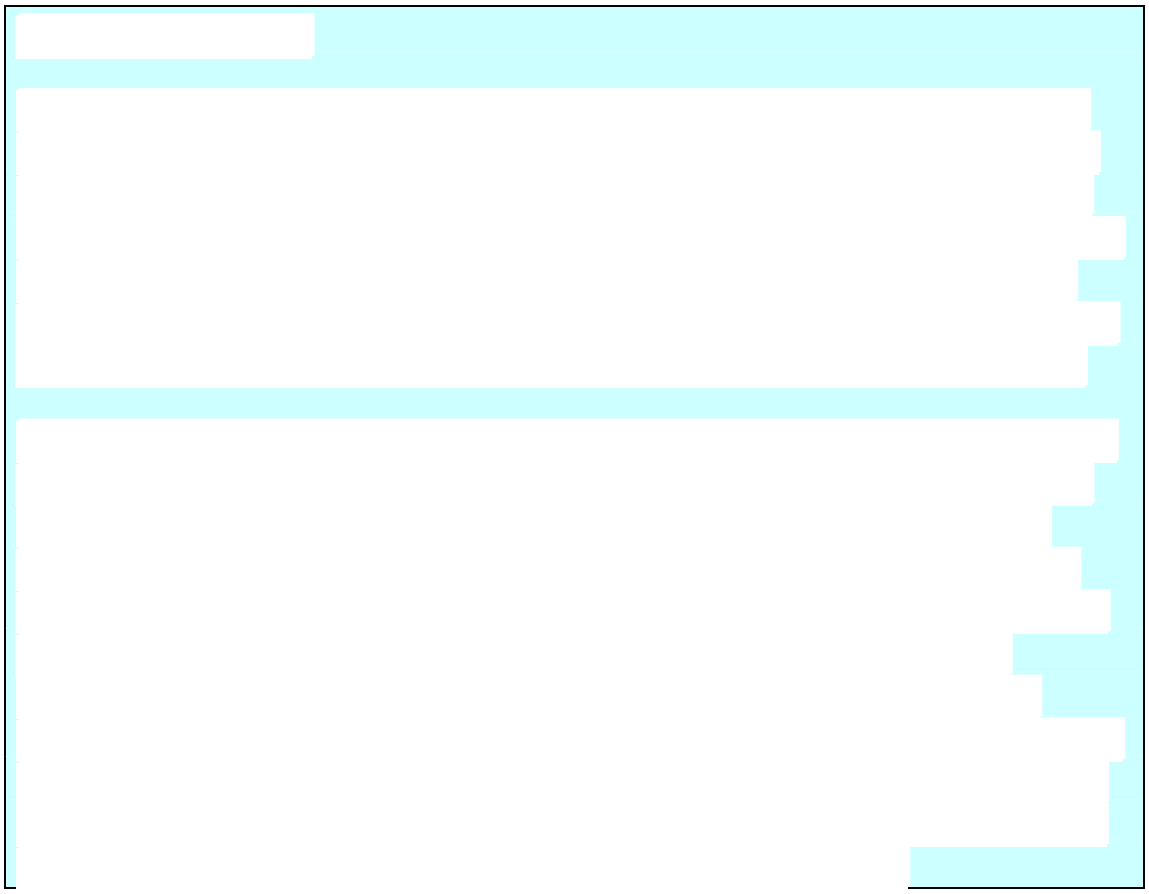
> An analysis of the family court records of 200 cases where child abuse allegations had been made over 1995-1996 from two of Australia's states found that only 9% of allegations were false, that is, proven to be untrue, arising either from misunderstandings or from fictitious accusations (Flood, 2010:337).[3]

The Benevolent Society is aware of families whose allegations of family violence and child abuse in the Family Court not been believed. The following two case studies illustrate the devastating effects on families when allegations of family violence have not been believed by the court:



[3] Flood, M. (2010) 'Fathers' Rights' and the Defense of Paternal Authority in Australia', in *Violence Against Women*, 16





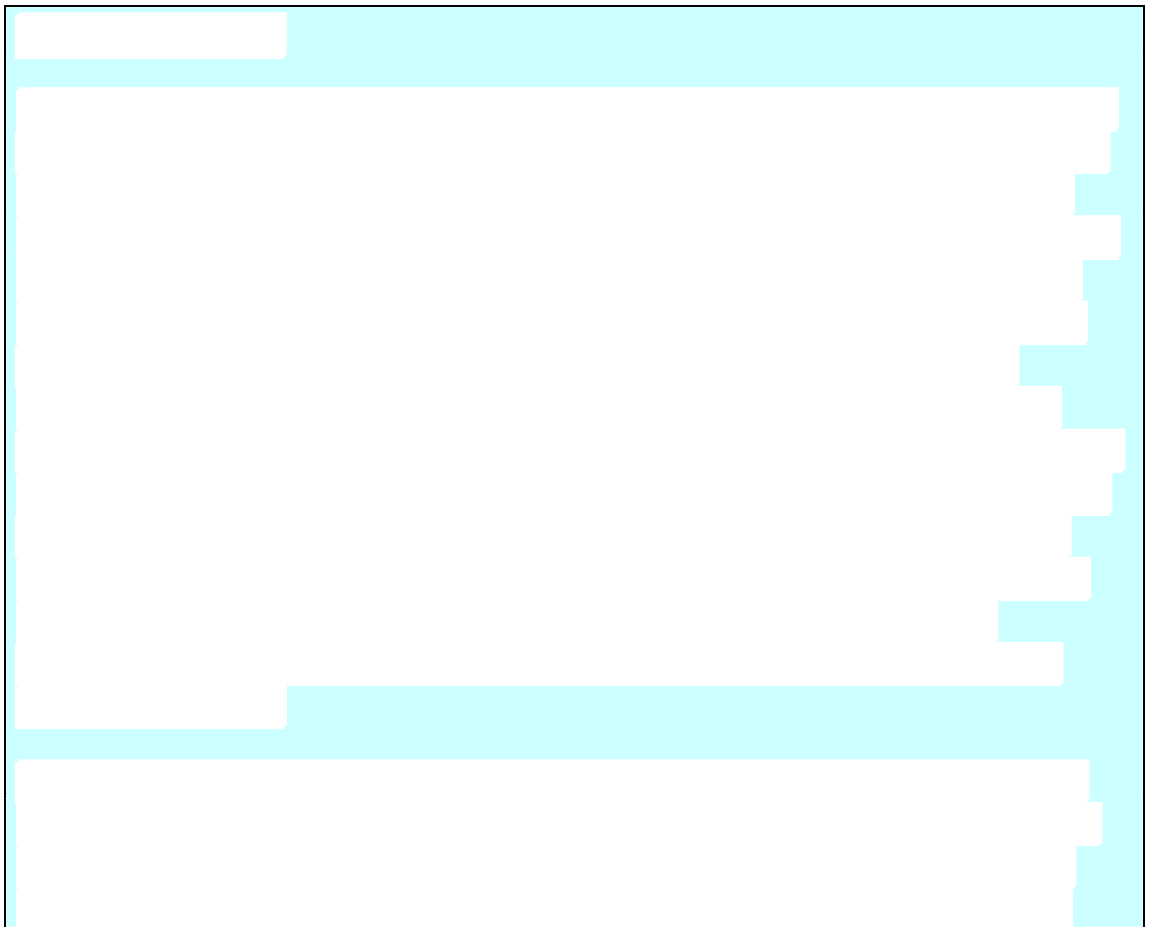
The Benevolent Society believes that, in order to dispel the myth that parents routinely make false allegations of family violence and child abuse, all judicial officers, family dispute resolution practitioners and all advisors in the family law system should have regular, mandatory training on the dynamics and impact of family violence.

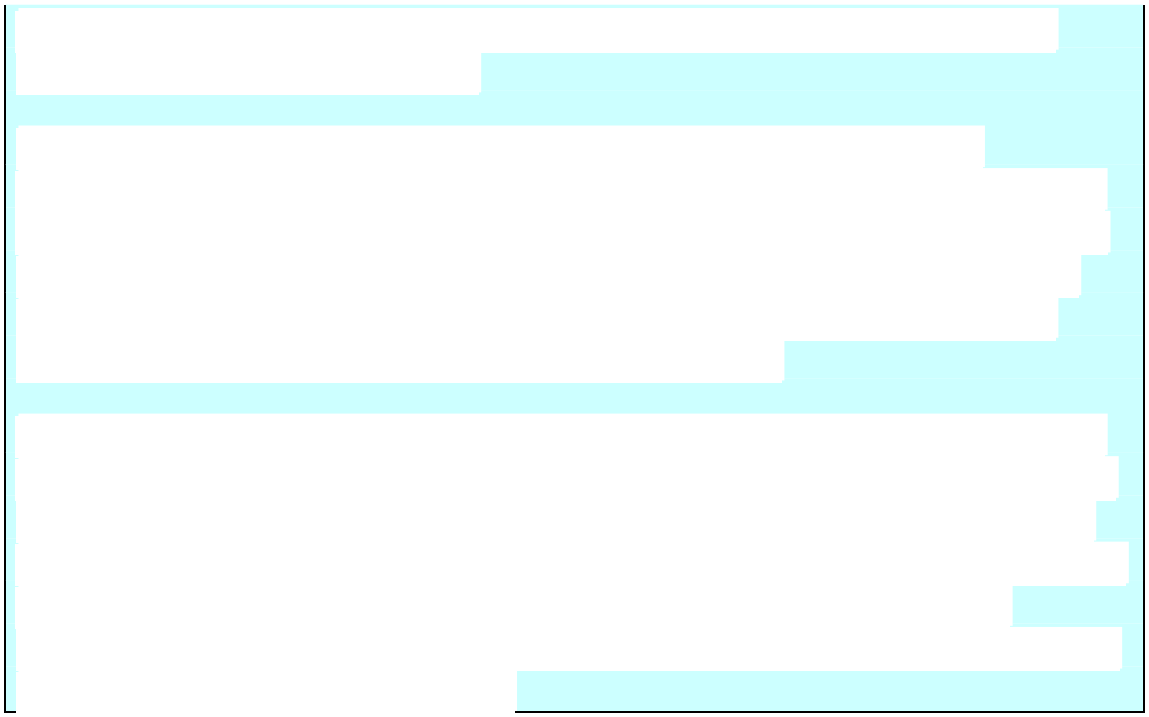
4. Improved integration and coordination between the federal Family Law Court and state-based criminal courts and child protection authorities

The Benevolent Society believes that the Family Court needs to have a full and accurate picture of the safety issues available to it in cases where family violence and/or child abuse is reported, and to this end must fully consider evidence from state-based police, criminal courts and child protection authorities.

A significant impediment within the family law system is discordance between the Family Court, which is a federal institution, and police and criminal justice systems and child protection authorities, which are state-based. In many instances, child protection reports and interventions, Apprehended Violence Orders and criminal convictions for violence and child abuse, are not only ignored by the Family Court in making contact orders, but in some cases the Family Court has made orders which are in direct contradiction of state-based protection or child protection orders.

The following two case studies illustrates how the lack of coordination between state and federal systems perpetuates harm to children:





Case Study: "Jane"

This issue was recognised by the recent Australian and NSW Law Reform Commission Family Violence Inquiry report[4], and supported by several other research reports that have found the lack coordination between these two systems to be very problematic. Key problems identified by the Family Violence Inquiry included the following:

- that although the Family Court does not have any investigatory capacity, state based police and child protection authorities are often also unwilling to investigate allegations of violence and abuse in instances where the family is already involved in Family Court proceedings[5]; and

- evidence from state based authorities that does exist is often not provided to or not considered by the Family Court[6].

The report made the following recommendation:

> "Recommendation 19–1 Federal, state and territory governments should, as a matter of priority, make arrangements for child protection agencies to provide investigatory and reporting services to family courts in cases involving children's safety. Where such services are not already provided by agreement, urgent consideration should be given to establishing specialist sections within child protection agencies to provide those services."[7]

The Benevolent Society supports this recommendation.

5. CONCLUDING COMMENTS

The Benevolent Society supports the changes already proposed in the 2011 Bill. However, we believe that further changes are necessary in order ensure that children are not placed at risk of future harm through inappropriate contact orders with abusive parents.

In summary, The Benevolent Society recommends the following:

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[4] Australian Law Reform Commission & NSW Law Reform Commission, 2010, *Family Violence: A National Legal Response*, 19.87 -19.100

[5] Australian Law Reform Commission & NSW Law Reform Commission, 2010, *Family Violence: A National Legal Response*, 19.87 -19.100 & Laing, L, 2010, No way to Live: Women's experiences of negotiating the family law system in the context of domestic violence, pp.92-3

[6] Ibid

[7] ALRC & NSW LRC, 2010, *Family Violence: A National Legal Response*, Commonwealth of Australia, p.59

1. That section 61DA, which requires the Court to apply a presumption of Equal Shared Parenting Responsibility as being in the best interests of the child when making parenting orders, be removed from the Act.

2. That section 60CC(2) of the Act be amended so that in determining the 'best interests of the child' the *only* consideration in all cases must be the child's safety, welfare and wellbeing, taking into account the circumstances of each individual case, and must be given priority over the facilitation of a meaningful relationship with both parents.

3. That the 2011 Bill be amended to require that regular, mandatory comprehensive training on the dynamics and impact of domestic and family violence and child abuse be undertaken by all professionals working within the family law system.

4. That the 2011 Bill be amended to require that the Family Court consider all evidence from state based police, criminal justice systems and child protection authorities when making parenting orders.