

TIME IS OF THE ESSENCE: PROGRESS ON THE NATIONAL COUNCIL'S PLAN FOR AUSTRALIA TO REDUCE VIOLENCE AGAINST WOMEN AND THEIR CHILDREN

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I INTRODUCTION

Effectively dealing with family violence at a national level in Australia is a complex matter on many levels. One of the greatest challenges is our nation's structure as a federation of states, each with its own family violence policy, legislation and services for victims and perpetrators of family violence, while the federal Government also has a role in delivering services through the family law system and contributing to the delivery of health, housing and education services. The problem of 'family violence' itself is variously conceptualised and named,¹ and strategies to address it are prioritised differently across Australian state and territory borders.

Across the nation there is, however, a reasonably high level of consistency in key strategies to address domestic and family violence and sexual assault. For example, all states and territories have developed specific policy, legislation and service systems (including emergency accommodation, crisis intervention, and forensic medical examinations and counselling services) to protect and support victims and to hold perpetrators accountable for their use of violence. Initiatives, including legislation, vary from one jurisdiction to another but all jurisdictions:

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1 The term 'family violence' is used predominantly in some jurisdictions, such as Victoria, and within the Commonwealth, while other jurisdictions such as Queensland, use 'domestic and family violence' to distinguish between intimate partner violence and violence in other family relationships. Further, some jurisdictions explicitly include sexual assault in definitions of domestic and family violence and others do not. Some Aboriginal and Torre Strait communities also use the term 'family violence' to include sexual assault and child abuse. In this paper, the terms 'domestic and family violence' and 'sexual assault' are used for consistency with the language used in the National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009) ('*Time for Action*').

1. provide specific civil law regimes to supplement the criminal law response to domestic and family violence;
2. provide crisis and short-term counselling and support services for victims of domestic and family violence and sexual assault;
3. have strategies in place for awareness raising and prevention of domestic and family violence; and
4. are working towards establishing, or enhancing, inter-agency and systems co-ordination to better meet victims' needs and ensure more effective delivery.

Yet domestic and family violence, specifically intimate partner violence, and sexual assault continue to be the most pervasive human rights abuses of women in Australia. Almost one in six Australian women are subjected to physical violence by a current or previous intimate partner, and almost one in five are subjected to sexual violence, over their lifetime.²

The Australian Government established the National Council to Reduce Violence against Women and their Children ('National Council') in May 2008 for a term of one year, fulfilling a 2007 election campaign commitment. Its main role was to develop a national plan to reduce the incidence and the impact of violence against women and their children. Within this role, the National Council was to first provide expert advice and direction to the Australian Government on measures to reduce the prevalence and effect of sexual assault and domestic and family violence on victims; secondly, consult widely across government and the community in the development of the plan; and thirdly, provide leadership for sustaining change in the identification of best practice policy, program and service development which will prevent violence against women and their children. These tasks were conducted by the ten National Council members,³ selected from across Australia by the Minister for the Status of Women, Tanya Plibersek, for their collective expertise and networks in responding to and preventing violence against women.

This article discusses the process and outcomes of the National Council's work, with a particular focus on law and justice issues. The article is presented in two main sections. Part II provides an overview of the development of a national plan for Australia to reduce violence against women and their children, and its defining features. Part III highlights some of the key law and justice areas identified in the National Council's plan as requiring national leadership and increased consistency within and across state and territory borders; and it

2 Dennis Trewin, 'Personal Safety Survey: Reissue' (ABS Cat. No. 4906.0, Commonwealth of Australia, Australian Bureau of Statistics, 21 August 2006) 11
<[http://www.abs.gov.au/AUSSTATS/subscriber.nsf/log?openagent&49060_2005%20\(reissue\).pdf&4906.0&Publication&056A404DAA576AE6CA2571D00080E985&0&2005%20\(Reissue\)&21.08.2006&Latest](http://www.abs.gov.au/AUSSTATS/subscriber.nsf/log?openagent&49060_2005%20(reissue).pdf&4906.0&Publication&056A404DAA576AE6CA2571D00080E985&0&2005%20(Reissue)&21.08.2006&Latest)>.

3 The National Council members were: Libby Lloyd AM (Chair), Heather Nancarrow (Deputy Chair), Assoc. Prof. Moira Carmody, Dorinda Cox, Maria Dimopoulos, Dr Melanie Heenan, Rachel Kayrooz, Andrew O'Keefe, Vanessa Swan, Lisa Wilkinson and Pauline Woodbridge.

discusses the progress, to date, on the implementation of a government endorsed national plan for Australia to reduce violence against women and their children.

II DEVELOPING A NATIONAL PLAN TO REDUCE VIOLENCE AGAINST WOMEN AND THEIR CHILDREN

A The Policy Context and Plan Development Process

Members of the National Council were acutely aware that the proposed national plan for Australia to reduce violence against women and their children would be instrumental in helping Australia meet its human rights obligations under international laws and universal human rights instruments. These include: the *Universal Declaration of Human Rights*; the *Convention on the Elimination of All Forms of Discrimination Against Women*; the *Convention on the Rights of the Child*; the *Declaration on the Elimination of Violence Against Women*; the *Vienna Declaration and Program of Action of the World Conference on Human Rights*; the Millennium Development Goals; the *UN Convention on the Rights of Persons with Disabilities*, the Beijing Platform for Action; and the United Nations' Campaign UNiTE to End Violence Against Women, 2008–2015.⁴ The National Council members were similarly aware of the tremendously important work that had gone before them, including the National Strategy on Violence against Women,⁵ and were determined to capitalise on the solid foundations that had been laid in the preceding four decades. This also required acknowledgment that the National Council's plan was being developed alongside, and could complement and be reinforced by, though not impinge upon, other reforms being progressed by Australian governments such as: the Coalition of Australian Governments ('COAG') Early Years Agenda; the National Affordable Housing Agreement; the COAG Closing the Gap Agenda; the evaluation of the Northern Territory Emergency Response; the National Disability Strategy and the National Framework to Protect Australia's Children.⁶

4 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Declaration on the Elimination of Violence Against Women*, GA Res 48/104, UN GAOR, 48th sess, 85th plen mtg, UN Doc A/RES/48/104 (20 December 1993); *Vienna Declaration and Program of Action of the World Conference on Human Rights*, UN Doc A/CONF.157/23 (12 July 23); United Nations, Millennium Development Goals (2010) <<http://www.un.org/millenniumgoals/>>; related to *United Nations Millennium Declaration*, GA Res 55/2, UN GAOR, 55th sess, 8th plen mtg, UN Doc A/RES/55/2 (2000); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008); *Beijing Declaration and Platform for Action*, Fourth World Conference on Women, UN Doc A/CONF.177/20 (15 September 1995); United Nations, *United Nations' Campaign UNiTE to End Violence Against Women, 2008–2015* (2010) <<http://www.un.org/en/women/endviolence/>>.

5 National Committee on Violence against Women, Commonwealth of Australia, *National Strategy on Violence against Women* (1992).

6 *Time for Action*, above n 1, 14.

Given the nature of the task at hand, the National Council recognised that it would need to enlist stakeholders from around Australia to ensure its work was comprehensive, inclusive and cross-sectoral. The National Council convened six expert round-tables and undertook preliminary research to identify current major initiatives to address sexual assault and domestic and family violence within Australian states and territories. Council members travelled extensively to hear first-hand accounts of the experiences of women, men, policy makers, service providers and communities. They conducted interviews and community meetings with a range of stakeholders in all state and territory capital cities and some regional and remote centres, including the Torres Strait, Broome and Fitzroy Crossing, Mt Isa, Alice Springs and the five communities at the tip of Cape York Peninsula. In addition, the National Council reviewed a total of 370 public submissions; conducted a desktop analysis of key Australian and international research on sexual assault and domestic and family violence; and commissioned a comparative analysis of sexual assault and domestic and family violence laws across jurisdictions, and a projected analysis of the future economic costs of violence against women if such violence was not significantly reduced. Understanding the need to engage a wide range of influential external stakeholders, National Council members also delivered presentations to key government and non-government fora; and briefed a number of Commonwealth and state and territory ministers, including members of the Standing Committee of Attorneys-General ('SCAG') and representatives of the federal Opposition, on the National Council's developing national plan of action. In all, members of the National Council collectively consulted more than 2,000 Australians in the development of *Time for Action*.⁷

Based on its collective expertise and extensive consultation and research, the National Council was resolute in its conclusion that the plan must incorporate a feminist oriented, intersectional analysis to ensure that the diverse contexts and circumstances of women's experiences of violence, and their experiences of strategies to address it, were encompassed in the National Council's work.⁸ Central to this analysis was an understanding, based on an ecological model as proposed by the World Health Organisation,⁹ of the multi-layered factors operating at the individual, relationship, community and societal levels that contribute to the perpetration of men's violence against women.

B The Framework for the National Council's Plan

Consistent with the ecological model for understanding family violence, and from the perspective of women affected by violence, the National Council established a broad set of values and principles to guide its work, and identified six key outcomes required to achieve its vision that 'women and their children live free

7 Ibid 12–3.

8 Ibid 22.

9 Etienne G Krug et al (eds), *World Report on Violence and Health* (World Health Organisation, 2002) 12–15.

from violence, within respectful relationships and in safe communities'. The National Council identified the six outcomes required to achieve this vision as:

1. communities are safe and free from violence;
2. relationships are respectful;
3. services meet the needs of women and their children;
4. responses are just;
5. perpetrators stop their violence; and
6. systems work together effectively.¹⁰

Across these outcome areas, and drawing on its extensive research and consultation, the National Council developed a total of 25 strategies and 117 specific actions to achieve its vision. Collectively, these strategies and actions constitute the National Council's comprehensive and detailed plan for the 12 year period from 2009 to 2021. This is documented in the National Council's Plan, *Time for Action*. Recognising the need for flexibility to capitalise on new knowledge and unanticipated developments, the National Council's plan proposes a series of four three-year implementation plans. The proposed implementation structure is designed to incorporate the results of further research and ongoing monitoring and evaluation, as proposed in *Time for Action*.¹¹

In addition to the strategies and actions, the National Council also made specific recommendations to the Australian Government for the advancement of the national plan, including that it 'refer the Plan of Action to COAG; and request that COAG develop an integrated, comprehensive response endorsed by all levels of government by early 2010'.¹² The National Council also identified 20 of the 117 actions as priorities requiring urgent action from the Australian Government, and thus recommended that these priority actions be achieved within the first three year plan.

C Defining Features of Time for Action

Time for Action is differentiated from other plans to reduce violence against women and their children in several ways, including its theoretical basis, its scope and its strategic vision. Each of these is addressed briefly here.

Time for Action is built upon a strong feminist analysis, identifying patriarchal structures as significant contributors to high levels of violence against women and their children. And, as a national plan to reduce this violence, *Time for Action* uniquely places intersectionality,¹³ a derivative of critical race theory, at the core of its analysis. This analysis reflects a range of intersecting factors in the lives of women, including but not limited to their gender, cultural identity, abilities, socio-economic status and sexuality. The intersection of a number of

¹⁰ *Time for Action*, above n 1, 25.

¹¹ *Ibid* 20.

¹² *Ibid* 26.

¹³ Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color' (1991) 43 *Stanford Law Review* 1241.

factors not only contributes to women's vulnerability to domestic and family violence and sexual assault, but also affects the way they experience services and other initiatives ostensibly designed to support them, but not necessarily of any benefit to them. This analytical framework enabled the development of strategies and actions reflective of, and responsive to diversity among women.

In addition to the National Council's extensive consultation and research, *Time for Action* incorporates a projected economic costs analysis,¹⁴ a comparative analysis of state and territory domestic violence and sexual assault laws and a snapshot of current state, territory and national efforts to address violence against women.¹⁵ This exclusive national snapshot is the result of an indicative 'as is' jurisdictional analysis,¹⁶ using a framework identified by Amnesty International Australia,¹⁷ and drawn from a range of sources, including the United Nations, to establish six principles and practices for a national plan. These principles and practices are that national plans must be structural, strategic and sustained, and must provide for prevention, provision of services and prosecution of offenders. While showing a reasonably high level of consistency in key strategies across jurisdictions the National Council's snapshot of Australia's current, collective response to violence against women and their children also exposed areas requiring improvement. For example, the snapshot highlighted

the need for consistent and integrated state and territory-based action plans that include ... ongoing evaluation ... greater depth of collaboration and sharing of information and resources across jurisdictions ... continued funding and support for national campaigns to prevent violence against women and their children ... consistent legislation linked to robust justice data collections systems.¹⁸

Time for Action is itself structural, strategic and sustained in its comprehensive scope and in its approach, and it addresses prevention, provision of services and effective prosecution. It is premised on an understanding that violence against women is a consequence, in part, of societal structures that create and reinforce gender inequality reflected in community attitudes and proposes strategies to address that inequality.¹⁹ *Time for Action* proposes that structural causes of inequality be addressed and that primary prevention initiatives be embedded in existing institutional structures such as education systems, sporting and other cultural settings. It proposes strategic and sustained attitudinal change through a bold, long-term plan for a wide spread cultural shift

14 KPMG, *The Cost of Violence against Women and their Children* (2009), prepared for the National Council to Reduce Violence against Women and their Children.

15 See, eg, *Time for Action*, above n 1, 107–15.

16 The National Council to Reduce Violence against Women and their Children, 'Background Paper to Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children' (Report, Department of Families, Housing, Community Services and Indigenous Affairs, March 2009) 5–7 ('The Background Paper to Time for Action').

17 Lara Fergus and Kate Lappin, *Setting the Standard: International Good Practice to Inform an Australian National Plan of Action to Eliminate Violence against Women*, (2 March 2009) Amnesty International Australia <http://www.amnesty.org.au/images/uploads/svaw/NPOA_report_-_Master_13June_opt_rfs.pdf>

18 'The Background Paper to Time for Action', above n 16, 187–9.

19 *Time for Action*, above n 1, 37.

away from current levels of acceptance of violence against women as inevitable, even tolerable in some circumstances. The plan's proposed large scale and significant national effort on the primary prevention of violence against women, beginning with early childhood education, is a notable departure from previous practice which has been focused on raising awareness and encouraging victims and perpetrators of such violence to seek help to stop it occurring again. *Time for Action* proposes strategic and sustained changes to practice across and within jurisdictions to enable systems to work better together across prevention, service provision and prosecution initiatives. Its intersectional analysis of violence against women and responses to it, advocates for the development, delivery and support of a service system that meets the diverse needs of women and their children; and it features strategies to improve the justice system's response to those who perpetrate violence against women, and to the women who have been subjected to that violence.

Time for Action proposes a structure and a process for the national co-ordination of knowledge production for the field, including national co-ordination of data collection, collation and analysis, and collaborative research effort. This would be facilitated by the creation of a National Centre of Excellence for the Prevention of Violence against Women. *Time for Action* provides for sustained effort, with flexibility to adjust the implementation of the plan at quarterly intervals over 12 years to take advantage of new knowledge, or better than expected progress.

III TIME FOR ACTION ON LAW AND JUSTICE

This section of the article focuses on law and justice issues identified in the National Council's plan as requiring national leadership and increased consistency within and across state and territory borders.

Included among the broad set of values and principles adopted by the National Council at the outset, is the principle that 'no law, policy or practice should jeopardise the safety and well-being of women and their children'²⁰, which sits within the core value of 'safety'. Within the core value of 'justice' there is a further set of four principles, which focus on equitable access to justice and holding perpetrators of violence accountable for their behaviour.

The National Council also recognised at the outset that:

As long as sexual assault and domestic and family violence persist, Australia is obligated under national and international conventions to legislate against it; to prosecute breaches of its laws; to provide appropriate civil and criminal law responses that protect against further violence; and to promote recovery and wellbeing ... Legal protection cannot be delivered if the laws are inadequate, if they are not applied in the way they were intended, if women experience re-victimisation in the justice process, or where the justice system is inaccessible or inequitable.²¹

20 Ibid 32.

21 *Time for Action*, above n 1, 18.

National Council members came to the conclusion that reforms in recent years to the domestic and family violence and sexual assault laws have led to good laws, overall and in most jurisdictions, with the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), discussed below, being the most notable exception. Broadly, rather than the laws themselves, it is the application of domestic and family violence and sexual assault laws that continues to require significant improvement and this is the case in some jurisdictions more than others. The National Council's plan of action to deliver justice for women affected by violence, and their children, was founded on the following five key strategies:

1. ensure accessible and equitable justice for women and their children;
2. ensure just civil remedies operate in parallel with criminal law and prioritise safety;
3. ensure excellence in legal responses to women and their children;
4. ensure judicial officers, law enforcement personnel and other professionals within the legal system have appropriate knowledge and expertise; and
5. build the evidence base.²²

These strategies were to be implemented through 22 specific actions. It is not intended, nor appropriate, to repeat each action here, but following is a brief summary of the major issues identified by the National Council in considering further action to achieve just responses to violence against women and their children.

A Key Law and Justice Issues

While it should be remembered that the majority of sexual assault against women is perpetrated within an intimate partner or family violence context,²³ *Time for Action* also addresses sexual assault against women in other contexts. In the area of sexual assault specifically, *Time for Action* identified as areas requiring particular attention the need for all jurisdictions to adopt more progressive sexual assault laws; and the benefits of specialist approaches to sexual assault. The National Council noted significant developments in several jurisdictions, which have resulted in progressive laws that should serve as models of good practice for all jurisdictions. Three particular elements were drawn out by the National Council as examples of good practice in sexual assault laws. These are:

1. the incorporation of communicative models of consent (defining consent as 'free agreement' and requiring juries to consider what the complainant

22 Ibid 119.

23 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks* Australian Law Reform Consultation Paper No 1, New South Wales Law Reform Commission Consultation Paper No 9 (2010) 80–1.

has done to indicate free agreement, rather than concluding that silence is consent);

2. lists of circumstances under which free agreement cannot be said to have been given; and
3. mandatory jury directions designed to ensure consistent, good practice in the application of these provisions.

In discussion of the benefits of specialist approaches to sexual assault, the National Council focussed on the need to address the artificial separation of court hearings involving multiple victims of the same offender, often a family member, meaning victims have to give evidence multiple times.²⁴

In *Time for Action*, the National Council focuses on six key areas related to the justice system's response to domestic and family violence. These six areas are:

1. increasing the use of the criminal law, while addressing concerns about dual arrests to guard against women being re-victimised by a system designed to protect them from men's violence;
2. increasing the use of 'ouster' or 'exclusion' provisions in civil legislation that provide for the perpetrator of the violence, rather than the victim, to be removed from the family home;
3. removing current barriers associated with geographic boundaries for domestic and family violence protection orders;
4. the establishment of domestic and family violence fatality review processes in all jurisdictions;
5. further exploration of alternative, or parallel, justice models that better meet victims' needs in terms of process and outcomes; and
6. ensuring that the interaction of family law, domestic violence law and child protection law work effectively together to prioritise the safety and well-being of women and their children.

1 *Increasing the Application of the Criminal Law*

Civil law responses to domestic and family violence were established in jurisdictions across Australia in the 1980s and were intended to be used in conjunction with the criminal law, where there was evidence that a criminal offence had been committed. The advantages of having a civil law response in addition to the criminal law are two-fold, and relate primarily to the nature of domestic and family violence. First, there is reluctance on the part of victims to engage the full force of the law against the abuser because of the personal relationship involved. Secondly, a lack of witnesses or corroborating evidence to prove the facts to the criminal standard of proof, particularly where the victim is unwilling to give evidence against their partner, can hamper the application of

24 *Time for Action*, above n 1, 108–9, 123.

the criminal law. Essentially, the domestic and family violence civil laws were designed to fill a gap in legislative protection for victims, and were not intended to replace the application of criminal law where that was a viable option. However, it seems that the application of the civil law alone is largely assumed by police to be the appropriate response to domestic and family violence, raising concerns that the civil law has 'de-criminalised' domestic and family violence.²⁵

Advocacy for increased application of the criminal law in cases of domestic and family violence has centered on the role of the state in protecting women from violence. Tasmania's Safe at Home legislation, which establishes domestic and family violence as a crime, removes the decision to prosecute domestic and family violence from the victim and places it in the hands of the state, represented by police. Other jurisdictions, such as Victoria, have stopped short of this approach but advocate pro-investigation policies, better evidence gathering and increased collaboration between police and other agencies to increase the use of the criminal law in conjunction with the civil law. This position, also adopted by the National Council, responds to the need for strategies for 'controlling the criminal justice system without increasing state control of women'²⁶ through dual arrests and child protection interventions aimed at victims, not perpetrators, of domestic and family violence. Further, there is also evidence that criminal justice system intervention can increase violence against women, particularly Aboriginal and Torres Strait Islander women.²⁷

It is important to provide options and empower victims of domestic and family violence to make informed choices about pursuing criminal justice interventions, while ensuring that their decisions are not the result of coercion by the perpetrator. The National Council concluded that 'more information is required about the way in which pro-arrest policies and associated legislation are applied, with a view to ensuring victims of violence are not re-victimised as a result of these policies'.²⁸

2 Increasing the Use of Ouster Orders

Domestic and family violence is the biggest single cause of homelessness among women and children.²⁹ The impacts of homelessness, on top of the

25 See Heather Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439; Heather Douglas and Lee Godden, 'The Decriminalisation of Domestic Violence' (Paper presented at Expanding our Horizons: Understanding the Complexities of Violence Against Women, Griffith University, 18–22 February 2002).

26 Donna Coker, 'Transformative Justice: Anti-Subordination Practices in Cases of Domestic Violence' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002), 128, 129.

27 Heather Nancarrow, 'Restorative Justice for Domestic Family Violence: Hopes and Fears of Indigenous and Non-Indigenous Australian Women', in John Ptacek (ed), *Restorative Justice and Violence Against Women* (Oxford University Press, 2010); Heather Nancarrow, 'In Search of Justice for Domestic and Family Violence: Indigenous and non-Indigenous Australian Women's Perspectives' (2006) 10 *Theoretical Criminology* 87.

28 *Time for Action*, above n 1, 114.

29 Homelessness Taskforce, 'The Road Home: A National Approach to Reducing Homelessness' (White Paper, Commonwealth of Australia, 2008) 5.

impacts of domestic and family violence, are wide ranging and include negative impacts on health, education and social development. Domestic and family violence legislation in most Australian jurisdictions enables courts to include specific conditions on a domestic violence protection order, including prohibiting a perpetrator of violence from entering or remaining on specified premises, even if they are, or were formerly, occupied by the respondent and the victim of violence for whom an order is made. However, such provisions have seldom been used, largely because of two concerns: that matters related to property are more appropriately dealt with in the family law jurisdiction; and that the perpetrator will be made homeless – a concern that wrongly assumes women and children could always go to women's shelters, while there are no alternatives for men.³⁰ Consequently, ouster orders were only granted as a last resort in cases of severe violence, although it is in these cases for which an ouster order is most likely to be inappropriate because of the risks involved.

Other research³¹ also supports removal of the perpetrator from the home and variously recommends, as a means to increase the use of ouster orders: increased funding for a range of alternative accommodation options for men; and increased funding for a range of new support options for women, and their children, wishing to remain in the home. Although initiatives to increase and support the use of ouster orders have been in place in several jurisdictions for a number of years, such orders are still rarely used. The National Council endorsed, and proposed extensions to the strategies contained in *The Road Home*.³²

3 *Overcoming Geographic Boundaries for Domestic and Family Violence Protection Orders*

Although there is capacity for protection orders made in one state or territory (or New Zealand) to be registered in another state or territory, the current process is cumbersome and inadequate in providing continuous protection for victims of violence who need to flee across borders. The Model Domestic Violence Laws³³ had proposed automatic national registration of protection orders through the national CrimTrac system to streamline portability of orders across borders, but this was never achieved. The National Council noted that women legally

30 Rachael Field, Belinda Carpenter and Susan Currie, 'Issues in the Making of Ouster Orders Under the *Domestic Violence (Family Protection) Act 1989* (Qld)' in John Dewar and Stephen Parker (eds), *Family Law Processes, Practices and Pressures* (Hart Publishing, 2003) 99, 106.

31 Donna Chung, Rosemary Kennedy, Bev O'Brien and Sarah Wendt, 'Home Safe Home: The Link Between Domestic and Family Violence and Women's Homelessness' (Report, Partnerships against Domestic Violence, Commonwealth of Australia, 2000); Partnerships against Domestic Violence, *Improving Women's Safety* (Commonwealth of Australia, 2004); Robyn Edwards, 'Staying Home Leaving Violence' (Report, Australian Domestic and Family Violence Clearinghouse, 2004); Ludo McFerran, 'Taking Back the Castle: How Australia is Making the Home Safer for Women and Children' (Issues Paper 1, Australian Domestic and Family Violence Clearing House, 2007) 14; Karen Wilcox and Ludo McFerran, 'Staying Home, Staying Safe: The Value of Domestic Violence Protection Order Provisions in Homelessness Strategies' (2009) 94 *Reform* 24.

32 *Time for Action*, above n 1, 99.

33 Partnerships Against Domestic Violence, 'Model Domestic Violence Laws' (Working Paper, Domestic Violence Legislation Working Group, 1999) 171.

protected from abuse in one jurisdiction are still frequently left unprotected if they move across borders, because their order is not registered in the jurisdiction to which they have moved. The failure to register a protection order may arise because the person for whom the order was made was not aware of the need to do so, or because they were afraid that registering the order would alert the person, from whom they are protected, to their new location. Further, the registration process for protection orders varies from one jurisdiction to another, adding confusion for the protected person and unnecessary administrative burden for some courts.

The National Council recommended that urgent attention be given to the establishment of an automatic national registration scheme for domestic and family violence protection orders, and any subsequent variations to an order. It also noted that consideration would need to be given to the inclusion of police-issued protection orders, available in some Australian jurisdictions.³⁴

4 Establishment of Domestic or Family Violence Fatality Review Processes

At the time of the National Council's research and consultation phase, Victoria had established and New South Wales was in the process of establishing, domestic violence fatality review processes, and community-based advocates had been running campaigns for the establishment of such process in other jurisdictions.³⁵ These initiatives were the result of the positive outcomes of such processes in North America, particularly in regard to understanding risk factors, improving systems' responses to domestic and family violence, and informing policy aimed at reducing domestic and family violence homicides. The National Council recommended the establishment of domestic and family violence death review processes, and the exchange of information about their processes and outcomes, in each jurisdiction.

5 Exploration of Alternative, or Parallel, Justice Models

There are various models of alternative, or parallel justice, operating in Australia, including those that can be broadly defined as 'therapeutic jurisprudence', 'restorative justice', and 'Indigenous justice'. As explained by Professor Kathleen Daly at a National Council roundtable in 2008, these categories differ

in terms of the key relationships in the justice process with the offender being central in each case. In therapeutic jurisprudence the key relationship is between the judge/magistrate and the offender; in restorative justice the key relationship is between the offender and the victim; and in Indigenous justice, the relationship is between the offender and the elders and, in some cases, a magistrate/judge.³⁶

34 *Time for Action*, above n 1, 100–1.

35 See Betty Taylor, 'Dying to be Heard: Domestic and Family Violence Death Reviews' (Discussion Paper, Domestic Violence Death Review Action Group, 2008).

36 *Time for Action*, above n 1, 105 n 174.

Restorative justice has been the primary focus of debate in this area. Concerns about restorative justice from feminist scholars such as Julie Stubbs³⁷, Ruth Busch³⁸ and Donna Coker³⁹ include the use of power and control tactics by perpetrators of domestic and family violence and sexual assault within, and over, the restorative justice process; the assumption that the 'community' in community conferencing will reinforce, rather than challenge violence-supportive attitudes and behaviours; and that it will be seen as an easier, cheaper form of justice and embraced by governments for that reason. On the other hand, Aboriginal and Torres Strait Islander women, particularly, have seen the merits of a 'community-owned', rather than a 'state-owned', approach to justice;⁴⁰ an approach that holds the promise of justice through self-determination and healing,⁴¹ although current restorative justice models do not meet the criteria envisioned by Aboriginal and Torres Strait Islander women to fulfil this promise.⁴² Other feminist scholars⁴³ identify further perceived benefits of restorative justice including its flexibility, allowing women to determine how their experiences are expressed in the justice process (rather than being relegated to a witness for the state), and to contribute to deciding what should happen to the perpetrator.

These perceived risks and promises of restorative justice have not yet been adequately tested, because cases of domestic and family violence and sexual assault have almost universally been excluded from such processes. An exception to this is the restorative justice conferencing of cases in the South Australian Youth Court, involving offenders under the age of 18 years. An in-depth analysis

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- 37 Julie Stubbs, 'Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 42; Julie Stubbs, 'Restorative Justice, Domestic Violence and Family Violence' (Issues Paper No 9, Australian Domestic and Family Violence Clearinghouse, 2004); Julie Stubbs, 'Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice' (2007) 7 *Criminology and Criminal Justice* 169; Julie Stubbs, 'Restorative Justice, Gendered Violence and Indigenous Women' in John Ptacek (ed), *Restorative Justice and Violence Against Women* (Oxford University Press, 2010).
- 38 Ruth Busch, 'Domestic Violence and Restorative Justice Initiatives: Who Pays if We Get it Wrong?' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 223.
- 39 See Coker, above n 26.
- 40 See Nancarrow, above n 27.
- 41 Dorinda Cox, Mandy Young and Alison Bairnsfather-Scott 'No Justice without Healing: Australian Aboriginal People and Family Violence' (2009) 30 *Australian Feminist Law Journal* 151.
- 42 Nancarrow, 'Restorative Justice for Domestic Violence Family Violence', above n 27; Nancarrow, 'In Search of Justice for Domestic and Family Violence', above n 27; Loretta Kelly, 'Using Restorative Justice Principles to Address Family Violence in Aboriginal Communities' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 206.
- 43 Kathleen Daly and Sarah Curtis-Fawley, 'Restorative Justice for Victims of Sexual Assault' in Karen Heimer and Candace Kruttschnitt (eds), *Gender and Crime: Patterns of Victimization and Offending* (New York University Press, 2006) 230; Mary Koss, 'Blame, Shame and Community: Justice Responses to Violence Against Women' (2000) 55 *American Psychologist* 1332; Joan Pennell and Gayle Burford, 'Feminist Praxis: Making Family Group Conferencing Work' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 108.

of three cases of son-to-mother violence⁴⁴ dealt with in this jurisdiction illustrates that the standard model of conferencing is inadequate to meet the needs of victims,⁴⁵ and highlights the need for specific training, preparation and conduct of such processes, as well as the need to link the justice process with other longer-term interventions and support. Members of the National Council were concerned that attempts to protect women from the perceived risks of restorative justice processes may be unnecessarily depriving women of its perceived benefits, particularly if more responsive models could be developed. The National Council concluded there was a need for ‘cautious exploration of how elements of restorative justice may be incorporated into, or run in parallel with, the conventional criminal justice system to achieve just outcomes for women.’⁴⁶

6 The Interaction of Family Law, Domestic Violence Law and Child Protection Law

Within the area of family violence, the interaction between the state-based family law and child protection systems and the Commonwealth family law system was most frequently, consistently and strongly raised throughout the National Council’s extensive consultation as an area requiring reform, because of its contribution to violence against women and their children. Within this, the application of the shared parenting provisions was of particular concern.

Many individuals and organizations expressed their concern about the high level of risk to the safety and well-being of women and children as a result of inconsistent and at times conflicting policy and practice across family law, domestic violence law and child protection law. Major concerns involved the application of specific sections of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth); conflicts between child protection policy and practice; and the under-utilisation of legitimate powers in state and territory legislation to revive, revoke, vary discharge or suspend existing *Family Law Act 1975* (Cth) (‘FLA’) orders – all of which compromise the safety and well-being of women and their children.

Section 61DA of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) provides for a rebuttable presumption of equal shared parenting of a child, on the assumption that this is in the best interests of the child. In determining the best interests of the child, the court must consider the benefits of a meaningful relationship with both parents and protection from harm associated with the child’s exposure to abuse, neglect or family violence. However, the burden of rebutting the presumption of equal shared parenting, on the basis of family violence, is on the victim and children exposed to the violence and, therefore, the most vulnerable people involved in the Family Court proceedings. This puts victims of domestic and family violence in the impossible

44 Kathleen Daly and Heather Nancarrow, ‘Restorative Justice and Youth Violence Toward Parents’ in John Ptacek (ed), *Restorative Justice and Violence Against Women* (Oxford University Press, 2010) 150.

45 The authors noted this is also true of conventional criminal justice approaches.

46 *Time for Action*, above n 1, 107.

position of being both a 'protective parent' and a 'friendly parent'. The latter is defined by section 60CC(3)(c) of the *FLA* as 'willingness ... to facilitate the child's relationship with the other parent'. It therefore impacts negatively on women's ability to raise violence as an issue, leaving themselves and their children vulnerable to continued violence.

This is further exacerbated by the increasingly central role of state and territory child protection systems in domestic and family violence matters. These systems place the onus of protecting children from exposure to violence on the victims, rather than the perpetrators, of that violence. Women with children who are victims of domestic and family violence, are required to demonstrate they are acting protectively, in ways determined by the state (including being required to seek a protection order and attend counselling) or risk losing their children. So, raising issues of violence renders the victim an 'unfriendly parent' in the Family Court, whilst failure to raise the violence (and have it addressed through the courts) renders her an 'unprotective parent' in the state courts.

Another related area of concern about the intersection of state and territory laws and the *FLA* is the lack of application of the legitimate powers provided to state and territory courts to revive, revoke, vary discharge or suspend existing *FLA* orders that are deemed to be inconsistent with orders providing for the safety of victims of domestic and family violence and their children. These powers were provided for in the mid-1990s to overcome inconsistencies in Family Court orders and state or territory-based domestic and family violence orders. There was wide-spread consternation at the lack of application of these powers, with current practices continuing to jeopardize the safety of women and their children. It appears that state and territory courts continue to be reluctant to step into the perceived Commonwealth jurisdiction, in spite of specific provisions to overcome the principle of Commonwealth law taking precedence over state and territory laws.

In response to the results of its consultation and research, the National Council specifically identified the need to:

Establish a reference for the Australian Law Reform Commission to examine present State/Territory domestic and family violence, child protection legislation and federal family law, and propose solutions to ensure that the inter-relationship in the application of these laws works to protect women and children from violence.⁴⁷

B Progress to Date

Time for Action was formally presented by the National Council to Prime Minister Kevin Rudd, in the presence of the Minister for the Status of Women, Tanya Plibersek and the Attorney-General, Robert McClelland on 29 April 2009. The Australian Government responded⁴⁸ with a commitment to: take *Time for*

47 Ibid 120.

48 Commonwealth of Australia, 'The National Plan to Reduce Violence against Women: Immediate Government Actions' (Report, Commonwealth of Australia, 2009).

Action to COAG; to work with the state and territory governments to develop a National Plan to Reduce Violence against Women and their Children, for release in 2010; and to implement, starting in 2009, a package of actions worth \$42 million, and covering 11 of the 20 priority actions identified by the National Council for the first three-year implementation plan. The immediate response also included a commitment to consult with the states and territories on a further nine of the priority actions, and to further consider the remaining two.

A cross-portfolio Ministerial Council was then established to progress the development of a National Plan to Reduce Violence against Women and to report to COAG by mid-2010, and the Attorney-General immediately acted on two key recommendations concerning just responses to domestic and family violence. First, and through the Standing Committee of Attorneys-General, work commenced on considering a mechanism for the automatic national registration for domestic and family violence protection orders. Then, on 24 July 2009, the Attorney-General announced the establishment of the Family Violence Inquiry, an investigation of the interaction between the family law, child protection and domestic and family violence systems, to be conducted jointly by the Australian Law Reform Commission ('ALRC') and the New South Wales Law Reform Commission ('NSWLRC'), in consultation with other states and territories. The Attorney-General said, '[t]he primary aim of this work will be to address inconsistencies so as to ensure women and children are better protected under both Commonwealth and State laws.'⁴⁹ The work of the ALRC and the NSWLRC follows two related, but separate initiatives completed in late 2009: a review of federal family law court practice and procedure in the context of family violence, conducted by Professor Richard Chisholm⁵⁰; and an evaluation of the impact of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).⁵¹

Following an extensive research and consultation process, which included inviting submissions in response to a 1000 page consultation document, the ALRC announced on 12 October 2010 that its final report⁵² had been delivered to the Attorney-General. Significantly, the Family Violence Inquiry generated a further reference to the ALRC; an inquiry into Family Violence and Commonwealth Laws to address matters which emerged throughout the consultation on the Family Violence Inquiry, but beyond its scope. The new 'Family Violence and Commonwealth Laws Inquiry' is consistent with the National Council's principle that 'no law, policy or practice should jeopardise the

49 Robert McClelland and Verity Firth, 'Review of Laws to Protect Women and Children' (Joint Media Release, 24 July 2009).

50 Richard Chisholm, *Family Courts Violence Review* (Attorney-General's Department (Cth), November 2009).

51 Rae Kaspiew et al, 'Evaluation of the 2006 Family Law Reforms' (Report, Australian Institute of Family Studies, 2009).

52 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response*, Australian Law Reform Report No 114, New South Wales Law Reform Commission Report 128 (2010).

safety or well-being of women and their children'.⁵³ It will consider the treatment of family violence in Commonwealth laws, including child support and family assistance law, immigration law, employment law, social security law, superannuation law and privacy provisions, and the impact on those experiencing domestic and family violence. The ALRC is due to report to the Attorney-General on this second family violence inquiry no later than 30 November 2011.

The immediate response from the Australian Government to *Time for Action*, which included an initial \$42 million investment to address urgent priorities and the implementation of the Government's successful social marketing campaign, www.theline.gov.au, was very positive. However, it was most disappointing that a national plan endorsed by COAG had not been finalised before the federal election on 21 August 2010. However, speaking at a federal Labor Women's Policy Forum in Melbourne on 9 August 2010, Tanya Plibersek reiterated the commitment of the Australian Labor Government, under the leadership of Prime Minister Julia Gillard, to a national plan to reduce violence against women and their children.⁵⁴ Minister Plibersek released Federal Labor's national plan for the period from 2010 to 2022, as well as the first three-year action plan. The plan acknowledges, and is built upon, the work of the National Council to Reduce Violence against Women and their Children, and the Australian Government's immediate response in April 2009. As such, the Labor plan focuses strongly on prevention, while not losing sight of the need to continue to provide, and enhance, support services for women affected by sexual assault and domestic and family violence, and the children exposed to that violence.

The launch of the Labor plan included a funding commitment of \$44.5 million over four years, including: \$6.9 million for a new National Centre of Excellence to evaluate the effectiveness of strategies to reduce violence against women, improve best practice and support workforce development; continuation of the \$17 million national social marketing campaign, 'The Line', and \$9 million for a respectful relationships program to support young people to develop healthy and respectful relationships; \$14.9 million for the Personal Safety Survey and National Community Attitudes Survey to track the impact of the new action plans every four years; \$8.8 million to provide telephone support for frontline workers such as allied health, child care and paramedics to better assist clients who have experienced violence; \$4.8 million to improve services for victims of domestic violence through reform projects focusing on the health sector and on services provided to children, Indigenous women and women with disabilities; \$4.6 million for new programs to stop perpetrators committing acts of violence and national standards for perpetrator programs; and the development of a national scheme for domestic and family violence orders through the Standing Committee of Attorneys-General.

⁵³ *Time for Action*, above n 1, 32.

⁵⁴ Tanya Plibersek, 'Government Calls for Applications to Establish New Domestic Violence Telephone and Online service' (Media Release, 9 August 2009).

IV CONCLUSION

Within a period of just nine months, 10 members of the National Council to Reduce Violence against Women and their Children undertook extensive consultation and research to deliver a comprehensive plan of action to reduce violence against women and their children in Australia. The National Council's plan, *Time for Action*, is built upon foundations consistent with the principles and practices that define international best practice in the development of such plans, and goes beyond these principles in its defining features. *Time for Action* recognises and responds to diversity among Australia's women, and their children; it seeks a fundamental and sustainable cultural shift so that, as a nation, Australians reject the attitudes and behaviours that enable violence against women occurring in the first place. *Time for Action* recognises, and addresses among its numerous strategies and actions, that violence against women and their children is a product of persistent patriarchal culture that continues to render women (in general) subordinate to men (in general), in public and private life. While *Time for Action* uniquely focuses on primary prevention of violence against women and their children, it also recognises that as a nation we must work better together, across borders as well as within borders, to respond to violence against women and their children through inclusive service provision, and effective justice responses.

To date, the Australian Government has, overall, responded well to *Time for Action*. It has embarked on its innovative national primary prevention campaign and, through the ALRC/NSWLRC inquiry, has already achieved a landmark report into the interaction of family law and domestic and family violence and child protection laws across the country. It has reiterated its commitment to the implementation of initiatives identified at the presentation of *Time for Action* to the Prime Minister in April 2009, and it continues to work with state and territory governments towards a COAG-endorsed national plan of action. Furthermore, there is evidence that the Australian Government is identifying and responding to additional initiatives as they emerge from the work of implementing the National Council's plan; demonstrating just the kind of flexibility and innovation that members of the National Council had in mind and now applaud.

The Australian Government has not waited for the delivery of a Council of Australian Governments plan to set about its role in implementing *Time for Action*, and nor should it. But to achieve the full potential of *Time for Action*, and overcome the challenge presented by our nation's structure as a federation of states, we need a solid, sustainable and resourced National Plan agreed to by COAG; and we need it now, in 2010, as planned.