

2. Conceptual Framework

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Summary

2.1 In undertaking inquiries the ALRC is directed to have regard to ‘Australia’s international obligations that are relevant to the matter’.¹ This chapter considers a number of international instruments that affect the issues in focus in this Inquiry, followed by an analysis of the broad policy themes relevant to the objective, as set out in the Terms of Reference, of protecting the safety of those who experience family violence.

2.2 In *Family Violence—A National Legal Response*, the ALRC identified a number of specific principles to provide the conceptual framework for the recommendations for reform in that Report: seamlessness, accessibility, fairness and effectiveness.² These have been evident as distinct themes in this Inquiry as well. Additional themes include: self-agency or autonomy, privacy and system integrity.

1 *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b).

2 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Ch 3.

International setting

2.3 A number of international conventions are relevant to the legal framework in relation to violence in the family, and acknowledge that violence against women and children is a violation of human rights.

2.4 Such international instruments do not become part of Australian law until incorporated into domestic law by statute.³ However, as Professors Bryan Horrigan and Brian Fitzgerald commented, '[i]nternational and transnational sources of law increasingly affect the development of Australian constitutional, statutory, and case law, and also governmental policy-making'.⁴ For example, as noted by the High Court in *Minister for Immigration and Ethnic Affairs v Teoh*, a convention can assist with the interpretation of domestic law:

The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law.⁵

2.5 The particular instruments of relevance to this Inquiry are summarised below in chronological order of introduction.

Universal Declaration of Human Rights

2.6 The *Universal Declaration of Human Rights* (UDHR), proclaimed by the General Assembly of the United Nations (UN) on 10 December 1948, was the first international expression of human rights.⁶ It is the basis of a number of later instruments that embody and expand upon its provisions. The ones of particular relevance to this Inquiry include: art 10 (the right to a fair and public hearing); art 12 (protection of privacy, family and home); art 16 (concerning marriage and the family); and art 22 (the right to social security).

International Covenant on Civil and Political Rights

2.7 The *International Covenant on Civil and Political Rights* (ICCPR), described as 'one of the most important human rights conventions of the United Nations era',⁷ was adopted by the UN General Assembly on 16 December 1966 and ratified by the Australian Government in 1980.

3 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–8, 315.

4 B Horrigan and B Fitzgerald, 'International and Transnational Influences on Law and Policy Affecting Government' in B Horrigan (ed) *Government Law and Policy: Commercial Aspects* (1998) 2, 2.

5 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288. The Court added a caution: 'But the courts should act in this fashion with due circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law'.

6 *Universal Declaration of Human Rights*, 10 December 1948, (entered into force on 10 December 1948).

7 B Opeskin and D Rothwell (eds), *International Law and Australian Federalism* (1997), 16.

Protecting families

2.8 A number of articles of the ICCPR are of particular relevance in the context of a consideration of family violence. Article 23 provides that '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.⁸ It also stipulates that signatory countries will take appropriate steps 'to ensure equality of rights and responsibility of spouses as to marriage, during marriage and at its dissolution'.⁹

2.9 Article 17 provides protection for the family, including specific recognition of privacy, in stipulating that:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.¹⁰

Protecting children

2.10 With respect to children, there are two particular articles of note. Article 23 refers to the position of children after the dissolution of marriage, stating that provision shall be made for their 'necessary protection'.¹¹ Article 24 focuses particularly on children in their own right, that they have the right 'to such measures of protection as are required' on the part of the child's 'family, society and the State'. In 1990, the UN adopted the *Convention on the Rights of the Child*—considered specifically below.

Protection of the law

2.11 Other key rights of a more general nature in the ICCPR are the right to a 'fair and public hearing' in art 14, with minimum procedural guarantees in the case of criminal charges;¹² and the affirmation in art 26 that 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law'.

2.12 There are also provisions that target discrimination. First, art 2 provides a positive assertion of the responsibility of signatories to ensure equal treatment, 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Secondly, art 26 provides a specific proscription of discrimination 'on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

Tensions in the protected rights

2.13 In the context of family violence, there are evident tensions in the way that these articles—and the expectations they engender—might operate. A person accused of violence that may be a criminal offence, for example, is entitled to a fair hearing

8 Reflecting art 16 of the UDHR.

9 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23 (entered into force on 23 March 1976), art 23(4).

10 *Ibid.*, art 17(1). This article reflects art 12 of the UDHR.

11 *Ibid.*, art 23(4).

12 This article reflects art 10 of the UDHR.

(art 14); the family itself, as a fundamental unit of society, is entitled to protection (art 23); and the child is entitled to the expectation of protection by his or her family and the state (art 24). When, for example, a child is the subject of abuse by a family member, each of these articles, and their inherent expectations, may be in apparent conflict. Similarly, where a woman or man is the subject of family violence, the protection of the family requires the family to be open to some public scrutiny— notwithstanding the right to privacy and the protection of the home (art 17).

Convention on the Elimination of Discrimination Against Women

2.14 While discrimination against *all persons* is proscribed under art 26 of the ICCPR, this provision is supplemented by the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW),¹³ which came into force for Australia on 27 August 1983.¹⁴ In March 2009, Australia also became a party to the CEDAW Optional Protocol, which allows individuals to bring a complaint directly to the UN CEDAW Committee, after all domestic remedies have been exhausted.

2.15 CEDAW defines discrimination as any distinction, exclusion or restriction that prevents the equal exercise or enjoyment by women of human rights and fundamental freedoms ‘in the political, economic, social, cultural, civil or any other field’.¹⁵ In doing so, it ‘moves beyond the concept of discrimination used in other human rights treaties’,¹⁶ to define the concept of discrimination ‘more broadly than earlier international treaties on women’.¹⁷ Elizabeth Evatt, a member of the UN Committee on the Elimination of Discrimination from 1984 to 1992, described CEDAW as ‘an international bill of rights for women’¹⁸ and as representing ‘a commitment by the international community to equality in the enjoyment of human rights’.¹⁹

2.16 In an inquiry in the 1990s as part of the Australian Government’s ‘New National Agenda for Women’, the ALRC noted that, as a party to CEDAW, Australia had undertaken to pursue ‘by all appropriate means and without delay a policy of eliminating discrimination against women’.²⁰ While observing that, as a party to the ICCPR, ‘Australia must guarantee the equal protection of human rights to men and women without discrimination and equality before the law’,²¹ the ALRC concluded

13 *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, [1983] ATS 9 (entered into force on 3 September 1981).

14 *Ibid.*

15 *Ibid.*, arts 1–3.

16 S Cusack, ‘Discrimination Against Women: Combating Its Compounded and Systemic Forms’ (2009) 34(2) *Alternative Law Journal* 86, 86.

17 H Charlesworth and S Charlesworth, ‘The Sex Discrimination Act and International Law’ (2004) 27 *University of New South Wales Law Journal* 858, 858, referring to, eg, the 1953 UN *Convention on the Political Rights of Women*.

18 E Evatt, ‘Eliminating Discrimination Against Women: The Impact of the UN Convention’ (1991) 18 *Melbourne University Law Review* 435, 435.

19 *Ibid.*, 437.

20 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), [1.2].

21 *Ibid.*

that a significant aspect of gender inequality—and therefore of discrimination in contravention of CEDAW—was ‘women’s experience and fear of violence’.²²

Declaration on the Elimination of Violence against Women

2.17 At the time that the ALRC was conducting its work in the 1990s that led to the report, *Equality Before the Law: Justice for Women*,²³ the Declaration on the Elimination of Violence against Women was adopted by the General Assembly of the UN on 20 December 1993, to complement and strengthen CEDAW. Violence against women was defined as meaning

any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.²⁴

2.18 This was further spelled out as encompassing:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.²⁵

Convention on the Rights of the Child

2.19 The UN *Convention on the Rights of the Child* (CROC)²⁶ has been described as ‘the most comprehensive statement of children’s rights ever drawn up at the international level’,²⁷ and as providing ‘a universally accepted rights-based framework

22 Ibid, [2.30]. Although CEDAW does not expressly mention violence as a form of discrimination, parties are asked to report on the protection of women against the incidence of all kinds of violence, ‘including sexual violence, abuses in the family, sexual harassment at the work place, etc’: E Evatt, ‘Eliminating Discrimination Against Women: The Impact of the UN Convention’ (1991) 18 *Melbourne University Law Review* 435, 438, n 21 citing Rec 12, 8th session 1989. So, for example, where art 16 calls for the elimination of discrimination in marriage and the family, family violence ‘is clearly a form of discrimination which denies women equality’: 441.

23 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994); Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 2)*, Report 69 (1994).

24 *Declaration on the Elimination of Violence against Women* 20 December 1993, UN GAOR, A/RES/48/104 (entered into force on 23 February 1994), art 1.

25 Ibid, art 2. In 1999, the General Assembly designated 25 November as the International Day for the Elimination of Violence against Women.

26 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4 (entered into force on 2 September 1990).

27 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [7.3].

for addressing the treatment of children'.²⁸ It was ratified by Australia on 17 December 1990.²⁹

2.20 CROC sets out the full range of human rights—civil, cultural, economic, political and social rights—pertaining to children under 18 years of age.³⁰ The four core principles of the Convention are non-discrimination; devotion to the best interests of the child; the right to life, survival and development; and respect for the views of the child. In a joint 1997 report, the ALRC and the Human Rights and Equal Opportunity Commission stated that:

CROC recognises that children, as members of the human family, have certain inalienable, fundamental human rights. It emphatically endorses the proposition that the family is the fundamental environment for the growth and well-being of children and states that, for the well-being of society, the family should be afforded protection and assistance so as to fully assume its responsibilities. At the same time, it recognises that children need special safeguards and care where the family does not or cannot assume these roles.³¹

2.21 That same year, in *B and B: Family Law Reform Act 1995*, the Full Court of the Family Court expressed the view that CROC

must be given special significance because it is an almost universally accepted human rights instrument and thus has much greater significance for the purposes of domestic law than does an ordinary bilateral or multilateral treaty not directed at such ends.³²

2.22 A number of the provisions of CROC were particularly relevant to *Family Violence—A National Legal Response* and continue to be an important part of the international setting for this Inquiry, especially the principle that 'the best interests of the child' is a 'primary consideration'.³³

Convention on the Rights of Persons with Disabilities

2.23 The Convention on the Rights of Persons with Disabilities and its Optional Protocol were adopted by the UN on 13 December 2006 and entered into force on

28 National Children's and Youth Law Centre, *Submission CFV 64*.

29 CROC was significant in 'shaping the first wave of reforms to Pt VII of the *Family Law Act 1975* (Cth) effected under the *Family Law Reform Act 1995* (Cth)': L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [7.5].

30 UNICEF, *Convention on the Rights of the Child: Introduction* <www.unicef.org/crc/index_30160.html> at 18 January 2010. The rights include the right to survival (art 6); to develop to the fullest (art 6); to protection from harmful influences, abuse and exploitation (art 19); and to participate fully in family, cultural and social life.

31 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), [3.15].

32 *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676, [10.19]. The relationship between CROC and the *Family Law Act* has been considered by the High Court in the context of the mandatory detention of children in immigration detention centres when proceedings for the release of two boys were brought under pt VII of the *Family Law Act: Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365. The High Court held that the welfare power was constrained by the constitutional head of power under which it was enacted and, accordingly, that the Family Court had no jurisdiction either to order the release of the children from detention or to make general orders concerning the welfare of detained children.

33 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4 (entered into force on 2 September 1990), art 3(1). See, eg, AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*.

3 May 2008.³⁴ Australia ratified the Convention on 17 July 2008, joining other countries around the world ‘in a global effort to promote the equal and active participation of all people with disability’.³⁵ The purpose of the Convention, as set out in art 1, is

to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

2.24 The Convention sets out the following guiding principles in art 3:

- a. Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
- b. Non-discrimination;
- c. Full and effective participation and inclusion in society;
- d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- e. Equality of opportunity;
- f. Accessibility;
- g. Equality between men and women;
- h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

2.25 With respect to this Inquiry, a key article of relevance is art 16, ‘Freedom from exploitation, violence and abuse’, by which States parties agree to take:

all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.³⁶

2.26 States parties also agree to put in place

effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.³⁷

Declaration on the Rights of Indigenous Peoples

2.27 The Declaration on the Rights of Indigenous Peoples was adopted by the UN General Assembly on 13 September 2007³⁸ and has been described as ‘the greatest

34 *Convention on the Rights of Persons with Disabilities*, 30 March 2007, [2008] ATS 12 (entered into force on 3 May 2008).

35 Attorney-General’s Department, *United Nations Convention on the Rights of Persons with Disabilities* <www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_UnitedNationsConventionontheRightsofPersonswithDisabilities> at 17 November 2011.

36 *Convention on the Rights of Persons with Disabilities*, 30 March 2007, [2008] ATS 12 (entered into force on 3 May 2008), art 16(1).

37 *Ibid*, art 16(5).

38 *Declaration on the Rights of Indigenous Peoples*, 13 September 2007, GA Res 61/295, UN Doc A/RES/47/1.

development on indigenous rights’ in the decade up to 2009.³⁹ Australia, Canada, New Zealand and the United States originally voted against the Declaration, but on 3 April 2009, the Australian Government reversed this position. At the time, the Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon Jenny Macklin MP, remarked that the Declaration was supported ‘in the spirit of re-setting the relationship between Indigenous and non-Indigenous Australians and building trust’.⁴⁰

2.28 The Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, hailed the Declaration as providing ‘a blueprint for Indigenous peoples and governments around the world’, containing the ‘minimum standards for the survival, dignity and well-being of Indigenous peoples all over the world’.⁴¹

2.29 The emphasis is ‘collectivist or peoples oriented’, in contrast to that of the UDHR and the ICCPR, which emphasise ‘human dignity and the worth of every individual person’.⁴² A number of articles, however, combine both approaches.⁴³ Article 1, for example, provides that Indigenous peoples have the right to the full enjoyment of all human rights recognised by the UN, ‘as a collective or as individuals’. Article 2 then affirms the right of Indigenous peoples and individuals to be free from any kind of discrimination, in particular that based on their Indigenous origin or identity.

2.30 Article 22 focuses upon particular forms of discrimination and protection from violence:

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

2.31 The *Community Guide to the UN Declaration on the Rights of Indigenous Peoples*, produced by the Australian Human Rights Commission in 2010, explains in relation to art 22 that:

Violence against our women and children is an issue of concern to Aboriginal and Torres Strait Islander communities.

39 A Xanthaki, ‘Indigenous Rights in International Law Over the Last 10 Years and Future Developments’ (2009) 10 *Melbourne Journal of International Law* 27, 29.

40 J Macklin, ‘Federal Government Formally Endorses the Declaration on the Rights of Indigenous Peoples’ (2009) 7(11) *Indigenous Law Bulletin* 6, 6.

41 M Gooda, *Community Guide to the UN Declaration on the Rights of Indigenous Peoples* <www.hreoc.gov.au/declaration_indigenous/index.html> at 12 July 2011.

42 T van Boven, ‘Categories of Rights’ in D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law* (2010) 173, 176; and see A Xanthaki, ‘Indigenous Rights in International Law Over the Last 10 Years and Future Developments’ (2009) 10 *Melbourne Journal of International Law* 27, 29.

43 T van Boven, ‘Categories of Rights’ in D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law* (2010) 173, 177.

Governments have obligations to take actions to prevent and protect our women and children from violence and discrimination.

Laws and policies developed to protect women and children should not at the same time discriminate against Aboriginal and Torres Strait Islander peoples. That is why governments must work with us in meeting these obligations.⁴⁴

2.32 The rights affirmed in the Declaration provide an additional lens through which to consider a range of the issues in this Inquiry. While many of the articles focus on community and cultural issues that are unique to Indigenous communities, the affirmation of rights of individuals within those communities is an additional layer of commitment to the rights spelled out in the other international instruments considered above.⁴⁵

Conceptual framework

2.33 The Australian Government has identified a clear goal ‘to reduce all violence in our communities’, recognising that ‘whatever the form violence takes, it has serious and often devastating consequences for victims, their extended families and the community’.⁴⁶ The overarching objective of this Inquiry therefore reflects the Government’s objective—through recommendations for reform of legal frameworks to protect the safety of those experiencing family violence. In this context, the idea of ‘legal frameworks’ extends beyond law in the form of legislative instruments and includes education, information sharing and other related matters. The overall touchstone throughout the chapters and recommendations, however, is one of improving safety.

2.34 This section provides an outline of the key themes and policy tensions that emerged in the Inquiry: seamlessness; fairness; accessibility; effectiveness; self-agency or autonomy; privacy; and system integrity.⁴⁷

Seamlessness

2.35 In *Family Violence—A National Legal Response*, ‘seamlessness’ was identified as a foundational policy principle driving the recommendations for reform.

Seamlessness—to ensure that the legal framework is as seamless as possible from the point of view of those who engage with it.⁴⁸

44 Australian Human Rights Commission, *Community Guide to the UN Declaration on the Rights of Indigenous Peoples* (2010), 43.

45 See M Martinez, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations Reported to the UN for the Working Group on Indigenous Peoples* (1997).

46 FaHCSIA, *National Plan to Reduce Violence Against Women and Their Children—Including the First Three-year Action Plan* (2011), 2.

47 In its submission, the Department of Immigration and Citizenship agreed with the focus on these key themes and noted ‘the importance of these factors in providing protection for victims of family violence’: DIAC, *Submission CFV 121*.

48 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [3.10]. See also [3.11]–[3.14].

2.36 In the context of the current Inquiry, seamlessness remains an important theme, particularly in relation to matters such as the consistency of definitions across the various Commonwealth laws under review. Consistency then informs training and awareness in service delivery areas; and facilitates better coordination of responses to family violence, through appropriate information sharing and the improvement of pathways between agencies.

Fairness

2.37 In *Family Violence—A National Legal Response*, fairness was a key framing principle:

Fairness—to ensure that legal responses to family violence are fair and just, holding those who use family violence accountable for their actions and providing protection to victims.⁴⁹

2.38 *Time for Action* identified as one key ‘outcome’ area, that ‘responses are just’.⁵⁰ Fairness also reflects human rights principles—in particular, Australia’s obligations under international instruments considered above.

2.39 In this Inquiry, fairness can be expressed in a number of distinct aims, to ensure that:

- concerns about safety are properly heard, understood and responded to;
- there is procedural certainty;⁵¹
- issues of family violence or safety concerns do not give rise to inappropriate advantages or disadvantages—what may be called ‘system perversities’;⁵²
- safety concerns are not exacerbated by the applicable system requirements;⁵³ and
- procedural fairness is accorded where issues of allegations of family violence by someone are relevant, as distinct from an individual’s expression of fears for safety.⁵⁴

2.40 Fairness is also considered in relation to one of the additional themes in this Inquiry—system integrity, considered below.

49 Ibid, [3.10]. See also [3.16]–[3.17].

50 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), Outcome 4.

51 See, eg, AASW (Qld), *Submission CFV 46*; WRC Inc (Qld), *Submission CFV 43*; Principal Member of the Migration and Refugee Review Tribunals, *Submission CFV 29*.

52 For example: concern about the ‘financial incentive for perpetrators’ was expressed in National Council of Single Mothers and their Children, *Submission CFV 45*.

53 For example, in the context of child support: ADFVC, *Submission CFV 53*; Sole Parents’ Union, *Submission CFV 52*.

54 Concern about the role of allegations of family violence was noted, eg, by Women with Disabilities ACT, *Submission CFV 153*; Commonwealth Ombudsman, *Submission CFV 54*; Non-Custodial Parents Party (Equal Parenting), *Submission CFV 50*; WRC Inc (Qld), *Submission CFV 43*.

2.41 A further aspect of fairness may be expressed as a need to ensure that Australia's resources are fairly distributed, including, for example, a fair distribution of social security benefits, and eligibility for citizenship via immigration. In the context of employment, fairness also requires consideration of what are appropriately considered to be 'workplace' issues and the responsibility of employers, rather than private matters for employees. As remarked by the Australian Chamber of Commerce and Industry:

All too often policy makers do not sufficiently take into account these issues when they make wide sweeping recommendations which would either create new obligations, increase red-tape on a business and/or introduce new costs (most times, achieving a triple whammy). This is despite other arms of government extolling their policy objectives in reducing the administrative burden on business.⁵⁵

Accessibility

2.42 In *Family Violence—A National Legal Response*, accessibility was identified as one of the framing principles for reform: 'to facilitate access to legal and other responses to family violence'.⁵⁶ Systems that are complicated, in which definitions are inconsistent, where concerns of form over substance impede a response to safety concerns, and where there are complex pathways to obtain answers, work against the principle of accessibility. This theme has been expressed strongly in this Inquiry—particularly in the context of immigration law.⁵⁷

2.43 An aim of accessibility that complements the other principles is the avoidance of victims having to retell the circumstances of the violence, thereby 're-traumatising' victims of family violence. This was a persistent theme in the earlier family violence inquiry and repeated in this Inquiry. The consequential under-reporting of family violence and fears for safety, for this and other reasons, were also identified.⁵⁸

Effectiveness

2.44 The principle of 'effectiveness'—to facilitate effective interventions and support in circumstances of family violence—also builds on the work of the Access to Justice Taskforce, referred to in *Family Violence—A National Legal Response*.⁵⁹ Similarly, the *National Plan* stressed that '[a]ll systems need to work together to make a major

55 ACCI, *Submission CFV 19*.

56 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [3.10], [3.15]. Using 'accessibility' as a principle in this way built upon the report of the Access to Justice Taskforce of the Australian Government Attorney-General's Department, which included accessibility as a key principle: 'Justice initiatives should reduce the net complexity of the justice system': Australian Government Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 8.

57 For example: Visa Lawyers Australia, *Submission CFV 76*. In the context of social security, see, eg, Council of Single Mothers and their Children (Vic), *Submission CFV 55*.

58 See the discussion in Ch 1 concerning under-reporting and barriers to disclosure.

59 Australian Government Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), referred to in Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [3.18].

difference to the prevalence and impact of violence against women'.⁶⁰ This theme is also reflected in the idea of 'seamlessness'.

2.45 With respect to improving legal frameworks to protect safety, a key issue is to ensure that concerns about safety are properly heard, understood and responded to⁶¹—also an aspect of fairness. A particular challenge in the context of family violence is the issue of disclosure of safety concerns, as the ability to provide effective responses may depend on if, how and when such disclosures are made. A continuing theme is that many people do not wish to disclose concerns about safety in the context of family violence. Difficulties in disclosing family violence were remarked upon in submissions to this Inquiry.⁶² The limited extent to which information about safety concerns was sought, or information provided, in some situations, was also noted.⁶³

Self-agency or autonomy

2.46 Another theme can be described as one of 'self-agency' or 'autonomy', concerning an individual's right to make decisions about matters affecting him or her. Respect for autonomy is 'the idea that every rational person should be able to decide matters for him or herself'.⁶⁴ An example in the context of this Inquiry may be called the 'right to choose' to disclose safety concerns,⁶⁵ or not, and the consequences that might flow from such choice.

2.47 The role of agency is a significant theme in broader jurisprudential analysis and is often seen in debates in the health law context, particularly in relation to questions of competency and principles of informed consent.⁶⁶ As Professor Terry Carney has pointed out:

An influential school of jurisprudence conceives the legitimate role (and limits) of law to be that of protecting people against unwarranted interference with their freedom of

60 FaHCSIA, *National Plan to Reduce Violence Against Women and Their Children—Including the First Three-year Action Plan* (2011), 14 and 32 (Strategy 5.3).

61 This reflects a theme that recurred throughout the review conducted by Professor Richard Chisholm in relation to family violence in family courts: 'that family violence must be disclosed, understood, and acted upon'. R Chisholm, *Family Courts Violence Review* (2009), 5. As Chisholm commented, each component of the family law system 'needs to encourage and facilitate the disclosure of family violence, ensure that it is understood, and act effectively upon that understanding': 5.

62 See discussion in Ch 1 concerning under-reporting and barriers to disclosure.

63 For example: WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*; Commonwealth Ombudsman, *Submission CFV 54*.

64 J Devereux and M Parker, 'Competency Issues for Young Persons and Older Persons' in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 54. The idea of autonomy is a predominant one in liberal political philosophy, developing from Enlightenment thinking and expressed, for example, in the writing of John Stuart Mill in his classical treatise 'On Liberty' (1859), especially ch 3: 'Of individuality, as one of the elements of well-being'. For a discussion of the development of autonomy, see, eg, J Christman, 'Autonomy in Moral and Political Philosophy' in E Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2011).

65 For example: ADFVC, *Submission CFV 26*.

66 See, eg, J Devereux and M Parker, 'Competency Issues for Young Persons and Older Persons' in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54.

choice/action and in providing the resources (or the 'level playing field') to enable people to enjoy and obtain personal fulfilment from the exercise of those rights.⁶⁷

2.48 Autonomy can be juxtaposed to 'paternalism', which 'provides a justification for interference with a person's own conception of their interests in order to secure their welfare'.⁶⁸

Respect for autonomy is meant to prohibit such interventions because they involve a judgment that the person is not able to decide for herself how best to pursue her own good. Autonomy is the ability to so decide, so paternalism involves a lack of respect for autonomy.⁶⁹

2.49 There is a clear tension in some areas about wanting to ensure that safety concerns are identified through appropriate screening and to respond accordingly, and an individual's wish for certain matters to remain 'private' and the consequences therefore to remain within their own control or self-agency.

2.50 One particular legislative area that illustrates a response that is driven by policy concerns as to the safety of children, but operates with a constrained place for an idea of individual agency, is that of the compulsory income management regime discussed in Part C, overriding autonomy by a concern to protect vulnerable people. Such areas reveal a tension between ideas of individual freedom, and self-agency, and what may be described as protective paternalism. For example, the Australian Domestic and Family Violence Clearinghouse considers compulsory income management:

to be a disempowering approach to people who have already been significantly disempowered by the abuse (e.g. having no involvement with household finances, having to give over their money to abusive partners, experiencing emotional and psychological abuse). It is effectively blaming victims of violence for their financial situation rather than acknowledging that their hardship is more likely to be a product of the abuse.⁷⁰

2.51 Another area where the issue of agency is of particular concern is in relation to child support and family assistance, considered particularly in Part D, where law reform recommendations are discussed that contribute to self-agency, by empowering and enabling victims of family violence to make informed choices about participation in the child support scheme, and to contribute to decisions that affect their safety.

Privacy

2.52 A related theme to autonomy is privacy—that sensitive information concerning fears for safety is obtained and handled in an appropriate way. For example, the Office of the Privacy Commissioner identified the challenge

67 T Carney, 'The Limits and the Social Legacy of Guardianship in Australia' (1989) 18 *Federal Law Review* 231, 237.

68 Ibid, 238.

69 J Christman, 'Autonomy in Moral and Political Philosophy' in E Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2011), [2.2].

70 ADFVC, *Submission CFV 71*. See also, eg, Erskine Rodan and Associates, *Submission CFV 80*; WRC (NSW), *Submission CFV 70*.

to ensure that initiatives contain appropriate privacy safeguards regarding the handling of an individual's personal information, while providing strong protection against harm from family violence.⁷¹

2.53 The theme of privacy is particularly relevant to the linking of service responses—an aspect of accessibility. What information is obtained and how it is used is also relevant to concerns about allegations of violence—an aspect of fairness. The extent to which privacy is accorded when a person chooses to disclose safety concerns may affect the decision to disclose.⁷²

System integrity

2.54 A number of the legislative regimes under consideration provide pathways to particular benefits. For example, to immigration, to social security payments and entitlements, to the receipt of child support, to family assistance and to fair workplace conditions. Issues of family violence may be a relevant factor that leads to a modification of the particular pathway or to a different mode of calculation of benefit. A main issue in such contexts is the kind and standard of proof required where an issue of family violence is raised.

2.55 The ALRC has identified a policy tension between ensuring that appropriate acknowledgment is given to the safety concerns of a person who is experiencing family violence and what may be broadly described as 'system integrity' issues, where appropriate checks and balances are included so as not to 'incentivise' the raising of family violence simply to achieve a benefit of some kind—or 'playing the family violence card' as it has been crudely described. Another kind of system integrity issue is to ensure that a person who causes another to fear for their safety in a family context is not advantaged in some way by that action.

71 Office of the Australian Information Commissioner, *Submission CFV 68*; Office of the Australian Information Commissioner, *Submission CFV 61*; Office of the Australian Information Commissioner, *Submission*.

72 For example: ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*. See discussion in Ch 1 concerning under-reporting and barriers to disclosure.