13. Recognising Family Violence in Offences and Sentencing

Contents

Introduction

13.1 This and the following chapter consider whether there should be an expanded role for the criminal law in recognising family violence. This chapter considers the recognition of family violence in criminal offences and sentencing. Chapter 14 considers the recognition of family violence in defences to homicide where a victim of family violence kills the person who was violent towards him or her. It also considers the recognition of categories of family relationships for the purposes of criminal laws[1]—for example where a family relationship between the offender and the victim is prescribed as an element of a criminal offence or defence, or as a sentencing factor.

1 Chapter 7 considers the categories of family relationships recognised for the purposes of identifying persons in need of protection under state and territory family violence legislation.

13.2 The underlying issue in Chapters 13 and 14 is the way in which the criminal law accounts for the nature and dynamics of family violence. Criminal laws are traditionally perceived as 'incident-based', in that they are focused upon discrete acts forming the basis of individual offences.[2] As identified in Chapter 5, family violence is characterised by patterns of controlling, coercive or dominating behaviour and may include both physical and non-physical violence.

13.3 The Commissions consider these issues in light of the direction in the Terms of Reference to consider what, if any, improvements can be made to the current criminal law framework to protect victims of family violence, and in particular, women and children. This Inquiry presents the Commissions with a unique opportunity to explore ways in which legal frameworks can be improved in order to better protect victims of family violence—even where no issues arise from the practical interaction of family violence laws with the criminal law. In the Commissions' view, a broad interpretation of the Terms of Reference calls for an assessment of how well the criminal justice system deals with family violence. A key consideration in undertaking this assessment is the Commissions' guiding principle of fairness. That is, ensuring that legal responses to family violence are fair and just—holding those who use family violence accountable for their actions, providing protection to victims and ensuring that accused persons are treated in accordance with Australia's human rights obligations.[3]

13.4 Criminal law responses are not, however, a stand-alone solution to family violence. The Commissions acknowledge that there is a more general issue about whether escalating a penal response to family violence is the best or only way for society to mark its condemnation of what is clearly abhorrent behaviour. The Commissions have heard that, in some cases, a blunt penal response can escalate violent behaviour and fail to address its causes. Such an approach can also have particularly adverse impacts upon Indigenous peoples.[4] Consistent with the Commissions' guiding principle of seamlessness, the measures considered in this chapter and Chapter 14 are intended to form part of an integrated response to family violence, which focuses on prevention as well as punishment.

13.5 The Commissions recognise that several state and territory governments have given considerable attention to some of the issues addressed in this and the following chapter. Some matters have been the subject of dedicated reviews and consequent legislative reforms.[5] In some cases, jurisdictions have taken divergent approaches to certain issues. Some differences appear to reflect jurisdiction-specific policy positions on matters extending beyond family violence. In acknowledging these matters, the Commissions have approached this chapter and Chapter 14 from the perspective of facilitating the continuous improvement of criminal law responses to family violence.

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2 However, as noted below, there is precedent in some offence provisions for the recognition of courses of conduct in respect of certain criminal behaviour.

3 See, eg, *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976), arts 14 and 26. See further Ch 2.

4 See, eg, Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [29.40]–[29.73].

5 For example, numerous reports and reviews in the last few decades have considered the issue of defences to homicide in cases involving family violence. These are considered in Ch 14.

Recognising family violence in criminal offences

Criticisms of the incident-focused nature of criminal offences

Case study

'Some of the women I have assisted have experienced years of violence, including rapes, which have been reduced to one charge of common assault. There is no way a just sentence for her suffering and trauma, and the harm done to society by his actions, can be applied to a single charge of common assault no matter how sensitive and insightful the magistrate is.'

One woman experienced a year of social isolation, food deprivation, constant sexual assault and severe physical violence. The police pressed one charge of common assault and one charge of actual bodily harm in respect of injuries they were able to photograph. At court the police prosecutor accepted a plea bargain and dropped one of the charges without consulting the woman who was present in court ready to appear and give evidence. The offender admitted to a third party that he had been assaulting his wife but the evidence was not used because it did not relate to a specific incident of assault. The offender received a good behaviour bond.[6]

13.6 The above case study echoes the criticisms advanced by some commentators about the way in which the dynamics of family violence are viewed in criminal offences. Some have argued that the predominantly incident-focused nature of most criminal offences fails to take account of the 'patterns of power and control' in family violence cases and, consequently, 'the full measure of injury that these patterns inflict'.[7] Where offences are framed in terms of discrete incidents—for example, an assault occurring in the context of family violence[8]—the investigation and prosecution will focus on conduct relevant to establishing each element of the offence. A broader history of abuse may be perceived as irrelevant to the immediate offence charged.[9]

13.7 During the Inquiry, lawyers representing victims of family violence informed the Commissions that persons who have committed family violence over a period of time are often prosecuted for only a small number of incidents.[10] It may be difficult to

6 *Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers*.

7 D Tuerkheimer, 'Recognizing and Remedying the Harm to Battering: A Call to Criminalize Domestic Violence' (2003) 94 *Journal of Criminal Law & Criminology* 959, 972. See also A Burke, 'Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization' (2006) 75 *George Washington Law Review* 552.

8 For a recent summary of offences commonly charged in the family violence context in NSW see C Ringland and J Fitzgerald, *Factors which Influence the Sentencing of Domestic Violence Offenders*, New South Wales Bureau of Crime Statistics and Research Issues Paper 48 (July 2010).

9 However, evidence of broader histories of abuse may be admissible in the prosecution of individual offences where relevant to a fact in issue and subject to exclusionary rules. This point is discussed below.

10 *Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers*.

prove specific incidents in the course of ongoing violence to the requisite standard because:

- victims may be unable to recall the dates or times of particular incidents;
- victims may not have reported incidents at the time, which may be due to reasons including: fear; unawareness of the criminal nature of the violent behaviour; a desire to protect the person committing the violence from criminal sanctions; unawareness or inaccessibility of services; or lack of confidence in the legal response;
- victims may have explained away their injuries to third parties, for the above reasons;
- evidence of the victim's disclosures to third parties, such as friends or counsellors, may be inadmissible as hearsay evidence;
- corroborating evidence may be of limited probative value—for example, the evidence of neighbours who heard incidents through a wall, or that of young children present in the home; and
- there may be no evidence of injuries or harm suffered at the time a complaint is made, particularly where non-physical abuse is alleged.[11]

13.8 Some commentators have argued that the incident-based focus of the criminal law has several adverse consequences in a family violence context. Where a course of violent behaviour is reduced to a small number of charges, it is said that the criminal law fails to punish adequately the harm done to the victim, and does not publicly recognise and condemn the seriousness of family violence.[12]

13.9 Others have suggested that isolating specific incidents from a victim's broader history of violence can damage the credibility of his or her evidence in respect of the offences prosecuted. It is said that a break in the 'natural sequence of narrative evidence', can render the victim's account of specific incidents 'incoherent' and 'unpersuasive'.[13] A narrow recognition of family violence in criminal offences can have a flow-on effect to other legal frameworks that depend on the criminal law—such as victims' compensation—with the result that family violence victims are under-compensated.[14]

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11 Ibid.

12 V Tadros, 'The Distinctiveness of Domestic Abuse: A Freedom Based Account' (2004) 65 *Louisiana Law Review* 989.

13 D Tuerkheimer, 'Recognizing and Remedying the Harm to Battering: A Call to Criminalize Domestic Violence' (2003) 94 *Journal of Criminal Law & Criminology* 959, 983–984.

14 See, eg, C Forster, 'The Failure of Criminal Injuries Compensation Schemes for Victims of Intra-Familial Abuse: The Example of Queensland' (2002) 10 *Torts Law Journal* 143; I Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview* (2010), prepared for the Australian Domestic and Family Violence Clearinghouse.

Current approaches to recognising family violence in criminal offences

13.10 Notwithstanding the traditionally incident-focused nature of criminal law, family violence has received varying degrees of recognition in criminal offences in Australian and overseas jurisdictions. Forms of recognition—separately addressed below—have included:

- a specific offence of family violence, based upon a course of conduct;
- course of conduct-based offences, covering certain family violence related conduct—for example, offences in the nature of the persistent sexual abuse of children;
- aggravated forms of existing offences where they are committed against persons in a defined family relationship with the offender—which attract higher maximum penalties;
- the designation of certain offences as 'family violence offences' which do not attract higher maximum penalties;
- specific offences of economic and emotional abuse;
- in the prosecution of offences under general criminal laws, the admission of evidence of the relationship between the accused person and the victim—including previous violence—where it is relevant to the facts in issue; and
- in federal jurisdictions in which primary responsibility for criminal law is vested in state and territory governments—federal offences relevant to the family violence context.

An umbrella offence of family violence

13.11 Family violence is not a specific offence in most common law jurisdictions, including Australia, Canada, New Zealand, the United Kingdom and the United States. In 2003, the United Kingdom government rejected an umbrella offence of family violence on the basis that a separate offence would reduce the range of available charging options from among existing offences, and thereby 'diminish the offence'.[15]

13.12 In the United States, the Maine legislature considered the introduction of a discrete family violence offence in 2007.[16] However, it ultimately enacted a series of individual 'domestic violence crimes' based upon existing offences committed against persons defined as 'family or household members'.[17] The Joint Standing Committee on

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15 Crime Reduction Centre Information Team, *Safety and Justice: The Government's Proposals on Domestic Violence* (2003), 30.

16 *A Bill to Protect Families and Enhance Public Safety by Making Domestic Violence a Crime 2007* SP 571 LD 1627, 123rd session (Maine).

17 *An Act To Protect Families and Enhance Public Safety by Making Domestic Violence a Crime 2008* 17-A MRSA (Maine) §§ 207-A, 209-A, 210-B, 210-C, and 211-A. The 'domestic violence crimes' are: domestic violence assault; domestic violence criminal threatening; domestic violence terrorising; domestic violence stalking; and domestic violence reckless conduct.

Criminal Justice and Public Safety recommended the use of specific offence provisions rather than an umbrella offence in order to conform to technical drafting standards.[18]

13.13 Several European jurisdictions have recognised a specific offence of family violence. A Council of Europe Report indicates that the following countries have specific offences: Andorra, Croatia, the Czech Republic, Hungary, Iceland, Montenegro, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, and Sweden.[19] Sweden explained the introduction of its specific offence as follows:

> Its purpose is to deal with repeated male violence towards women with whom they have a close relationship. The introduction of the new offence will make it possible for the courts to substantially increase the penal value for the acts committed against the woman, when the acts are part of a process which constitutes a violation of integrity. Thus it will be possible, in a much better way than with existing legislation, to take the entire situation of the abused woman into account. The new crime does not exclude that the perpetrator at the same time can be prosecuted, for instance, for rape or other gross crimes.[20]

13.14 The Indian Penal Code includes an offence of cruelty to women.[21] In 2005, a study conducted on the operation of this section concluded that, of 30 cases it had studied, no prosecution had succeeded under that section. Although many in the legal system were of the view that the section was being misused, the study concluded that victims thought the section required strengthening and non-governmental organisations considered it the only effective mechanism of redress for victims of family violence.[22]

13.15 A potential umbrella offence has received limited consideration in Australian jurisdictions. For example, in 2000, the Taskforce on Women and the *Criminal Code* (Qld) recommended that the Queensland Government investigate the creation of a 'specific offence of domestic or family violence', in order to 'specifically name the behaviour and encourage the prosecution of it'.[23] The Taskforce recommended that an investigation should 'canvass the creation of a course-of-conduct offence', in similar terms to the offence of torture in s 320A of the *Criminal Code* (Qld).[24]

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18 Committee Amendment, Criminal Justice and Public Safety, Filing No S-276, June 11, 2007.

19 Directorate General of Human Rights—Council of Europe, *Legislation in the Member States of the Council of Europe in the Field of Violence Against Women* (2007).

20 'Statement by Ms Ingegerd Sahlström, State Secretary for Equality Affairs' (Press Release, 3 March 1998).

21 *Indian Penal Code 1860* s 498A, introduced by *Criminal Law (Second Amendment) Act 1983* (India). This provision prohibits husbands, or relatives of husbands, from subjecting a woman to 'cruelty', with a maximum sentence of three years. 'Cruelty' is defined to include any wilful conduct likely to drive the woman to commit suicide, or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or harassment of the woman, with a view to coercing her or a related person to meet unlawful demands for property or security, or as a consequence of a failure to meet such a demand.

22 Centre for Social Research, *A Research Study on the Use and Misuse of Section 498A of the Indian Penal Code* (2005).

23 Queensland Government Office for Women, *Report of the Taskforce on Women and the Criminal Code* (2000), Rec 52.1.

24 Ibid, 81.

13.16 While there is academic support for a specific course of conduct-based offence,[25] there is no consensus on its precise formulation. For example, Professor Deborah Tuerkheimer advocates legislation that would require proof of 'a course of conduct' that the defendant 'knows or reasonably should know ... is likely to result in substantial power or control over the victim'.[26] Professor Alafair Burke has suggested that the offence should instead require that the defendant engaged in a pattern of family violence with the intention of gaining power or control over the victim.[27]

13.17 There is precedent for course of conduct-based offences in Australian criminal laws. For example, all states and territories have introduced offences in the nature of the persistent sexual abuse of children.[28] These offences are considered in detail in Chapter 25. In short, they were enacted to recognise the difficulties of particularising incidents of repetitive conduct.[29] They generally capture a number of unlawful sexual acts, and in some cases expressly provide that it is not necessary to prove the dates or exact circumstances of individual incidents.

13.18 Where available, offences in the nature of torture—namely, those covering the intentional infliction of severe pain or suffering on the victim over a period of time—may also be relevant in the family violence context.[30] In 2000, the Taskforce on Women and the *Criminal Code* (Qld) recommended that the offence of torture in s 320A of the *Criminal Code* (Qld) be amended to include an example of how the offence could be used for offences involving domestic and family violence.[31]

Aggravated offences

13.19 The criminal legislation of South Australia and Western Australia makes provision for aggravated offences that are committed in a family violence context. In South Australia, the *Criminal Law Consolidation Act 1935* (SA) creates an aggravated offence where the offender committed an offence knowing that the victim was:

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25 See, eg, A Burke, 'Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization' (2006) 75 *George Washington Law Review* 552; D Tuerkheimer, 'Recognizing and Remedying the Harm to Battering: A Call to Criminalize Domestic Violence' (2003) 94 *Journal of Criminal Law & Criminology* 959; and D Tuerkheimer, 'Renewing the Call to Criminalize Domestic Violence: An Assessment Three Years Later' (2006) 75 *Georgetown Washington University Law Review* 613.

26 D Tuerkheimer, 'Recognizing and Remedying the Harm to Battering: A Call to Criminalize Domestic Violence' (2003) 94 *Journal of Criminal Law & Criminology* 959, 1019–1020.

27 A Burke, 'Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization' (2006) 75 *George Washington Law Review* 552, 556.

28 *Crimes Act 1900* (NSW) s 66EA; *Crimes Act 1958* (Vic) s 47A; *Criminal Code* (Qld) s 229B; *Criminal Code* (WA) s 321A; *Criminal Law Consolidation Act 1935* (SA) s 50; *Criminal Code* (Tas) s 125A; *Crimes Act 1900* (ACT) s 56; *Criminal Code* (NT) s 131A. See also Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), cl 5.2.14.

29 See, eg, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 133–137. See also, *S v The Queen* (1989) 168 CLR 266.

30 See, eg, *Criminal Code* (Qld) s 320A; *Crimes Act 1900* (ACT) s 36.

31 Queensland Government Office for Women, *Report of the Taskforce on Women and the Criminal Code* (2000), Rec 52.3.

- a spouse, former spouse, domestic partner or former domestic partner of the offender; or
- a child in the custody of, or who normally resides with: the offender, a spouse, former spouse, domestic partner or former domestic partner of the offender.[32]

13.20 The section also creates aggravated offences where the offender abused a position of trust or authority in committing the offence, and where the offender committed the offence in the course of deliberately and systematically inflicting severe pain on the victim.[33] These factors appear to be based upon the provisions in the Standing Committee of Attorneys-General (SCAG) Model Criminal Code.[34]

13.21 In respect of sentencing, the Act appears to modify the operation of the common law principle articulated in *R v De Simoni*,[35] whereby an accused person who is convicted of a basic offence cannot be sentenced on the basis of circumstances of aggravation which would have warranted a conviction for a more serious offence. Section 5AA(6) provides that the section does not prevent a court from taking into account, in the usual way, the circumstances of and surrounding the commission of an offence for the purpose of determining sentence. The section applies notwithstanding the fact that the relevant circumstances would have justified an aggravated form of the charge and sets out the following example to illustrate this point:

> A person is charged with a basic offence and the court finds that the offence was committed in circumstances that would have justified a charge of the offence in its aggravated form. In this case, the court may, in sentencing, take into account the circumstances of the aggravation for the purpose of determining penalty but must (of course) fix a penalty within the limits appropriate to the basic offence.

13.22 In Western Australia, offences against the person are treated as aggravated if, among other things, the offender is in a 'family and domestic relationship with the victim', [36] a child was present at the time of the offence, or the conduct of the offender constituted a breach of a protection order.[37] The criminal legislation sets out higher penalties for a number of offences, including assault and causing grievous bodily harm where those offences are committed in aggravating circumstances.[38]

13.23 In both jurisdictions the existence of a family relationship between the victim and offender is expressed as a circumstance of aggravation.[39] There is limited precedent for aggravated offences in a family violence context in European countries. In some cases, jurisdictions with mandatory minimum sentencing schemes provide for

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32 *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(g).
33 *Criminal Law Consolidation Act 1935* (SA) ss 5AA(1)(a), 5AA(1)(i).
34 *Model Criminal Code* (1st ed, 2009), cl 5.1.41.
35 *R v De Simoni* (1981) 147 CLR 383.
36 'Family and domestic relationship' in s 221 has the same meaning that it has in the *Restraining Orders Act 1997* (WA) s 4: *Criminal Code Act Compilation 1913* (WA) s 221(2).
37 *Criminal Code Act Compilation 1913* (WA) s 221.
38 The *Criminal Code Act Compilation 1913* (WA) s 297, sets out a maximum penalty of imprisonment for 10 years for grievous bodily harm, and imprisonment for 14 years where grievous bodily harm is committed in circumstances of aggravation.
39 The recognition of family relationships in criminal laws is considered further in Ch 14.

a higher minimum sentence in their aggravated family-violence related offences. For example, art 172 of the Criminal Code of Bosnia and Herzegovina provides that:

> Aggravated Bodily Injury
>
> (1) Whoever inflicts a serious bodily injury upon another person or severely impairs his health, shall be punished by imprisonment for a term between six months and five years.
>
> (2) Whoever perpetrates the criminal offence referred to in paragraph 1 of this Article against his spouse, common-law partner, or to the parent of his child with whom he does not share a household, shall be punished by imprisonment for a term between one and five years.[40]

13.24 In the United States, several states recognise aggravated forms of assault or battery in respect of offences committed against persons with whom the offender is in a defined family relationship. Most criminal family-violence related provisions incorporate existing offences by reference—or are based upon the elements of existing offences—with an additional requirement of a specified relationship between the victim and defendant.[41] Offences against persons in defined family relationships typically carry higher penalties than basic offences. For example, in Georgia, a simple assault committed against a spouse, parent, child, sibling, co-habitant or other protected person is punishable 'for a misdemeanour of a high and aggravated nature', whereas a simple assault in the absence of a family relationship is punishable as a misdemeanour only.[42]

The relationship between aggravated offences and sentencing factors

13.25 Another issue is the relationship between aggravated offences and sentencing factors—in particular, aggravating sentencing factors, that is, those that increase the penalty to be imposed within the prescribed maximum for the offence. One relevant issue is when a particular circumstance ought to be specified as an element of an aggravated offence, or left to general sentencing discretion in respect of basic offences—or prescribed as an aggravating factor in sentencing legislation. In practical terms, key differences between these alternatives include the following:

- an aggravated offence attracts a higher maximum penalty than the basic offence—whereas an aggravating sentencing factor justifies a higher penalty

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40 See Directorate General of Human Rights—Council of Europe, *Legislation in the Member States of the Council of Europe in the Field of Violence Against Women* (2007), 18.

41 See, eg *Alabama Code* §§ 13A–6–130 (domestic violence offences based upon assaults committed against family members); *Mississippi Code* § 97–3–7(3),(4) (domestic violence offences based upon assaults committed against family members); *Missouri Annotated Statutes* § 565.072–074 (domestic violence offences based upon various offences against the person, including attempted murder and causing physical injury); *Montana Code* § 45–5–206(3) (partner or family member assault); *Nevada Revised Statutes* § 200.485(1) (battery which constitutes domestic violence); and *Ohio Revised Code* § 2919.25(D) (domestic violence offence based upon causing or threatening to cause physical harm to a family member).

42 *Georgia Code* § 16–5–20(d).

within the existing maximum for the basic offence,[43] and a non-mitigating sentencing factor will neither increase nor decrease culpability;[44]

- in respect of aggravated offences, it is generally accepted that the relevant circumstance of aggravation should be specified in the charge;[45] and
- aggravated offences require proof of the circumstances of aggravation beyond reasonable doubt—whereas the applicable standard of proof in sentencing is determined by reference to whether the factor is adverse or favourable to the interests of the accused person.[46]

13.26 The Commissions have not identified any existing guidelines delineating when a factor should be prescribed as an element of an aggravated offence and when it should be treated as a circumstance of aggravation in sentencing. The former Standing Committee of Attorneys-General Model Criminal Code Officers Committee (MCCOC)—now the Model Criminal Law Officers Committee (MCLOC)—considered this issue in its 1998 *Report on the Model Criminal Code—Chapter 5: Non-Fatal Offences Against the Person*. The Committee observed that 'there are no generally articulated or agreed guidelines in existence on the question whether and when it is desirable, as a matter of principle, to make a matter one for trial or sentence'. The Committee took the view that a principal guiding criterion should be 'whether the legislature desires that the aggravating criterion should be the subject of decision by a jury for the purposes of guilt or innocence, and whether it is sensible to ask the jury to make such a decision'.[47]

13.27 The Committee proposed a series of factors of aggravation for non-fatal offences against the person, including:

- in the case of the model offence of intentionally causing serious harm, the commission of the offence during torture (defined as the deliberate and systemic infliction of pain on the victim over a period of time);
- the commission of an offence by the use or threatened use of an offensive weapon;
- the commission of an offence against a child under the age of 10 years;
- the commission of an offence against a person in abuse of a position of trust; and

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43 Subject to the principle in *R v De Simoni (1981) 147 CLR 383*, discussed further below.

44 The use of non-mitigating sentencing factors in the family violence context is discussed below in relation to sentencing.

45 *Kingswell v The Queen* (1985) 159 CLR 264, 281; *R v Meaton* (1986) 160 CLR 359, 363–364.

46 Matters adverse to the interests of an accused person must be established beyond reasonable doubt, whereas matters favourable to his or her interests need only be established on the balance of probabilities: *R v Olbrich* (1999) 199 CLR 270, 281. The labelling of factors as aggravating or mitigating is not necessarily determinative of their characterisation as adverse or favourable: *R v Storey* [1998] 1 VR, 371.

47 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Non-Fatal Offences Against the Person* (1998), 113.

- the commission of an offence against a person in abuse of a position of authority.[48]

13.28 The Committee considered the inclusion of breach of a court order—for example, a protection order—directed against the kind of conduct involved in the offence. The Committee commented that this factor 'generalised a factor of aggravation common to a number of stalking laws'.[49] However, the Committee concluded that this factor was 'not in the same order' as the other factors, and could be dealt with by way of sentencing discretion. It therefore raised the model maximum penalty for stalking from three years to five years.[50]

13.29 However, the Model Criminal Code provisions have not been implemented consistently in state and territory legislation. For example, the NSW sentencing legislation includes some of the model provisions on aggravated offences—or broadly similar circumstances of aggravation—as aggravating factors in sentencing.[51] As identified above, the family-violence related aggravated offences in the South Australian criminal legislation include, but are not limited to, the Model Criminal Code provisions.[52]

13.30 A further issue relevant to the relationship between any new aggravated family-violence related offences and circumstances of aggravation in sentencing is the principle articulated in *R v De Simoni* as noted above. It provides that:

> a judge, in imposing sentence, is entitled to consider all of the conduct of the accused—including that which would aggravate the offence—but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.[53]

13.31 Consequences of this principle include the following:

- where an accused person is convicted of a basic offence—the facts of which involve a particular circumstance that may constitute both the elements of an uncharged, aggravated form of that offence, and an aggravating factor in sentencing the basic offence—a court may not treat that circumstance as an aggravating factor in sentencing the basic offence;[54] and
- where a sentencing court is considering an aggravating factor in the sentencing of an offence—but that factor could have formed the basis of a charge for a different offence—it is necessary to determine whether that other offence would

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48 Ibid, cl 5.1.38, 111–117. These provisions appear in the consolidated *Model Criminal Code* (1st ed, 2009) as cl 5.41.
49 Ibid, 115.
50 Ibid, 115.
51 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(2)(a),(c), (ea), (k).
52 See, eg, *Criminal Law Consolidation Act 1935* (SA) ss 5AA (a)-(d), 5AA(i). See also s 5AA(1)(e), which adopts the Model Criminal Code provision for the commission of an offence against a child but specifies different age ranges.
53 *R v De Simoni* (1981) 147 CLR 383, 389.
54 See, eg, *Huntingdon v R* [2007] NSWCCA; *Rend v R* [2006] NSWCCA; *R v Newham* [2005] NSWCCA.

> have made the offender liable to a 'more serious' penalty. If so, the factor cannot be treated as an aggravating factor in sentencing the first-mentioned offence.[55]

13.32 Further, issues of double punishment may arise where a person is convicted of an aggravated offence, and the relevant circumstance of aggravation is also an aggravating factor in sentencing. The *Crimes (Sentencing Procedure) Act 1999* (NSW) makes provision for this contingency. Section 21A(2) provides that the court is not to have additional regard to an enumerated aggravating sentencing factor if it is an element of the offence. This provision has been interpreted as prohibiting the 'double counting' of circumstances of aggravation in both the elements of an offence and in sentencing.[56] However, the phrase '*additional* regard' contemplates that a sentencing court may have some regard to the aggravated elements of an offence. The extent to which a court may do so is a question of degree—for example, a circumstance of aggravation may be relevant to a sentencing court's consideration of the nature and seriousness of the facts of the offence.[57]

13.33 The NSW Court of Criminal Appeal has held that, where a circumstance of aggravation in the offence is particularly heinous, in that it 'transcends that which would be regarded as an inherent characteristic of the offence', it may be regarded as an aggravating factor in sentencing.[58] The Court has further identified the necessity of adopting a purposive approach to the comparison of circumstances of aggravation in offences and aggravating factors in sentencing.[59]

13.34 The introduction of any aggravated family-violence related offences would therefore require consideration of their relationship to existing circumstances of aggravation in sentencing legislation. For example—in addition to the prohibition on 'double counting' discussed above—the NSW sentencing legislation preserves the *De Simoni* principle. Section 21(4) provides that the Court is not to have regard to any legislatively prescribed aggravating or mitigating factors in sentencing if it would be contrary to any Act or rule of law to do so. As mentioned earlier, South Australia appears to have taken a different approach, enabling the court to take into account circumstances that would have justified a charge for an aggravated offence in sentencing a basic offence, provided that the sentence is within the prescribed limit for the basic offence.[60]

Designated family violence offences not attracting higher maximum penalty

13.35 As discussed in Chapter 5, the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) designates as 'domestic violence offences' certain offences committed against persons with whom the offender is in a defined family relationship.[61]

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55 *R v De Simoni* (1981) 147 CLR 383, 391.
56 *R v Youkhana* [2004] NSWCCA; *R v Solomon* (2005) 153 A Crim R 32; *Elyard v R* [2006] NSWCCA, [39].
57 *R v Way* (2004) 60 NSWLR 168, 189–190.
58 *Elyard v R* [2006] NSWCCA, [43].
59 Ibid, [9]–[10].
60 *Criminal Law Consolidation Act 1935* (SA) s 5AA(6).
61 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 12.

Convictions for domestic violence offences are specifically identified on offenders' criminal records.[62] This enables the court to build a progressive record of family-violence related criminal conduct, which may be taken into account in the trial of subsequent offences. For example, the *Bail Act 1978* (NSW) excludes the presumption in favour of bail in respect of domestic violence offences where the accused person has 'a history of violence'.[63] The latter term is defined as including a guilty finding within the last 10 years of a 'personal violence offence'.[64] The *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that a record of previous convictions is an aggravating factor in sentencing.[65]

13.36 While the ACT family violence legislation recognises 'domestic violence offences' for the purpose of defining domestic violence, it does not make express provision for a scheme for the recording and subsequent consideration of convictions for domestic violence offences.[66] However, previous convictions for domestic violence offences—or those not specifically designated but nevertheless committed in circumstances of family violence—may be relevant to the general exercise of discretion in relation to bail applications and in sentencing.

Offences of economic and emotional abuse

13.37 Tasmania is the only Australian jurisdiction with specific offences in respect of economic and emotional abuse in the context of family violence. In respect of economic abuse, the *Family Violence Act 2004* (Tas) requires the offender to have an intention to unreasonably control or intimidate his or her spouse or partner (the victim), or cause mental harm, apprehension or fear in committing certain acts of economic abuse. These acts include:

- coercing the victim to relinquish control over assets or income;
- disposing of relevant property without the consent of the victim or affected child;
- preventing the victim from accessing joint assets to meet normal household expenditure; and
- withholding financial support reasonably necessary for the maintenance of the victim and any affected child.[67]

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62 In addition, the recording of a domestic violence offence enables the prosecution to make an application to the court requesting that previous convictions are similarly recorded as domestic violence offences: Ibid s 12(3)–(6).

63 *Bail Act 1978* (NSW) s 9(1A)(1). The *Bail Act* also displaces the presumption in favour of bail where the accused person has been violent to the other person in the past, whether or not the accused person has been convicted of an offence in respect of the violence: s 9A (1A)(b).

64 *Bail Act 1978* (NSW) s 9(1A)(2). Bail is discussed in Ch 10.

65 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(d).

66 *Domestic Violence and Protection Orders Act 2008* (ACT) s 13, sch 1. But see *Bail Act 1992* (ACT) s 9F.

67 *Family Violence Act 2004* (Tas) s 8.

13.38 In respect of emotional abuse, the *Family Violence Act* prohibits a person from pursuing 'a course of conduct that he or she knows, or ought to know, is likely to have the effect of unreasonably controlling or intimidating, or causing mental harm, apprehension or fear in, his or her spouse or partner'.[68]

13.39 The Tasmanian Attorney-General explained the rationale for the economic and emotional abuse offences as recognising the non-physical dimensions of family violence, addressing the tendency of such abuse to undermine victims' capacity to take action, and acknowledging the need to take a more holistic view of family violence.[69] The Commissions are not aware of any prosecutions under the *Family Violence Act* for either economic or emotional abuse.[70]

Leading evidence of an accused person's history of family violence

13.40 Where a person is charged with an offence alleged to have been committed as part of a broader course of family violence, family-violence related evidence—including evidence of uncharged acts of prior violence and the nature of the relationship between the parties—may be admissible, provided that it is relevant to a fact in issue.[71]

13.41 For example, certain family-violence related evidence has been admitted to:

- prove motive or to establish the intent of the accused, or to negative a defence of accident, self-defence or provocation;[72]
- assist the trier of fact to understand evidence that may otherwise be disjointed or implausible[73]—for example, evidence demonstrating the accused person's or victim's state of mind;[74] and
- establish a tendency on the part of an accused person to resort to violence in specific circumstances, in support of a contention he did not act in self-defence.[75]

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68 *Family Violence Act 2004* (Tas) s 9. 'Course of conduct' is defined to include limiting the freedom of movement of a person's spouse or partner by means of threats or intimidation.

69 Tasmania, *Parliamentary Debates*, House of Assembly, 18 November 2004, 166 (J Jackson—Attorney General and Minister for Justice and Industrial Relations), 100–101.

70 The 2008 review of the *Family Violence Act 2004* (Tas) commented that stakeholders were awaiting the first case based on the offence of economic abuse. While no charge had been brought for emotional abuse and intimidation, that ground has been used in support of applications for protection orders: Urbis, *Review of the Family Violence Act 2004* (2008), prepared for the Department of Justice (Tas), 11–12.

71 *Wilson v R* (1970) 123 CLR 334, 339. Such evidence may also be excluded where its prejudicial value outweighs its probative value.

72 *R v Anderson* (2000) 1 VR 1, 12. For example, evidence of a victim's fear of her partner has been admitted to support an inference that she did not provoke him to murder her: *R v Gojanovic* (2002) 130 A Crim R 179. See also *R v Parsons* (2000) 1 VR 161.

73 See, eg, *R v AH* (1997) 42 NSWLR 702.

74 See, eg *Rodden v R* [2008] NSWCCA; *Gipp v The Queen* (1998) 194 CLR 106.

75 *R v Middendorp* [2010] VSC. The accused was found guilty of the defensive homicide of his partner: see *R v Middendorp* [2010] VSC.

Legislative guidance on family-violence related evidence

13.42 Victoria and Queensland have legislatively confirmed the potential relevance of family-violence related evidence in respect of certain criminal defences. These provisions are discussed in detail in the discussion of homicide defences in Chapter 14. In general terms, in Victoria, s 9AH of the *Crimes Act 1958* (Vic) provides that where circumstances of family violence are alleged in murder, defensive homicide or manslaughter cases, evidence of family violence may be relevant to establishing self-defence or duress. The section provides guidance about particular facts in issue to which evidence of family violence may be relevant, and the types of evidence that may be relevant.

13.43 The Queensland provision is framed in more general terms. Section 132B(2) of the *Evidence Act 1977* (Qld) provides that 'relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed' is admissible in criminal proceedings against a person for certain offences against the person, including homicide offences, offences endangering life or health and assaults.[76] However, the provision has been judicially criticised as redundant because relevant evidence is, by definition, generally admissible.[77] In 2000, the Taskforce on Women and the *Criminal Code* (Qld) recommended that s 132B be repealed and replaced with:

> a new scheme detailing the admissibility of evidence of the domestic relationship between the accused and the complainant/victim, and including the use of expert and lay testimony, the use to which the evidence can be put, and to which offences or defences it applies.[78]

Judicial guidance on family-violence related evidence

13.44 Judicial bench books in some states and territories also provide some guidance about the admissibility of family-violence related evidence.[79] Notwithstanding these resources, some commentators have expressed concern about inconsistent judicial approaches to the admissibility of such evidence.[80]

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76 See *Criminal Code* (Qld) Chs 28–30.

77 *R v PAB* [2006] QCA, [28]. See also, Victorian Law Reform Commission, *Defences to Homicide: Consultation Paper* (2003), 134–135.

78 Queensland Government Office for Women, *Report of the Taskforce on Women and the Criminal Code* (2000), Rec 55.

79 See, eg, Judicial College of Victoria, *Victorian Criminal Charge Book* (updated 12 July 2010), 4.16, which refers to family-violence related case law; Supreme Court of Queensland, *Equal Treatment Bench Book* (2005), 14.4.2.

80 See, eg, P Easteal and C Feerick, 'Sexual Assault by Male Partners: Is the Licence Still Valid?' (2005) 8(2) *Flinders Journal of Law Reform* 185, 197–201. The authors identify inconsistencies in the treatment of relationship evidence in 'partner rape' trials from 1993 to 2002.

Federal offences relevant in the family violence context

Australian federal offences

13.45 Federal criminal laws have limited relevance in the family violence context because they are confined to subject matters within Commonwealth legislative power.[81] Chapter 5 identifies relevant federal offences including:

- the use of carriage or postal services to make threats, or menace, harass or cause offence; and
- conduct constituting economic abuse—for example, offences against social security legislation in respect of coercing a family member to claim a social security payment.

13.46 Chapter 5 also identifies potentially relevant federal offences, including:

- the use of carriage services for child abuse or child pornography material; and
- sexual servitude offences where the person committing the offence is in a defined family relationship with the victim.

United States federal offences

13.47 In the United States, the *Violence Against Women Act* created federal offences in respect of acts of family violence committed across state boundaries, including:

- travelling interstate with the intent to kill, injure, harass or intimidate a spouse, intimate partner, or dating partner and—in the course, or as a result, of such travel—committing or attempting to commit a crime of violence against that person, or placing that person in reasonable fear of death or serious bodily injury or causing substantial emotional distress to that person or a family member;
- travelling interstate with the intention to violate a protection order, and subsequently engaging in such conduct in violation of the order;
- causing another person to travel interstate by force, coercion, duress or fraud—and in the course, or as a result, of such conduct—violating a protection order, or attempting to commit a crime of violence against that person; and
- using mail, an interactive computer service or any facility of interstate or foreign commerce with the intent to kill, injure, harass or cause substantial emotional distress to another person.[82]

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81 The *Australian Constitution* does not give the Australian Parliament a general power to make criminal laws. States and territories have primary constitutional responsibility for criminal law as part of their plenary powers to legislate for the peace, order and good government of their jurisdictions. The Commonwealth derives its constitutional authority primarily from specific heads of power in the *Australian Constitution*—for example, the enumerated legislative powers in s 51 and the executive power in s 61. See further Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [1.40]–[1.48].

82 *Violence Against Women Act of 1994* 18 USC (US) §§ 2261, 2261A, 2262.

13.48 The *Gun Control Act* similarly creates federal offences in relation to the possession and use of firearms and ammunition by persons who are the subject of protection orders, and those who are convicted of a 'misdemeanour crime of domestic violence'. A 'misdemeanour crime of domestic violence' is defined as an offence under federal or state law which involves an element of the use or attempted use of physical force or threatened use of a deadly weapon, and is committed against an individual with whom the offender maintains a domestic relationship.[83]

13.49 Maximum penalties for offences against the *Violence Against Women Act* are gradated according to the extent of bodily injury to the victim—ranging from life imprisonment if death of the victim results, to 5, 10 or 20 years imprisonment depending on the severity of bodily injury or the use of a dangerous weapon.[84] Offences against the *Gun Control Act* carry a maximum penalty of 10 years imprisonment.[85]

Canadian federal offences

13.50 As criminal law is generally a federal responsibility in Canada, its federal offences provide limited insights for comparative purposes. Family violence is prosecuted pursuant to federal offences of general application—for example: offences against the person;[86] stalking, intimidation and harassment-based offences;[87] child abuse and abduction offences;[88] and breaching protection orders.[89] Some aggravated offences of general application are relevant to the family violence context—for example, the *Criminal Code* recognises murder committed in the course of stalking as first-degree murder, where the offender intended to instil fear in the victim for his or her safety, or that of anyone known to him or her.[90]

Options for reform

13.51 In the Consultation Paper, the Commissions sought stakeholder views on the following non-exclusive options for the recognition of family violence in state and territory criminal law offences:

- an umbrella offence of family violence, capturing courses of conduct committed by an offender who is in a family relationship with the victim, where such behaviour is part of a pattern of power and control over the victim;[91]

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83 *Gun Control Act of 1968* 18 USC (US) § 922(d), (g).
84 *Violence Against Women Act of 1994* 18 USC (US) §§ 2261(b), 2262(b).
85 *Gun Control Act of 1968* 18 USC (US)§ 924(2).
86 *Criminal Code 1985* RSC c C–46 (Canada) ss 229–231, 235, 265–268.
87 Ibid ss 264, 264.1, 372, 423, 430.
88 Ibid ss 151–153, 155, 170–172, 215, 218, 280–283.
89 Ibid ss 127, 145(3), 733.1, 811.
90 Ibid s 231(6).
91 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Question 7–1.

- an aggravated offence in respect of offences committed against victims with whom the offender is in a family relationship, and where the offence committed formed part of a pattern of controlling, coercive or dominating behaviour;[92]
- sub-categories of existing offences committed by an offender who is in a family relationship with the victim but which do not attract higher maximum penalties;[93] and
- offences of economic and emotional abuse committed in a family violence context.[94]

13.52 The Commissions also considered the recognition of family violence in federal criminal offences. In particular, the Commissions sought stakeholder views about the possibility of aggravated federal offences, or sub-categories of existing federal offences committed in the context of family violence.[95]

Submissions and consultations

13.53 While many submissions supported improvements to the criminal justice response to family violence, there was considerable division of opinion on the preferable form of response.

An umbrella offence of family violence

13.54 In the Consultation Paper, the Commissions sought stakeholder views about the necessity and feasibility of creating a specific offence of family violence, and how such an offence might be conceptualised. On the latter issue, the Commissions asked whether it would be feasible to create a two-tiered offence that captured both coercive conduct and physical violence committed in a family violence context.[96] There was a relatively even division of views among the limited number of submissions responding to this question.

In support of an umbrella offence

13.55 A common theme in those submissions and consultations supporting an umbrella offence was an identified need to recognise the pattern-based nature of family violence and its full impact upon victims.[97] For example, one legal service provider stated that existing offences and other measures—such as the use of representative charges in sentencing—do not 'fully paint the picture of the ongoing humiliation, terror

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92 Ibid, Questions 7–2(a), 7–3, 7–4.
93 Ibid, Question 7–2(b).
94 Ibid, Question 5–5.
95 Ibid, Question 7–4.
96 Ibid, Question 7–1.
97 Confidential, *Submission FV 190,* 25 June 2010; Confidential, *Submission FV 164,* 25 June 2010; P Easteal, *Submission FV 38,* 13 May 2010. A small number of submissions from individuals supported a discrete offence without providing reasons: Confidential, *Submission FV 130,* 21 June 2010; Confidential, *Submission FV 125,* 20 June 2010; Confidential, *Submission FV 109,* 8 June 2010; Confidential, *Submission FV 105,* 6 June 2010; Confidential, *Submission FV 82,* 2 June 2010; M Condon, *Submission FV 45,* 18 May 2010. See also Department of Premier and Cabinet (Tas), *Submission FV 236,* 20 July 2010, which commented that 'the sector is generally supportive' of a discrete offence.

and suffering' experienced by victims of family violence. It suggested that 'a specific offence of family violence may allow for all of this evidence to be put to a court through establishing a pattern of behaviour'.[98]

13.56 Other submissions argued that it would be preferable to recognise the dynamics of family violence through means other than sentencing—including by way of an umbrella offence. For example, in supporting a discrete offence, Professor Patricia Easteal argued that judicial sentencing discretion in intra-familial sexual assault cases can be affected by 'mythology that characterises assault as perpetrated by strangers in unfamiliar places ... and involving physical injury'.[99] Easteal referred to a body of research on the trial and sentencing of sexual assaults committed in the family violence context, which found that sentences did not consistently recognise the degree of suffering experienced by victims—in particular that associated with a breach of trust. She commented that:

> this research suggests that although judges today generally reject the view that a prior relationship is a mitigating factor in sentencing, they do not appear to focus on breach of trust as an aggravating variable as they do in cases of parenting-type relationships ... Despite breach of trust being stressed more in intra-family cases, sentences in those cases remained lower than where the offender was unknown to the victim and where the rape included violence rather than merely coercion.[100]

13.57 While not expressing a view on a discrete offence, the NSW Office of the Director of Public Prosecutions (NSW ODPP) commented that—in light of problems associated with the admissibility of uncharged conduct in sentencing—the best way to ensure that a pattern of violent behaviour is placed before the court is by the use of an offence incorporating a course of conduct.[101]

13.58 Some family violence service providers and individuals suggested that a discrete offence would perform an educative function. In particular, it would convey the seriousness and pattern-based nature of family violence to the community, offenders, and other participants in the criminal justice system—including judicial officers and legal representatives.[102]

Against an umbrella offence

13.59 Stakeholders opposing a discrete offence of family violence raised two common issues. First, some stakeholders endorsed the Commissions' preliminary views on the

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98 Confidential, *Submission FV 164,* 25 June 2010. See also C Pragnell, *Submission FV 70,* 2 June 2010, who suggested that a discrete offence was necessary to recognise that family violence includes elements of violence that are not usually present in violence committed against persons unrelated to the offender.

99 P Easteal, *Submission FV 38,* 13 May 2010.

100 Ibid, citing studies including: J Kennedy, P Easteal and C Taylor, 'Rape Mythology and the Criminal Justice System: A Pilot Study of Sexual Assault Sentencing in Victoria' (2009) 23 *Australian Centre for the Study of Sexual Assault Aware Newsletter* 13; P Easteal and C Feerick, 'Sexual Assault by Male Partners: Is the Licence Still Valid?' (2005) 8(2) *Flinders Journal of Law Reform* 185; P Easteal and M Gani, 'Sexual Assault by Male Partners: a Study of Sentencing Variables' (2005) 9 *Southern Cross University Law Review* 39; C Taylor, *Court Licensed Abuse: Patriarchal Lore and the Legal Response to Intrafamilial Sexual Abuse of Children* (2004).

101 Office of the Director of Public Prosecutions NSW, *Submission FV 158,* 25 June 2010.

102 Confidential, *Submission FV 190,* 25 June 2010; Confidential, *Submission FV 105,* 6 June 2010.

difficulties associated with conceptualising and particularising the offence.[103] For example, the Local Court of NSW commented that it would be difficult to conceptualise the elements of the offence, 'given the spectrum of criminality of conduct that may amount to family violence'.[104] The Magistrates' Court and the Children's Court of Victoria commented that a discrete offence may introduce unnecessary complexity in the criminal justice process.[105]

13.60 The Deputy Chief Magistrate of South Australia, Dr Andrew Cannon, commented that a discrete offence may raise constitutional issues.[106] A failure to identify conduct captured by the offence with sufficient precision may 'give the police and the courts ... a legislative function in defining criminal conduct unknown to the existing law'.[107] The No To Violence Male Family Violence Prevention Association commented that the broad parameters of an umbrella offence may result in police reluctance to lay such a charge.[108]

13.61 A second common issue in submissions and consultations was a preference for other approaches to recognising family violence in the criminal law. Several stakeholders suggested that conduct constituting family violence is adequately recognised in existing criminal offences.[109] In addition, some agencies and organisations supported the NSW model of designating certain offences as 'family violence offences' where they are committed against persons in a defined relationship with the offender. As noted above, this creates a history of family-violence related conduct that is relevant in future proceedings—for example, in relation to bail, sentencing and protection orders. National Legal Aid, Legal Aid NSW and the Women's Domestic Violence Court Advocacy Service Network argued that this was a preferable means of providing the courts with offenders' histories of family violence.[110]

13.62 Other submissions argued that sentencing laws and practices were more appropriate forms of recognition than a new offence. For example, the Local Court of NSW referred to s 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which provides for specific aggravating factors in sentencing. The Court noted that some factors were included specifically to address offences committed in the family violence context.[111] The Court considered that this provision—together with 'the

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103 A Cannon, *Submission FV 137,* 23 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136,* 22 June 2010; Local Court of NSW, *Submission FV 101,* 4 June 2010; Office of the Director of Public Prosecutions (WA), *Consultation*, Perth, 4 May 2010.

104 Local Court of NSW, *Submission FV 101,* 4 June 2010.

105 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010.

106 A Cannon, *Submission FV 137,* 23 June 2010.

107 Ibid.

108 No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136,* 22 June 2010.

109 National Legal Aid, *Submission FV 232,* 15 July 2010; Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Queensland Law Society, *Submission FV 178,* 25 June 2010; A Cannon, *Submission FV 137,* 23 June 2010; Office of the Director of Public Prosecutions (WA), *Consultation*, Perth, 4 May 2010.

110 National Legal Aid, *Submission FV 232,* 15 July 2010; Legal Aid NSW, *Submission FV 219,* 1 July 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46,* 24 May 2010.

111 Local Court of NSW, *Submission FV 101,* 4 June 2010.

consistent approach of the courts in NSW ... to reinforce the need for general deterrence and denunciation'—was preferable to an umbrella offence.[112] The Law Society of NSW made a general comment that the options for reform appeared to assume that family violence 'is not sufficiently taken into account in the sentencing process'.[113] It emphasised the importance of sentencing discretion to take account of the 'varied and dynamic' situations of family violence that attract criminal sanctions.[114]

13.63 Some submissions argued that a more effective response would be to improve the practical application of existing laws.[115] The Queensland Law Society identified the 'real issue' as 'the desire, ability and resources of police' to prosecute family-violence related offences, and 'the granting of appropriate penalties by courts in sentencing'.[116] It supported a coordinated community response and the deployment of specialist police to family justice centres.[117] Women's Legal Service Queensland argued that a new offence would not address the 'existing problems of a lack of understanding of the dynamics of violence' on the part of lawyers, judicial officers and police.[118]

13.64 Other arguments against the introduction of a new offence were that the consolidation of existing offences into a single category would not necessarily improve outcomes,[119] and the desirability of maintaining parity of criminal law responses to all types of violence.[120] Two stakeholders suggested that a separate offence should be the subject of further inquiry.[121]

Conceptualising an umbrella offence

13.65 The majority of submissions did not make any specific proposals about how an umbrella offence could be conceptualised. Easteal supported the illustrative example in the Consultation Paper of a two-tiered offence incorporating coercive conduct and physical violence.[122] Easteal recommended the inclusion of sexual violence as an element of the offence and emphasised the need to clearly define the types of coercion and control captured by the offence.[123] The Magistrates' Court and the Children's

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112 Ibid.

113 Law Society of New South Wales, *Submission FV 205,* 30 June 2010.

114 Ibid. See also North Australian Aboriginal Justice Agency, *Submission FV 194,* 25 June 2010, which expressed similar views on sentencing discretion in family violence cases generally. Sentencing is considered further below.

115 Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Queensland Law Society, *Submission FV 178,* 25 June 2010.

116 Queensland Law Society, *Submission FV 178,* 25 June 2010.

117 Ibid.

118 Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010.

119 Inner City Legal Centre and The Safe Relationships Project, *Submission FV 192,* 25 June 2010; J Stubbs, *Submission FV 186,* 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010.

120 Confidential, *Submission FV 198,* 25 June 2010.

121 Inner City Legal Centre and The Safe Relationships Project, *Submission FV 192,* 25 June 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010. See also Berry Street Inc, *Submission FV 163,* 25 June 2010 which acknowledged the need to recognise the nature and dynamics of family violence and discussed the merits and drawbacks of various options, but expressed uncertainty as to how best to proceed.

122 P Easteal, *Submission FV 38,* 13 May 2010.

123 Ibid.

Court of Victoria commented on the potential difficulty of conceptualising a two-tiered approach.[124]

Aggravated offences occurring in a family violence context

13.66 In the Consultation Paper, the Commissions sought stakeholder views as to whether state and territory criminal legislation should provide that offences are aggravated where the offender is in a family relationship with the victim, and where the offence formed part of a pattern of controlling, coercive or dominating behaviour.[125] The Commissions asked whether a similar approach should be taken in respect of federal offences, and sought stakeholder views on relevant federal offences.[126]

13.67 The Commissions also sought stakeholder views on the family relationships that should be recognised for the purposes of aggravated offences.[127] As the recognition of categories of family relationships in criminal laws is relevant to offences, defences and sentencing, it is considered separately in Chapter 14.

13.68 There was no identifiable consensus among stakeholders on the desirability of an aggravated offence. Submissions were divided between recognising family violence as an aggravated offence or as an aggravating factor in sentencing basic offences.[128] Of those submissions supporting an aggravated offence, there were differences of opinion about the appropriate basis for aggravation.[129]

Submissions and consultations supporting an aggravated offence

13.69 The majority of stakeholders supporting an aggravated offence did not advance reasons for their positions.[130] However, some stakeholders considered that an aggravated offence—and the associated higher maximum penalties—would appropriately recognise the seriousness and unacceptability of family violence.[131] One legal service provider suggested that an aggravated offence was preferable to an umbrella offence because it was based on existing criminal offences.[132] Another

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124 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010.

125 Consultation Paper, Question 7–2.

126 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Question 7–4.

127 Ibid.

128 Aggravating and mitigating factors in sentencing are considered below.

129 As outlined below.

130 See, eg, J Stubbs, *Submission FV 186,* 25 June 2010; Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Confidential, *Submission FV 184,* 25 June 2010; Confidential, *Submission FV 183,* 25 June 2010; Queensland Law Society, *Submission FV 178,* 25 June 2010; N Ross, *Submission FV 129,* 21 June 2010.

131 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Peninsula Community Legal Centre, *Submission FV 174,* 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010; Confidential, *Submission FV 164,* 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146,* 24 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136,* 22 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195,* 25 June 2010

132 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010.

recommended that an aggravated offence should also attract higher *minimum* penalties, on the basis that minimum penalties are more commonly applied.[133]

The basis of aggravation

13.70 The majority of submissions supporting an aggravated offence concurred with the Commissions' preliminary view that a family relationship alone was an insufficient basis for aggravation.[134] However, one legal service provider argued that a family relationship should be recognised as a circumstance of aggravation of itself, because it may be difficult to prove, in addition, a pattern of behaviour.[135] Conversely, Professor Julie Stubbs submitted that a pattern of behaviour should be the sole basis for aggravation rather than a family relationship per se. Stubbs argued that proceeding on the basis of a family relationship would undesirably import an assessment of 'the importance of family versus strangers'.[136]

Submissions and consultations opposing an aggravated offence

13.71 Several stakeholders argued that aggravating circumstances associated with family-violence related conduct are more appropriately addressed in sentencing,[137] or that patterns of behaviour are matters for judicial education and training.[138] Some NSW-based agencies favoured the legislative designation of aggravating circumstances in sentencing, suggesting that existing provisions in s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) already address most family-violence related offences in an adequate manner.[139]

13.72 Others emphasised the importance of judicial sentencing discretion.[140] The North Australian Aboriginal Justice Agency (NAAJA) recommended that 'courts should retain unfettered discretion to sentence a defendant according to the seriousness of a particular case'.[141] It argued that:

> aggravated factors, of themselves, are of little utility and can result in unjust sentencing outcomes. For example, a court may consider itself compelled to sentence

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133 Confidential, *Submission FV 164,* 25 June 2010.

134 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010; Confidential, *Submission FV 164,* 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146,* 24 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136,* 22 June 2010.

135 Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010.

136 J Stubbs, *Submission FV 186,* 25 June 2010.

137 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; North Australian Aboriginal Justice Agency, *Submission FV 194,* 25 June 2010; Office of the Director of Public Prosecutions NSW, *Submission FV 158,* 25 June 2010; Local Court of NSW, *Submission FV 101,* 4 June 2010. See also Law Society of New South Wales, *Submission FV 205,* 30 June 2010, which commented on the importance of sentencing discretion generally.

138 National Legal Aid, *Submission FV 232,* 15 July 2010.

139 Office of the Director of Public Prosecutions NSW, *Submission FV 158,* 25 June 2010; Local Court of NSW, *Submission FV 101,* 4 June 2010. See also National Legal Aid, *Submission FV 232,* 15 July 2010.

140 Law Society of New South Wales, *Submission FV 205,* 30 June 2010; North Australian Aboriginal Justice Agency, *Submission FV 194,* 25 June 2010.

141 North Australian Aboriginal Justice Agency, *Submission FV 194,* 25 June 2010.

> more harshly on the basis of a so-called aggravating factor where the circumstances of the case would not otherwise warrant it to sentence in that manner.[142]

13.73 NAAJA considered that the concept of 'controlling, coercive or dominating' behaviour is ambiguous and may capture non-criminal behaviour—for example, parental discipline of children.[143] National Legal Aid expressed concerns that reliance on a pattern of controlling, coercive or dominating behaviour as an aggravating factor may risk taking into account uncharged conduct. It considered that the significance of the family relationship is a matter appropriate for education and training.[144]

Sub-categories of existing offences—no higher maximum penalty

13.74 In the alternative to umbrella or aggravated offences of family violence, in the Consultation Paper the Commissions sought stakeholder views on the creation of specific offences committed by an offender who is in a family relationship with the victim, but which do not attract a higher maximum penalty.[145]

13.75 Few stakeholders commented on this issue. One stakeholder expressly supported this option without explanation;[146] another opposed it without explanation.[147] The Magistrates' Court and the Children's Court of Victoria and No To Violence acknowledged the potential educative function of separate offences but ultimately supported an aggravated offence.[148] The Magistrates' Court and the Children's Court of Victoria also suggested that this approach would not unnecessarily clutter state and territory criminal laws due to the existence of other legislation addressing the relationship between the offender and the victim.[149]

13.76 The National Association of Services Against Sexual Violence opposed this option on the basis that it 'maintains the false dichotomy that sexual assaults on family members are not sexual assaults or a crime in the same way other sexual assaults are'.[150]

Federal offences

13.77 In the Consultation Paper, the Commissions sought stakeholder views about the recognition of family violence in federal criminal offences. They asked whether federal

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142 Ibid.

143 Ibid. NAAJA also referred to circumstances of aggravation in relation to assault offences in the Northern Territory *Criminal Code* that it considered inappropriately removed judicial sentencing discretion—for example, where the victim is female and the defendant is male, or where the victim is a child under the age of 16 years and the defendant is an adult. NAAJA submitted that it is not always just or appropriate to mandate these circumstances as aggravating.

144 National Legal Aid, *Submission FV 232,* 15 July 2010. See also Law Society of New South Wales, *Submission FV 205,* 30 June 2010, which expressed the general view that, as a matter of fairness, an offender should not be sentenced on the basis of uncharged conduct.

145 Consultation Paper, Question 7–2(b).

146 P Easteal, *Submission FV 38,* 13 May 2010.

147 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010.

148 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136,* 22 June 2010.

149 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010.

150 National Association of Services Against Sexual Violence, *Submission FV 195,* 25 June 2010.

criminal legislation should be amended to include specific offences committed by an offender who is in a family relationship with the victim, and whether such offences should attract a higher maximum penalty. The Commissions sought stakeholder views on specific federal offences suitable for recognition in the family violence context.[151]

13.78 Several stakeholders supported a consistent approach among federal, state and territory laws to the designation of aggravated or separate family-violence related offences.[152] However no submissions identified specific, existing federal offences suitable for such an approach.[153] The Magistrates' Court and the Children's Court of Victoria commented on the desirability of federal legislation governing the contravention of protection orders occurring across state or territory borders. The courts stated that 'it is very difficult to enforce ... orders that are breached by threats, intimidation or harassment when the offender is in one state and the victim in another'.[154]

Economic and emotional abuse

13.79 In the Consultation Paper, the Commissions sought stakeholder views about the necessity and desirability of creating specific criminal offences for economic and emotional abuse committed in a family violence context.[155] Responses to this question were divided.

Submissions supporting new offences

13.80 Some stakeholders supported the criminalisation of both economic and emotional abuse, primarily on the basis that these forms of abuse are often core components of family violence.[156] The Department of Premier and Cabinet (Tas) submitted that the economic and emotional abuse offences in the Tasmanian criminal legislation are necessary and desirable because they can improve understanding of the severity and unacceptable nature of such conduct.[157] The Department identified several beneficial flow-on effects, including: strengthening the basis for making protection orders in cases of economic and emotional abuse; acting as a general deterrent; and enlivening victims' compensation entitlements in the event of a successful prosecution.[158]

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151 Consultation Paper, Question 7–4.

152 See, eg, J Stubbs, *Submission FV 186,* 25 June 2010; Queensland Law Society, *Submission FV 178,* 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010.

153 However one legal service provider expressed a general view that federal offences pertaining to sexual assault should be included in any such approach: Confidential, *Submission FV 183,* 25 June 2010.

154 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010.

155 Consultation Paper, Question 5–5.

156 See, eg, C Pragnell, *Submission FV 70,* 2 June 2010; National Peak Body for Safety and Protection of Parents and Children, *Submission FV 47,* 24 May 2010; M Condon, *Submission FV 45,* 18 May 2010.

157 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

158 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010. National Legal Aid also commented upon these particular effects, without expressing a view on the desirability of creating discrete offences: National Legal Aid, *Submission FV 232,* 15 July 2010.

13.81 The Department submitted that the absence of prosecutions for these offences to date suggests that they are not being utilised in inappropriate circumstances. It noted that economic abuse is difficult to prove—in particular where some instances of conduct are merely frugal or greedy, while others are coercive or controlling.[159] The Department submitted that 'generally, the kinds of examples of economic abuse which could be prosecuted occur in cases where there is long-term and extremely violent conduct occurring'.[160]

13.82 Some organisations and individuals expressed particular support for an offence of emotional abuse.[161] For example, the Australian Domestic and Family Violence Clearinghouse argued:

> Emotional abuse which causes harm which undermines community safety and the public interest ought to be addressed under criminal laws. There are many anecdotes from within our sector of emotional abuse of women and children which would have the requisite seriousness and severity to suggest applicability of criminal laws.[162]

Submissions opposing new offences

13.83 Many submissions opposed new offences for similar reasons to those applying to an umbrella offence. Stakeholders identified difficulties in defining, proving, administering and enforcing the offences.[163] For example, the Victorian Government argued that emotional abuse would be 'very difficult to define with the degree of specificity necessary to constitute a criminal offence'.[164] While neither supporting nor opposing new offences, National Legal Aid cited the difficulty in distinguishing between merely frugal or greedy and coercive and controlling conduct as a potential problem in defining an economic abuse offence, rather than as a protection against inappropriate use.[165]

13.84 Some stakeholders considered that economic and emotional abuse are adequately addressed by existing offences such as fraud, blackmail and fraudulently inducing a person to invest.[166] NAAJA expressed 'grave concerns' that criminalising

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159 Department of Premier and Cabinet (Tas), *Submission FV 236,* 20 July 2010. See also, the submission of National Legal Aid, which cited these factors as potential impediments to the creation and appropriate use of an economic abuse offence: National Legal Aid, *Submission FV 232,* 15 July 2010.

160 Department of Premier and Cabinet (Tas), *Submission FV 236,* 20 July 2010.

161 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216,* 30 June 2010; K Johnstone, *Submission FV 107,* 7 June 2010; T Searle, *Submission FV 108,* 2 June 2010.

162 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216,* 30 June 2010.

163 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Legal Aid NSW, *Submission FV 219,* 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212,* 28 June 2010; J Stubbs, *Submission FV 186,* 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010; Police Association of New South Wales, *Submission FV 145,* 24 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46,* 24 May 2010.

164 Victorian Government, *Submission FV 120,* 15 June 2010. See also Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010.

165 National Legal Aid, *Submission FV 232,* 15 July 2010, cf the views of the Department of Premier and Cabinet (Tas): Department of Premier and Cabinet (Tas), *Submission FV 236,* 20 July 2010.

166 Victorian Government, *Submission FV 120,* 15 June 2010. See also Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010.

economic and emotional abuse 'would result in more Aboriginal people being incarcerated with little or no idea why'.[167]

Commissions' views

Overall approach to new criminal offences

13.85 Overall, the Commissions take the view that it would be premature to recommend any new forms of family-violence related criminal offences at the present time. In taking this position, the Commissions are guided by a number of factors, including:

- the necessarily high-level analysis of criminal offences in this Inquiry, having regard to the breadth of the Commissions' Terms of Reference;
- the substantial difficulties associated with conceptualising and defining effective and enforceable new offences;
- the identified scope for improvements to existing criminal justice responses to family violence—including in the enforcement of existing offences;
- the absence of detailed evidence about the operation of recent reforms in some jurisdictions—for example, aggravated offences in Western Australia and South Australia, and economic and emotional abuse offences in Tasmania; and
- the significant divisions of stakeholder opinions on the preferable form of any new offence provisions.

13.86 The Commissions regard the third factor as particularly determinative. Most submissions supporting new criminal offences did so on the basis that existing criminal law responses—in particular, sentencing discretion—failed to recognise adequately the nature and dynamics of family violence. A key theme was that new offence provisions would provide direction and guidance. While new offences may be one means of achieving this outcome, the Commissions consider that new offences are justified only where it can be established that the mischief sought to be addressed cannot be adequately dealt with under the existing legislative framework. To this end, the Commissions make recommendations for practical reforms aimed at improving the understanding of the dynamics of family violence in criminal justice responses. These include recommendations directed at the sentencing of family-violence related offences[168] and the development of specialised family violence courts and police units.[169] The Commissions consider that these measures should be implemented and given an opportunity to take effect as a precondition to any future consideration of creating new criminal offences. The Commissions reiterate their view that improvements in the criminal justice response are only part of an integrated response to family violence.

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167 North Australian Aboriginal Justice Agency, *Submission FV 194,* 25 June 2010.
168 See Recs 13–1(b) and 13–3 below.
169 See Ch 32.

13.87 In taking this position, the Commissions do not categorically oppose the development of new offences in the future. Rather, they emphasise the importance of an incremental and evidence-based approach to the recognition of family violence in criminal laws. In the Commissions' view, a preferable approach would be for jurisdictions to focus on improving their existing practices, undertaking ongoing evaluations of current measures—particularly recent reforms—and remaining open to considering new offences in the longer term, on a needs basis.

An umbrella offence of family violence

13.88 The Commissions do not support the creation of an umbrella offence of family violence at this time. The Commissions maintain their preliminary view expressed in the Consultation Paper that there are significant difficulties in conceptualising the exact parameters of an umbrella offence, and in particular whether such an offence should be framed to include conduct that is not generally recognised under existing criminal laws—for example, economic and emotional abuse. This raises a fundamental issue concerning the proper delineation of civil and criminal redress. As discussed below, the Commissions are not satisfied that it is necessary or appropriate to criminalise such conduct.

13.89 The Commissions agree with those submissions identifying practical difficulties in particularising the conduct captured by an umbrella offence. In addition to potential constitutional impediments and prosecutorial reluctance to lay charges, an umbrella offence may present difficulties in providing accused persons with adequate particulars of the conduct constituting the charge. The Commissions acknowledge that these difficulties are not necessarily insurmountable—as demonstrated by the existence of course of conduct-based offences in Australian criminal laws in relation to persistent child sexual abuse. However, these offences have received limited use, and have been the subject of legal challenges necessitating amendments in some jurisdictions. In the Commissions' view, this suggests a need to accumulate and evaluate experience in using course of conduct-based offences before they are replicated in other areas.[170]

13.90 The Commissions acknowledge, however, that an umbrella offence may potentially recognise and facilitate understanding of the dynamics of family violence in the criminal justice system. The significant anecdotal evidence presented by stakeholders suggests that there is currently an inconsistent understanding of the dynamics of family violence on the part of system participants—including police, lawyers and judicial officers. However, the Commissions consider that there is insufficient evidence to conclude that improvements cannot be realised within existing frameworks, or that an umbrella offence would necessarily achieve the desired outcomes.

13.91 The Commissions agree with stakeholder suggestions that a preferable approach would be for state and territory governments to examine the operation of—and consider making improvements to—existing responses before contemplating an umbrella offence. To this end, the Commissions make recommendations in respect of

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170 The specific offences pertaining to persistent child sexual abuse are considered in Ch 25.

recognising courses of conduct in sentencing,[171] integrated responses and best practice,[172] and specialised prosecution and policing measures.[173]

13.92 The Commissions further acknowledge the importance of education and training measures to improve understanding of the dynamics of family violence within the system. This includes the relevance of family violence-related evidence in the prosecution of existing criminal offences. The Commissions endorse the recommendation of the National Council to Reduce Violence Against Women and their Children for the production of a national bench book on family violence, in consultation with jurisdictions, and as part of a national professional development program for judicial officers on family violence. The Commissions consider that such a bench book should, among other things, specifically address the potential relevance of family-violence related evidence in respect of offences committed in the family violence context. This matter is the subject of Recommendation 13–1(a) below.

Aggravated offences with a higher maximum penalty

13.93 Similarly, the Commissions do not recommend the development of aggravated offences committed in the family violence context at this time. Aggravated offences may potentially serve educational or denunciatory functions, and may be a more feasible option than an umbrella offence in that they are based on existing criminal offences. However, the Commissions consider that there is insufficient evidence on which to make a recommendation for the creation of such offences.

13.94 The division of stakeholder preferences between aggravated offences and aggravating factors in sentencing make necessary further analysis of these alternatives before the enactment of aggravated offences can be considered. In particular, it would be necessary to examine the sufficiency and appropriateness of the range of existing basic and aggravated offences relevant to the family violence context and their application in practice, including:

- the sufficiency of existing maximum penalties in punishing basic and aggravated offences committed in the family violence context;
- the exercise of sentencing discretion in these cases;[174] and
- in respect of existing basic offences—the substance and application of any relevant statutory sentencing factors in the family violence context.

13.95 Given the Commissions' preference for incremental reform that first addresses matters of operation and implementation, they do not make any recommendations in relation to potential aggravated offences at this time. However, the matters listed above would be appropriate for detailed research and analysis by state and territory

171 Recommendations 13–1, 13–2 and 13–3 below.
172 Ch 29.
173 Ch 32.
174 For example, the extent to which circumstances of family violence are recognised as aggravating factors in appropriate cases. See, eg, *R v MFP* [2001] VSCA .

governments contemplating the introduction of aggravated family-violence related offences in the future.

13.96 As a general proposition, the Commissions consider that national consistency of criminal laws is a desirable objective. To that end, they recognise the benefit of considering aggravated family-violence related offences in a national forum such as the SCAG MCLOC. The considerable work undertaken on the *Model Criminal Code*—in particular the aggravated non-fatal offence provisions in Chapter 5[175]—should inform any future consideration of aggravated offences in the family violence context.

13.97 The Commissions note, however, that the *Model Criminal Code* provisions have been implemented inconsistently across jurisdictions. National consideration of aggravated offences in the family violence context may provide an opportunity to identify the reasons the aggravated offence provisions do not appear to have received uniform support. It may also facilitate consensus about the conceptual basis for the designation of aggravated offences, as distinct from allowing for aggravating circumstances to be taken into account in sentencing.

13.98 If jurisdictions elect to consider enacting aggravated family-violence related offences, the Commissions make four observations about the substance of such provisions. First, the Commissions caution against the prescription of minimum penalties as suggested in one submission.[176] In the context of discussing sentencing options in relation to federal offenders in the report *Same Crime, Same Time: Sentencing of Federal Offenders* (Report ALRC 103) the ALRC expressed the view that mandatory terms of imprisonment are generally incompatible with sound practice and principle. The ALRC emphasised the importance of sentencing discretion to enable justice to be done in individual cases, and concluded that the legislature should not prejudge the appropriate minimum penalty in legislation without regard to the facts of individual cases.[177] The Commissions endorse this view, which is consistent with the guiding principle of fairness identified in Chapter 3.

13.99 Secondly, the Commissions maintain their views expressed in the Consultation Paper that a defined family relationship between the victim and offender should not be the sole basis for aggravating an offence. In the Commissions' view, this elevates, by definition, the status of offences committed against family members over those committed against strangers, without principled justification.[178] It further creates an unacceptable risk that persons may be charged with aggravated offences in circumstances where it may not always be just and appropriate to do so—for example, where an alleged offender has a mental illness, is a child with substance abuse issues, or is a victim of family violence who uses defensive force to protect themselves or another family member. While prosecutorial discretion may reduce the likelihood of

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175 *Model Criminal Code* (1st edn, 2009) cl 5.1.41.

176 Confidential, *Submission FV 164,* 25 June 2010.

177 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [6.61], [6.65]–[6.61], Rec 6–1.

178 The Commissions emphasise, however, that this point is distinct from the recognition, where appropriate, of a family relationship between the offender and the victim as an aggravating factor in sentencing, as a matter of sentencing discretion: see *R v MFP* [2001] VSCA , discussed below.

prosecutions for aggravated offences in such circumstances, the Commissions consider that it is undesirable to leave open this possibility, given the gravity of the potential consequences for accused persons in these circumstances.

13.100 The Commissions acknowledge that factors additional or alternative to the existence of a family relationship may be more difficult to prove. However, the Commissions consider that the concept of family violence itself necessitates some form of proof of the underlying dynamics of power and control in the relationship. The mere existence of a family relationship between parties is inconclusive of this matter. Requiring proof of such matters is also proportionate to the increased gravity of the consequences for persons convicted of aggravated offences.

13.101 Thirdly, the Commissions take the view that the relevant factors of aggravation for offences should be the subject of further examination by those state and territory governments that elect to pursue aggravated family-violence related offences. This includes the question of whether aggravated offences should be created specifically in relation to family violence, or whether they should encompass offences committed in the context of relationships of power and control more generally. The Commissions tend towards the latter option because it would avoid the potential problems of elevating the status of violence committed against a family member over similar violence committed against a stranger. The Commissions also reiterate their comments about the desirability of national consistency.

13.102 In the Consultation Paper, the Commissions cited the commission of an offence within a pattern of coercive, controlling or dominating behaviour as an example of a potential circumstance warranting a charge for an aggravated offence. The Commissions agree with stakeholder contentions that this exact formulation may be problematic. In particular, it may capture non-criminal conduct or take into account uncharged conduct. The Commissions consider that the circumstances of aggravation contained in the *Model Criminal Code* pertaining to the commission of offences during torture or in the abuse of a relationship of trust or authority may provide an instructive basis for further consideration. In particular, the Commissions note that such offences are capable of application to all forms of violence without distinction on the basis of the relationship between the accused person and the victim.

13.103 Finally, the Commissions suggest that jurisdictions considering the introduction of aggravated family-violence related offences should clearly address the relationship between these offences and existing circumstances of aggravation in sentencing legislation. For example, where an accused person is charged with a basic offence in respect of conduct that could have sustained a charge under an aggravated offence, the sentencing legislation should make express provision as to the relevance, if any, that the aggravating circumstances may have in sentencing. The Commissions also emphasise the importance of prosecutorial guidelines, education and training addressing the appropriate use of any aggravated family-violence related offences.

Sub-categories of existing offences committed in a family violence context, without a higher maximum penalty

13.104 The Commissions do not make any recommendations in respect of separate offences—which do not attract higher maximum penalties—where they are committed against persons who are in a defined family relationship with the offender. The Commissions acknowledge that such offences could play a potential educative function, and that they may not necessarily 'clutter' existing criminal laws. However, the Commissions consider that the creation of new offences for educative purposes should be undertaken only where there is a demonstrated need for this particular form of response. The Commissions are not convinced that the options for implementing educative measures within existing frameworks have been exhausted.[179]

Federal offences

13.105 The Commissions do not make any recommendations in respect of the creation of new federal family-violence related offences. The Commissions consider that the absence of adequate statistics on the types of existing federal offences committed against family members[180] precludes the making of further recommendations about the creation of new offences and the nature of penalties. This matter would be appropriate for further consideration once such baseline evidence is available.

13.106 The Commissions acknowledge the concerns expressed by stakeholders about the enforcement of breaches of protection orders that are committed by offenders located in other states. However, the Commissions are unconvinced that a new scheme of federal offences—such as the United States *Violence Against Women Act*—is an appropriate response at this time. In Chapter 30, the Commissions endorse the recommendation of the National Council for the development of a national protection orders database, as part of the Australian Government's commitment to the implementation of a system for the registration and recognition of protection orders. The Commissions consider that these measures will facilitate the enforcement of protection orders across state and territory boundaries, however they emphasise the importance of undertaking ongoing monitoring and evaluation of outcomes. The Commissions further observe that any future consideration of new federal offences in the nature of the United States *Violence Against Women Act* would require identification of an appropriate head of Commonwealth constitutional power.

Economic and emotional abuse offences

13.107 The Commissions do not make any recommendations in respect of economic or emotional abuse offences. Overall, stakeholder views confirmed the Commissions' preliminary concerns about the feasibility of criminalising economic and emotional abuse, and the absence of evidence to justify the creation of new offences. In particular,

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179 In Ch 5, the Commissions express their views on the separate issue of linking the definitions of family violence in family violence legislation to the criminal law, through the designation of specific 'family violence offences'.

180 See Ch 5.

the Commissions note the difficulties in defining the conduct captured by these offences with sufficient particularity. They also note the potential difficulties in enforcing and proving these offences beyond reasonable doubt. The Commissions further note that there have been no prosecutions for such offences in Tasmania—the only jurisdiction to have embraced this approach. Accordingly, there is no evidence base to allow adequate consideration of this issue at this stage.

13.108 In addition, a discrete offence for economic abuse appears to be unnecessary given the existence of other criminal offences such as: obtaining a financial advantage or causing financial disadvantage;[181] obtaining property belonging to another;[182] fraud;[183] and failure to provide the necessities of life.[184] As noted above, coercing a family member to claim a social security payment is recognised as economic abuse amounting to family violence in some jurisdictions.[185] Such behaviour could conceivably also fall within the ambit of offences under social security legislation or the *Criminal Code* (Cth) relating to fraudulent conduct.

13.109 Evidence of economic and emotional abuse may also have broader relevance to existing criminal offences and defences where patterns of family-violence related behaviour are relevant to the facts in issue. For example, evidence of patterns of past abuse may be relevant to defences where victims of family violence commit crimes under duress or in self-defence.

13.110 In addition, as identified in Chapter 5, economic and emotional abuse may be the subject of a civil family violence protection order. Breach of a protection order is a criminal offence in all Australian states and territories. Existing civil laws may also provide remedies for some instances of economic abuse. For example, contracts review legislation[186] or common law or equitable remedies may be used to set aside or vary unjust financial contracts—such as where a family violence victim is coerced to sign a document transferring property. The Commissions note that there may arguably be a material inequality in the bargaining power of a victim of family violence and an aggressor, such that it may not be reasonably practicable for a victim of family violence to negotiate a contract with or for the benefit of the aggressor.

13.111 The Commissions make no recommendations in respect of the existing offences in the Tasmanian family violence legislation, in the absence of evidence about their operation. However, the Commissions emphasise the importance of the ongoing monitoring and evaluation of these provisions, with a view to ensuring that they are enforceable in practice.

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181 See, eg, *Crimes Act 1900* (NSW) s 192D.
182 See, eg, Ibid s 192C.
183 See, eg, Ibid s 192E.
184 These offences are discussed in the context of child protection in Ch 20.
185 See, eg, *Family Violence Protection Act 2008* (Vic) s 6.
186 See, eg, *Contracts Review Act 1980* (NSW) s 7.

Recognising family violence in sentencing

13.112 The dynamics of family violence can also be recognised to some extent in the sentencing of offenders who are found guilty of crimes committed in circumstances of family violence. This includes by way of the following forms of recognition:

- the fact that the offence being sentenced was committed as part of a broader course of family-violence related conduct; and
- the presence of any jurisdiction-specific aggravating or non-mitigating circumstances relevant to the family violence context—for example, the existence of a family relationship between the offender and victim, or the commission of the offence in abuse of a position of trust or authority in relation to the victim, or in breach of a protection order.

13.113 These matters are the focus of this section. In addition, the Commissions consider practical strategies to promote the consistent recognition and treatment of family-violence related factors in sentencing, in line with the Commissions' guiding principle of fairness.[187]

Recognising courses of family-violence related conduct in sentencing

13.114 One stakeholder commented that:

> Perhaps there is space for evidence of a pattern of domestic violence to be a factor in sentencing. By this I mean that the standard assault charges be laid, but when it comes to sentencing, evidence that establishes a pattern of domestic violence would result in a premium being added to whatever sentence is assigned to the proved assault. This way there is no diminishing of the seriousness of the assault charge by putting it in a special category of 'domestic violence' but the fact that it is not a simple one-off assault is also taken into account.[188]

13.115 This raises the following issues—which are examined below:

- the available legal mechanisms for taking a course of conduct into account in sentencing specific offences;
- the particulars of these mechanisms, including: the stage at which such a course of conduct is proved; the manner of proof and the standard of proof; and whether the course of conduct is limited to proven acts of a criminal nature—as opposed to unproven criminal acts, or acts which are not generally criminal such as economic or emotional abuse; and
- the extent to which these mechanisms are currently used in respect of offences committed in circumstances of family violence.

13.116 The emphasis of this chapter is upon courses of conduct comprising *uncharged* conduct, or a combination of uncharged conduct and a small number of charges. As mentioned earlier in this chapter, the Commissions have heard concerns

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187 See Ch 3.
188 *Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers*.

from stakeholders that persons who have committed family violence over a period of time are often prosecuted for only a small number of incidents, due to difficulties in proving specific incidents in the course of ongoing violence. Accordingly, the Commissions have not given consideration to the sentencing of multiple offences in circumstances where most or all incidents forming part of a course of conduct are the subject of individual charges. In particular, the Commissions have not addressed issues relating to the imposition of concurrent or cumulative sentences in respect of multiple offences that form part of a course of conduct.[189]

Sentencing legislation

13.117 Most state and territory sentencing legislation does not expressly refer to a course of conduct as a sentencing factor. One exception is the sentencing legislation of the ACT, which provides that a court sentencing an offender must take into account, where relevant and known:

> if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—the course of conduct.[190]

13.118 There is also reference to a course of conduct in the sentencing legislation of South Australia. Under that legislation, in order to assist a court to determine the sentence for an offence, a prosecutor is required to furnish the court with particulars of injury, loss or damage resulting from

> a course of conduct consisting of a series of criminal acts of the same or a similar character of which the offence for which sentence is to be imposed forms part.[191]

13.119 The absence of express recognition of a course of conduct in sentencing legislation may be attributable to legal uncertainty about whether a sentencing court can take into account conduct in respect of which an offender has not been charged.

13.120 The ACT provision is expressed in the same terms as the federal sentencing legislation—s 16A(2)(c) of the *Crimes Act 1914* (Cth).[192] There has been case law in respect of the federal provision which reveals judicial disagreement about its meaning and ambit. In *Weininger v The Queen*, Kirby J stated that s 16A(2)(c) did not allow 'uncharged criminal acts' to be taken into account in sentencing and expressed the view that the section was an attempt to express the totality principle.[193] Callinan J, however, expressed the view that the section allowed a court to consider relevant conduct,

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189 The term 'concurrent' refers to sentences for multiple offences to be served at the same time. The term 'cumulative' refers to sentences for multiple offences to be served one after the other.

190 *Crimes (Sentencing) Act 2005* (ACT) s 33.

191 *Criminal Law (Sentencing) Act 1988* (SA) s 7(1)(b)(ii).

192 *Crimes Act 1914* (Cth) s 16A sets out factors a court must take into account in the sentencing of federal offenders.

193 *Weininger v The Queen* (2003) 212 CLR 629, 647. The totality principle is relevant to the sentencing of offenders for multiple offences. It ensures that an offender who is sentenced for multiple offences receives an appropriate sentence overall and not a 'crushing sentence'. See Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [5.12]–[5.15].

> albeit that it might involve criminal acts which in turn might not have resulted in charged and established (by verdict or plea) facts constituting other offences.[194]

13.121 Submissions and consultations in the course of the ALRC's inquiry into the sentencing of federal offenders reflected confusion about the meaning and operation of s 16A(2)(c), and the ALRC recommended that the section be redrafted to provide greater clarity.[195]

Representative charges

13.122 A provision allowing a course of conduct to be taken into account is also relevant where representative charges are used—that is, where a court sentences an offender for a limited or representative number of offences on the basis that those offences are part of a wider course of conduct. Representative charges have been used in sexual assault cases, those involving the apprehension of 'serial offenders' and corporate criminal and fraud matters.[196] The uncharged offences cannot be used to increase the maximum penalties available for the offences charged, but may provide a basis for refusing to extend any leniency that may otherwise have been extended if the charged offences were isolated incidents.[197]

13.123 However, there are diverging judicial views as to whether multiple admitted or proven offences may also be viewed as a course of conduct for the purposes of placing each individual offence in a higher range of objective seriousness than would otherwise be the case. The Victorian Court of Criminal Appeal has determined the issue in the affirmative, holding that:

> As recent decisions of this Court have made clear, the fact that a count is a representative count has a twofold relevance to sentencing. First, it is to be understood as the absence of a mitigating factor, in the sense that a plea of guilty to a representative count prevents the defendant from claiming 'any leniency that might have been permitted on the basis that the offence was an isolated event'. Secondly, the sentencing court must look at the conduct represented by the count in order to judge the offending in its full context, 'which is likely to bear upon such matters as the extent of culpability, need for specific deterrence and prospects of rehabilitation'.[198]

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194 *Weininger v The Queen* (2003) 212 CLR 629, 665.

195 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [6.61], [6.65]–[6.66], Rec 6–1.

196 See, eg, N Cowdery, 'Negotiating with the DPP' (Paper presented at Legal Aid Commission of NSW Criminal Law Conference, Sydney, 3 August 2006).

197 *R v D* (1997) 69 SASR 413, 419. This approach has also been adopted by the NSW Court of Criminal Appeal. See, eg, *R v JCW* (2000) 112 A Crim R 466, [67]–[68]. However, the Queensland Court of Appeal has rejected this approach. See *R v D* [1996] 1 Qd R, but cf *R v Bettridge* (Unreported, Queensland Court of Appeal, 27 May 1998). This matter is discussed below.

198 *Director of Public Prosecutions v CPD 2* (2009) 22 VR 533, 542, citing *Director of Public Prosecutions v McMaster* [2008] 19 VR, 202 and *R v CJK* (2009) 22 VR 104, 111. See also *R v LFJ* [2009] VSCA, [8].

13.124 The Supreme Court of South Australia has limited the relevance of representative charges to the first ground in the above quotation.[199] The NSW Court of Criminal Appeal, however, is divided on this issue.[200]

13.125 In addition, the Queensland Court of Appeal has held that uncharged conduct which may amount to a separate offence cannot be considered for *any* purpose at all in sentencing—including to deny leniency.[201] However, the court has subsequently recognised that it may be necessary to revisit this position, 'some points of which are arguably inconsistent with other authorities both in this court and in other jurisdictions'.[202]

Circumstances of aggravation and mitigation

13.126 Another means of recognising family violence in sentencing is either to treat the fact that a crime was committed in the context of a family relationship as an aggravating factor in sentencing, or prevent it from being considered a mitigating factor in sentencing.

13.127 Aggravating factors increase the culpability of an offender and act to increase the penalty to be imposed on sentencing—but never beyond the maximum penalty for an offence. Mitigating factors decrease the culpability of an offender and act to decrease the extent to which the offender should be punished.

13.128 Not all sentencing legislation of the states and territories sets out aggravating or mitigating factors. Some sentencing legislation states that a court must have regard to the presence of any mitigating or aggravating factor concerning the offender,[203] or must have regard to any mitigating or aggravating factor in determining the seriousness of an offence[204] without listing examples of such factors.[205] In addition, the sentencing legislation of some states and territories identifies certain factors that must be treated as non-mitigating in all cases.[206]

13.129 The sentencing legislation of NSW, by comparison, sets out a list of aggravating and mitigating factors that a court must take into account.[207] In NSW, it is not an aggravating factor that the victim of an offence is a spouse, intimate partner or related to the offender. However, the sentencing legislation of NSW specifies some aggravating factors that may be relevant to the sentencing of offenders who are found guilty of crimes committed in circumstances of family violence. These include that: the

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199 *R v Bukvic* [2010] SASC 195, [48].

200 *Giles v Director of Public Prosecutions* [2009] NSWCCA, [67]–[68] (Basten JA), [85]–[86] (Hulme JA), [102]–[104] (Johnson JA).

201 *R v D* [1996] 1 Qd R.

202 *R v Bettridge* (Unreported, Queensland Court of Appeal, 27 May 1998).

203 For example, *Sentencing Act 1991* (Vic) s 5(2)(g); *Penalties and Sentences Act 1992* (Qld) s 9(2)(g).

204 *Sentencing Act 1995* (WA) s 6(2)(c), (d).

205 Although the *Sentencing Act 1995* (WA) s 8 provides that a plea of guilty, and facilitation by the offender of criminal property confiscation in certain cases are mitigating factors.

206 See, eg, *Sentencing Act 1995* (WA) s 8(3) and *Crimes (Sentencing) Act 2005* (ACT) s 34(2). See, further, Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [6.186], Rec 6–6.

207 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A.

crime was committed in the home of the victim or any other person; in the presence of a child; the offender had a record of previous convictions, particularly those for serious personal violence offences as defined in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW); or the offender abused a position of trust or authority in relation to the victim.[208]

13.130 Case law in NSW supports the proposition that the fact that an offence is committed in the context of a family relationship is not a mitigating factor. In *Raczkowski v The Queen*, for example, the NSW Court of Criminal Appeal stated:

> The Court was invited to consider that the offences occurred in the context of a (broken down) domestic relationship … That a violent and pre-planned attack occurred in what might be classified as a domestic setting is not a matter of mitigation.[209]

13.131 Case law in NSW also indicates that the fact that an offence is committed while an offender is subject to the conditions of a protection order to protect the victim of the offence, may be treated as an aggravating factor.[210]

13.132 The Tasmanian family violence legislation specifies some aggravating factors that may be relevant to the sentencing of offenders who are found guilty of crimes committed in circumstances of family violence, in addition to circumstances not involving family violence. These include the fact that the offender knew or was reckless as to whether a child was present at the time of the offence or knew that the affected person was pregnant.[211] The latter factor has particular relevance in family violence circumstances because studies have shown that pregnancy increases a woman's vulnerability to family violence.[212]

13.133 The South Australian sentencing legislation specifies the following as a relevant factor, without classifying it as an aggravating (or mitigating) factor:

> if the offence was committed by an adult in circumstances where the offending conduct was seen or heard by a child (other than the victim (if any) of the offence or another offender)—those circumstances.[213]

13.134 In other jurisdictions, case law indicates that a family relationship between the offender and the victim may, in certain cases, be treated as an aggravating factor, as a matter of sentencing discretion. For example, in *R v MFP* the Victorian Court of Criminal Appeal stated, with respect to the offence being committed in a 'domestic' context:

> Moreover, I think it can be seen to be aggravating both as to its potential consequences and also inasmuch as a husband (or a wife) is in a privileged position in relation to a spouse. They each know the everyday movements, the habits, the likes

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208 Ibid s 21A(2)(d), (ea), (eb), (k).
209 *Raczkowski v The Queen* [2008] NSWCCA , [46].
210 *Kennedy v The Queen* (2008) 181 A Crim R 185, [8].
211 *Family Violence Act 2004* (Tas) s 13(a).
212 Parliament of Australia—Parliamentary Library, *Domestic Violence in Australia: An Overview of the Issues* (2003, updated 2006).
213 *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(ed).

> and dislikes, the fears and pleasures of their spouse, which might enable them not only to effect an attack more easily on their victim but also to devise the kinds of attack which could more seriously affect their spouse, not merely physically, but so as to cause mental anguish … The matter need not be examined any further, for in truth the advantages that he had, including that of surprise, justified the judge in holding that it was proper to view more seriously this attack occurring in the domestic context of this family.[214]

13.135 The sentencing legislation of some overseas jurisdictions provides that the commission of a crime in the context of a family relationship is an aggravating factor in sentencing. In Canada, the *Criminal Code* was amended in 1996 to provide that it is an aggravating factor if there is evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner.[215] On 3 April 2006, the Parliament of Iceland passed an amendment to art 70 of the General Penal Code with regard to family violence, as follows:

> In the event that an infraction was directed against a man, woman or child closely related to the perpetrator and their family connection is believed to have aggravated the violence of the act, this should generally be taken into account to increase the severity of the punishment.

13.136 The New Zealand sentencing legislation lists as an aggravating factor the fact that the case involved violence against, or neglect of, a child under the age of 14 years.[216]

The ALRC's previous consideration of aggravating factors

13.137 In the context of discussing the range of sentencing factors relevant to the sentencing of federal offenders, ALRC Report 103 expressed the view that federal sentencing legislation should not distinguish between sentencing factors that aggravate a sentence, and those that mitigate a sentence.

13.138 The relationship between mitigating and aggravating factors is complicated by the fact that the opposite of a mitigating factor is not necessarily an aggravating factor, and vice versa. For example, a plea of guilty could be a mitigating factor, but it is improper to treat a plea of not guilty as an aggravating factor. Similarly, while youth or old age may be a mitigating factor, the fact that an offender's age does not fall into either extreme is not an aggravating factor. Some factors may be either aggravating or mitigating depending on the circumstances. Other factors may serve neither to increase nor to decrease the severity of a sentence, but may guide the court in selecting an appropriate sentencing option or in specifying certain conditions tailored to the needs and circumstances of the offender. Factors that could fall into this category include the cultural background, age, and physical and mental condition of an offender.

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214 *R v MFP* [2001] VSCA , [20].

215 *Criminal Code 1985* RSC c C–46 (Canada) s 718.2(a)(ii). It is also an aggravating factor if the person abused a position of trust or authority in relation to the victim: s 718.2(a)(iii).

216 *Sentencing Act 2002* (NZ) s 9A. Section 9 lists general aggravating factors, some of which may be relevant to family violence, such as an abuse of power or authority.

13.139 Rather than distinguishing between aggravating and mitigating factors, ALRC Report 103 took the approach of recommending factors that should not be treated as either aggravating or mitigating. For example, it stated that because an offender's consent is integral to effective participation in a restorative justice process or initiative, it would be improper to treat the absence of consent to participate as an aggravating factor.[217]

Sentencing guidance

13.140 Another means of recognising the dynamics of family violence in sentencing offences is the use of specific sentencing guidance. For example, the Sentencing Guidelines Council in the UK has published a guideline on sentencing in the context of family violence.[218] This guideline must be considered by courts pursuant to s 172 of the *Criminal Justice Act 2003* (UK) and

> makes clear that offences committed in a domestic context should be regarded as being no less serious than offences committed in a non-domestic context. Indeed, because an offence has been committed in a domestic context, there are likely to be aggravating factors present that make it more serious.[219]

13.141 These aggravating factors include: an abuse of trust and power; the particular vulnerability of the victim; exposure of children to violence; where contact arrangements are exploited in order to commit an offence; a proven history of violence or threats by an offender in a domestic setting; a history of disobedience to court orders; and if the victim is forced to leave home.[220]

13.142 The guideline also provides guidance on the application of mitigating and other factors in the family violence context. For example, it provides that the offender's 'good character in relation to conduct outside the home' should generally be 'of no relevance where there is a proven pattern of behaviour'.[221]

13.143 The guideline also cautions against taking the expressed wishes of the victim into account in sentencing in the context of family violence. Reasons for this include:

- it is undesirable that a victim should feel responsibility for the sentence imposed;
- there is a risk that the plea for mercy made by a victim will be induced by threats made by, or by a fear of, the offender; and
- the risk of such threats will be increased if it is generally believed that the severity of the sentence may be affected by the wishes of the victim.[222]

13.144 Guidance on sentencing is provided in a number of ways in Australian states and territories. For example, the Judicial Commission of NSW and the Judicial College

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217 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [6.153], [6.157], [6.159].
218 Sentencing Guidelines Council, *Overarching Principles: Domestic Violence* (2006).
219 Ibid.
220 Ibid, 4–5.
221 Ibid, 5–6.
222 Ibid, 6.

of Victoria each produce sentencing bench books.[223] A bench book outlines what judicial officers 'may need to know, understand and do on a day-to-day basis', in the form of a practice manual.[224] Bench books are not intended to lay down or develop the law.[225] Bench books have an important role to play as part of a national judicial education and support program.[226]

13.145 The National Council recommended the production of a model bench book, in consultation with jurisdictions, and as part of a national professional development program for judicial officers on family violence. The National Council commented that such a bench book would 'provide a social context analysis and case law to complement existing resources and enhance the application of the law'.[227]

13.146 Another form of guidance is through the use of 'guideline judgments' by criminal courts of appeal, as provided for in NSW, Victoria, Western Australia and South Australia.[228] As the ALRC stated in ALRC Report 103, guideline judgments are generally delivered by an appellate court in the context of a particular case, but go further than the points raised on appeal to suggest a sentencing scale for the category of crime before the court. They may indicate how particular aggravating or mitigating factors should be reflected in a sentence or suggest how sentences are to be determined for a category of offences or type of offender.[229]

13.147 The advantages of guideline judgments are said to be that they foster consistency while retaining judicial discretion; accommodate special or exceptional cases while serving the aims of rehabilitation, denunciation and deterrence; allow a judge to respond to all the circumstances of a case; result in fewer appeals by the prosecution; and lower pressure on the executive arm of government to respond to media attention.[230] On the other hand, the potential disadvantages of guideline judgments include erosion of judicial discretion, and the possibility of greater use of imprisonment due to a new emphasis on establishing exceptional circumstances to justify departure from a guideline.[231]

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223 Judicial Commission of New South Wales, *Sentencing Bench Book* (2009) <www.judcom.nsw.gov.au/publications/benchbks/sentencing/index.html> at 21 February 2010; Judicial College of Victoria, *Victorian Sentencing Manual* (2009). For a brief overview of bench books—including those that deal with ethnic, gender and cultural issues, such as the *Aboriginal Bench Book for Western Australian Courts*: see Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), 498–500.

224 L Armytage, 'Developing Bench Books for Tribunals: Some Guidelines' (Paper presented at Sixth Annual Australasian Institute of Judicial Administration Conference, Sydney, 5 June 2003), 2.

225 *R v Forbes* (2005) 160 A Crim R 1, [72]–[76].

226 Judicial education and use of bench books is further discussed in Ch 31.

227 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), 121.

228 *Crimes (Sentencing Procedure) Act 1999* (NSW), Pt 3 Div 4; *Sentencing Act 1991* (Vic); *Sentencing Act 1995* (WA) ss 143, 143A; *Criminal Law (Sentencing) Act 1988* (SA) ss 29A–29C.

229 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [21.22].

230 R Johns, *Sentencing Law: A Review of Developments in 1998–2001* (2002), 25–26.

231 P Byrne, 'Guideline Sentencing: A Defence Perspective' (1999) 11 *Judicial Officers' Bulletin* 81, 81.

13.148 Regardless of the merits of guideline judgments, it is clear that in federal criminal matters a court cannot give a guideline judgment in the nature of an advisory opinion.[232] In *Wong v The Queen*,[233] the High Court appears to have cast doubt on the constitutional validity of guideline judgments at the federal level in some other circumstances. *Wong* has created a climate of uncertainty around guideline judgments—at least in the federal sphere—which does not provide a firm foundation for law reform in this area.[234]

13.149 While guideline judgements at the federal level are constitutionally problematic, they remain an option at the state and territory level. Such judgements do not have to specify penalty levels. However, guideline judgements do not appear to have been used outside of NSW,[235] and no such judgment has been made in relation to family violence in NSW.[236] Research suggests that guideline judgments are now less frequently used in NSW because of the introduction of standard minimum sentencing.[237]

Submissions and consultations

Recognising courses of conduct

13.150 In the Consultation Paper, the Commissions sought stakeholder views about the extent to which courses of conduct are currently recognised in the sentencing of family-violence related offences. This included: the use of representative charges by prosecutors; whether offenders pleading guilty to family-violence related charges acknowledge that the offences charged form part of a broader course of conduct including uncharged offences; and judicial recognition of courses of conduct in sentencing.[238] Most submissions and consultations indicated that:

- representative charges are not commonly used in the prosecution of family-violence related offences;[239] and

232 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357.

233 *Wong v The Queen* (2001) 207 CLR 584.

234 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [21.37]; see also [21.28]–[21.35].

235 The Full Court of the South Australian Supreme Court has considered, and rejected, one application for such a judgment: *R v Payne* (2004) 89 SASR 49. The Western Australian Supreme Court has also rejected applications for such a judgment: *Yates v Western Australia* [2008] WASCA ; *Herbert v The Queen* (2003) 27 WAR 330; *Jones v The Queen* [1998] WASCA .

236 Supreme Court of New South Wales, *Guideline Judgments* <www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_guidelinejudg> at 1 April 2010.

237 J Anderson, 'Guideline Judgments and Standard Minimum Sentencing: An Uneasy Alliance in the Way of the Future' (Paper presented at Sentencing: Principles, Perspectives and Possibilities Conference, Canberra, 10 February 2006).

238 Consultation Paper, Questions 7–5, 7–6, 7–7.

239 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010, Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010; Confidential, *Submission FV 164,* 25 June 2010.

- offenders pleading guilty to family-violence related charges rarely acknowledge that the charges are representative of broader criminality additionally comprising uncharged conduct.[240]

13.151 However, stakeholders were divided about:

- the extent to which courts currently consider courses of conduct in sentencing family-violence related offences;[241] and
- the preferable extent to which courses of conduct should be taken into account in sentencing family-violence related offences, including the appropriate use of representative charges.[242]

Current practices in using representative charges

13.152 Most submissions addressing current practices were based upon anecdotal evidence of stakeholders' experiences. Some legal service providers commented that, in their experience, representative charges are rarely used in family violence cases.[243] The Local Court of NSW suggested that the limited use of representative charges in the Local Court is reflective of their limited use in NSW more generally. The Court observed that the practice appears to be used more frequently in sexual assault cases in higher courts.[244] The Magistrates' Court and the Children's Court of Victoria commented that representative charges do not appear to be considered as an option in most cases.[245] Two stakeholders suggested a need for further research into the use of representative charges in the family violence context.[246]

13.153 In contrast, the NSW ODPP expressed the view that representative charges are not being under-utilised in NSW, notwithstanding the complexities associated with sentencing for uncharged conduct.[247] While not commenting specifically on the frequency with which representative charges are utilised in the family violence context, the Commonwealth Director of Public Prosecutions stated that it uses representative charges where they are the most appropriate charges given the evidence available, in

240 National Legal Aid, *Submission FV 232,* 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010.

241 National Legal Aid, *Submission FV 232,* 15 July 2010; Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010. cf Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Legal Aid NSW, *Submission FV 219,* 1 July 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46,* 24 May 2010.

242 Consultation Paper, Proposal 7–1.

243 Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010.

244 Local Court of NSW, *Submission FV 101,* 4 June 2010.

245 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010.

246 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146,* 24 June 2010.

247 Office of the Director of Public Prosecutions NSW, *Submission FV 158,* 25 June 2010.

accordance with the *Prosecution Policy of the Commonwealth*.[248] The Prosecution Policy relevantly refers to the 'criminality principle'—namely, that the charges laid should adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and provide the court with an appropriate basis for sentence.[249]

Current practices in relation to guilty pleas

13.154 Similarly, some stakeholders observed that, in their experience, guilty pleas are not usually accompanied by an acknowledgement by the offender that the offences charged are representative of broader criminality, including uncharged conduct.[250] However, the Aboriginal Family Violence Prevention and Legal Service Victoria commented that such acknowledgement appears to occur more regularly in the Victorian Koori Court. It noted that Aboriginal elders assisting the court have questioned offenders about their previous conduct, in some cases because they have personal knowledge of their behaviour.[251]

Current practices in recognising courses of conduct in sentencing

13.155 The majority of stakeholders commenting on current practices observed that, in their experience, courses of conduct are rarely taken into account in sentencing.[252] National Legal Aid observed that, in some cases, a number of individual charges are laid, or the offender is charged with a course of conduct-based offence. It identified a practice in Western Australia whereby multiple breaches of protection orders are charged individually and, 'where there are a number of breaches constituting stalking behaviour, the offender is charged with stalking'.[253] However, some stakeholders suggested that courses of conduct are routinely taken into account in sentencing family-violence related charges. The Magistrates' Court and the Children's Court of Victoria stated that, in practice, courts do take into account offending forming part of a course of conduct of family violence.[254] NSW Legal Aid and the Women's Domestic Violence Court Assistance Service suggested that the NSW model of designated 'domestic violence offences' enables the court to accumulate progressively histories of family violence and take them into consideration in sentencing.[255]

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248 Commonwealth Director of Public Prosecutions, *Submission FV 76,* 2 June 2010.

249 Office of the Director of Public Prosecutions (Cth), *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, [2.19]. See also [2.20]—circumstances in which a less serious charge may be favoured.

250 National Legal Aid, *Submission FV 232,* 15 July 2010; Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010.

251 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010

252 National Legal Aid, *Submission FV 232,* 15 July 2010; Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010.

253 National Legal Aid, *Submission FV 232,* 15 July 2010.

254 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010. The Department of Premier and Cabinet (Tas) also indicated, without further elaboration, that courts in Tasmania are taking courses of conduct into account in sentencing family-violence related offences: Department of Premier and Cabinet (Tas), *Submission FV 236,* 20 July 2010.

255 Legal Aid NSW, *Submission FV 219,* 1 July 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46,* 24 May 2010.

13.156 Stakeholders did not generally distinguish between judicial consideration of uncharged criminal conduct, and abusive or violent conduct that does not amount to an offence. However, the Magistrates' Court and the Children's Court of Victoria stated that courts are unlikely to take into account uncharged criminal conduct or non-criminal family violence, but—as discussed below—suggested that there may be scope to do so.[256] As further discussed below, other submissions expressed general reservations about taking uncharged conduct into account in sentencing.[257]

The appropriate use of representative charges and course of conduct evidence in sentencing family-violence related offences

13.157 In the Consultation Paper, the Commissions sought stakeholder views about three issues. First, the Commissions proposed that police and prosecutors should be encouraged—by way of prosecutorial guidelines, education and training—to pursue, to the maximum extent possible, the option of representative charges as a way of presenting a course of conduct to the court.[258]

13.158 Secondly, the Commissions asked whether the court should also consider the following matters in sentencing, for the purpose of rejecting any claim to mitigation:

- whether the offence forms part of a series of proved or admitted criminal offences of the same or similar character;
- whether an offender has pleaded guilty to charges and has acknowledged that they are representative of criminality that also comprises uncharged conduct; and
- whether the offence forms part of a broader pattern or proved or admitted family violence, which may include violence of a non-physical nature against the victim—such as economic or emotional abuse—which is typically not, of itself, criminal.[259]

13.159 Thirdly, the Commissions asked stakeholders whether the sentencing legislation of states and territories should expressly provide for a course of conduct to be taken into account in sentencing, to the extent that it does not already do so.[260]

13.160 A common theme emerging from submissions on these matters was the need to balance multiple public interests, including that:

- sentences accurately reflect the nature and extent of criminal conduct;

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256 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010.
257 National Legal Aid, *Submission FV 232,* 15 July 2010; Law Society of New South Wales, *Submission FV 205,* 30 June 2010; Local Court of NSW, *Submission FV 101,* 4 June 2010.
258 Consultation Paper, Proposal 7–1.
259 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), [7.38]–[7.40], Question 7–6.
260 Ibid, Question 7–8.

- offenders are not punished for crimes for which they have not been convicted; and
- trials are conducted as efficiently as possible.

13.161 While several stakeholders expressed in-principle support for the use of guidelines and training in the use of representative charges, without specific comments as to detail,[261] some did so in qualified terms, on the basis of the second and third points identified above. For example, National Legal Aid and the Aboriginal Family Violence Prevention and Legal Service Victoria supported the use of prosecutorial guidelines, education and training on the use of representative charges where appropriate, but noted the importance of limiting their use to charged and proven or admitted conduct.[262] National Legal Aid further commented that representative charges and course of conduct evidence may 'complicate proceedings and lead to evidentiary disputes and delay in the early resolution of cases'.[263] Other submissions expressed similar cautions about the use of representative charges—in particular, reliance upon uncharged conduct—without taking a firm view on the proposal.[264]

13.162 The Magistrates' Court and the Children's Court of Victoria commented that it may be desirable for sentencing courts to consider both uncharged criminal conduct and acts of non-criminal family violence in order to put evidence of the offending in a social context. The courts suggested that greater specialisation and training in family violence may facilitate this practice.[265]

13.163 The National Association of Services Against Sexual Violence similarly supported the use of representative charges to place a 'more realistic picture' of the offending before the court. It commented, in the context of intimate partner sexual assaults and child sexual abuse, that:

> Where there are many incidents, but sufficient evidence for only one or two to meet the threshold of 'beyond reasonable doubt', the other incidents just evaporate as if they never occurred.[266]

13.164 Conversely, the Local Court of NSW did not support the proposal that representative charges should be encouraged in the family violence context on three

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261 Department of Premier and Cabinet (Tas), *Submission FV 236,* 20 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Legal Aid NSW, *Submission FV 219,* 1 July 2010; M Payne, *Submission FV 193,* 28 June 2010; Women's Legal Services NSW, *Submission FV 182,* 25 June 2010; Confidential, *Submission FV 184,* 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146,* 24 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195,* 25 June 2010.

262 National Legal Aid, *Submission FV 232,* 15 July 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010.

263 National Legal Aid, *Submission FV 232,* 15 July 2010; Local Court of NSW, *Submission FV 101,* 4 June 2010, which cited the same reason as ground of opposition to the increased use of representative charges.

264 Law Society of New South Wales, *Submission FV 205,* 30 June 2010; Office of the Director of Public Prosecutions NSW, *Submission FV 158,* 25 June 2010.

265 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010.

266 National Association of Services Against Sexual Violence, *Submission FV 195,* 25 June 2010.

broad grounds.[267] First, it cited the unsettled issue of whether multiple offences admitted or proven as a course of conduct can be used to place each individual offence at a higher level of objective seriousness. The court noted that the question remains open in NSW following the division of opinion among members of the Court of Criminal Appeal in *Giles v Director of Public Prosecutions (NSW)*.[268]

13.165 Secondly, the court noted the practical necessity of maintaining the safeguards associated with the current use of representative charges—namely that a court must be satisfied that the conduct relied upon by the prosecution is:

- identified with a degree of precision; and
- either proved or admitted by the offender.

13.166 The court expressed concern that the proposal may compromise the first-mentioned safeguard, and thus undermine the entitlement of an accused person 'to be made aware with precision of the alleged facts giving rise to charges against him or her'.

13.167 Thirdly, the court expressed concern that the practice of representative charging may 'unintentionally have the effect of hindering or protracting the prosecution of family-violence related offences'. The court referred to practice notes directed towards ensuring that guilty pleas are entered at the first available opportunity, and that not guilty pleas proceed expeditiously to hearing. Directions include prescribed dates for the service of the main parts of the prosecution brief, the entry of a plea, the listing of hearing dates and the service of the remainder of the prosecution brief. The court stated that these procedures stemmed from an observation that

> the longer it takes to finalise a family-violence related charge, the more prone the matter becomes to a 'cooling off' of the victim's complaint, with the victim becoming reluctant or unwilling to maintain her or his original statement.

13.168 The court further expressed concern about:

> the impact that complicating the factual scenarios and charges underlying prosecutions for family violence offences through the use of representative charging might have upon the numbers of defendants prepared to plead guilty to a charge, the extent to which statements of facts are agreed between the prosecution and the defence, and/or the willingness of victims to make or continue to maintain a complaint.[269]

13.169 Some submissions suggested that courses of conduct should be recognised in the substantive elements of offences rather than in sentencing. The NSW ODPP commented that—given the problems arising from the admissibility of uncharged conduct—the best way of ensuring that a course of conduct is placed before the courts is by way of a course of conduct-based offence, such as the persistent sexual abuse of a child.[270] Women's Legal Service Queensland suggested that potential problems

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267 Local Court of NSW, *Submission FV 101,* 4 June 2010.
268 *Giles v Director of Public Prosecutions* [2009] NSWCCA.
269 Local Court of NSW, *Submission FV 101,* 4 June 2010.
270 Office of the Director of Public Prosecutions NSW, *Submission FV 158,* 25 June 2010.

associated with the use of uncharged conduct in sentencing are best addressed by way of substantive offences—including encouraging police to 'charge all charges', and recognising the dynamics of family violence in new, aggravated offences.[271]

13.170 Most stakeholders supported the express recognition of courses of conduct as a sentencing factor in sentencing legislation, without explanation or any comments as to the detail of such provisions.[272] However, two legal service providers expressed qualified support, to the extent that legislative provisions address only conduct which has been charged and proved or admitted by the offender.[273]

Aggravating and mitigating circumstances

13.171 In the Consultation Paper, the Commissions proposed that state and territory sentencing legislation should provide that the fact that an offence was committed in the context of a family relationship should not be treated as a non-mitigating factor in sentencing.[274]

13.172 The Commissions also asked stakeholders whether:

- the commission of an offence in the context of a family relationship should be prescribed in state and territory sentencing legislation as an aggravating factor;
- if so, whether making a specific link between a family relationship and the escalation of violence would be an appropriate model; and
- which family relationships should be taken into account for the purposes of prescribing a family relationship as either a non-mitigating or an aggravating sentencing factor.[275]

A family relationship as an aggravating factor in sentencing

13.173 Several stakeholders supported the treatment of a family relationship between the offender and the victim as an aggravating factor in sentencing, however no consistent rationale was advanced for this position.[276] Some stakeholders suggested

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271 Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010.

272 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; J Stubbs, *Submission FV 186,* 25 June 2010; Women's Legal Services NSW, *Submission FV 182,* 25 June 2010; Queensland Law Society, *Submission FV 178,* 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146,* 24 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136,* 22 June 2010; N Ross, *Submission FV 129,* 21 June 2010.

273 National Legal Aid, *Submission FV 232,* 15 July 2010; Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010.

274 Consultation Paper, Proposal 7–2.

275 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Question 7–9. The issue of recognising categories of family relationships for the purposes of criminal laws is considered in Ch 14.

276 National Legal Aid, *Submission FV 232,* 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Legal Aid NSW, *Submission FV 219,* 1 July 2010; Confidential, *Submission FV 183,* 25 June 2010; Peninsula Community Legal Centre, *Submission*

that such an approach would ensure the recognition of the serious nature of family violence and, in doing so, perform an educative function.[277] Others suggested that it would recognise the exploitation of a relationship of trust between the offender and the victim.[278] Easteal supported an aggravated sentencing factor in the form of repeated sexual assaults committed in the family violence context. While expressing reservations about 'gradating' violence, Easteal supported a linkage between a family relationship and the escalation of violence over time as a basis for aggravation.[279]

13.174 The Aboriginal Family Violence Prevention and Legal Service Victoria (AFVPLS) favoured the use of a non-mitigating sentencing factor and an aggravated offence, but suggested that an aggravating factor in sentencing would be appropriate in cases where there is no charge or conviction on an aggravated offence.[280]

13.175 Other stakeholders opposed the designation of a family relationship as an aggravated sentencing factor for various reasons. The NSW ODPP considered the range of aggravating factors currently available under NSW sentencing legislation to be sufficient. It suggested that an additional requirement of a family relationship may duplicate existing sentencing factors, and would introduce the additional complexity of defining a family relationship.

13.176 Other submissions suggested that the mere existence of a family relationship should not constitute an aggravating factor.[281] Stubbs commented that this approach would involve weighing the seriousness of offences committed against family members with those committed against strangers exclusively on the basis of the relationship. Stubbs suggested that a preferable basis for aggravation would be a course of conduct or the escalation of violence.[282]

13.177 The Queensland Law Society supported the enactment of an aggravated offence in the family violence context.[283] NAAJA emphasised the importance of judicial sentencing discretion based solely upon the objective seriousness of the particular case, rather than pre-defined circumstances of aggravation.[284]

FV 174, 25 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46,* 24 May 2010; P Easteal, *Submission FV 38,* 13 May 2010.

277 National Legal Aid, *Submission FV 232,* 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Legal Aid NSW, *Submission FV 219,* 1 July 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46,* 24 May 2010.

278 National Legal Aid, *Submission FV 232,* 15 July 2010; Peninsula Community Legal Centre, *Submission FV 174,* 25 June 2010.

279 P Easteal, *Submission FV 38,* 13 May 2010.

280 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010.

281 J Stubbs, *Submission FV 186,* 25 June 2010; Office of the Director of Public Prosecutions NSW, *Submission FV 158,* 25 June 2010.

282 J Stubbs, *Submission FV 186,* 25 June 2010.

283 Queensland Law Society, *Submission FV 178,* 25 June 2010.

284 Law Society of New South Wales, *Submission FV 205,* 30 June 2010; North Australian Aboriginal Justice Agency, *Submission FV 194,* 25 June 2010.

A family relationship as a non-mitigating factor in sentencing.

13.178 Almost all submissions supporting the existence of a family relationship as an aggravating sentencing factor also supported its designation as a non-mitigating factor, without commenting expressly on issues of interaction between the two approaches.[285] Several other stakeholders supported a non-mitigating factor only.[286] In a joint submission, Domestic Violence Victoria and others supported the use of a non-mitigating sentencing factor in conjunction with an aggravated offence that is based upon a relationship of coercion and control between the offender and the victim.[287]

13.179 Notwithstanding this division of views on the appropriate interactions between reform options, two broad themes emerged from those submissions supporting the recognition of family relationships as a non-mitigating factor in sentencing: that the mere existence of a family relationship should not, of itself, diminish the seriousness of an offence;[288] and the concern that the severity of family-violence related offences—in particular sexual assaults—may be minimised if left entirely to judicial discretion.[289] Several other submissions supporting this proposal did so without explanation.[290]

13.180 Two stakeholders opposed the proposal on the basis that it may have unintended consequences for victims of family violence who are charged with offences—for example, social security fraud committed under duress, or offences against the person committed in the course of defending themselves against family violence.[291]

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285 National Legal Aid, *Submission FV 232,* 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Legal Aid NSW, *Submission FV 219,* 1 July 2010; Confidential, *Submission FV 183,* 25 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46,* 24 May 2010; P Easteal, *Submission FV 38,* 13 May 2010.

286 National Association of Services Against Sexual Violence, *Submission FV 195,* 25 June 2010; Confidential, *Submission FV 184,* 25 June 2010; Women's Legal Services NSW, *Submission FV 182,* 25 June 2010; Queensland Law Society, *Submission FV 178,* 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010; Confidential, *Submission FV 171,* 25 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136,* 22 June 2010; N Ross, *Submission FV 129,* 21 June 2010.

287 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146,* 24 June 2010.

288 Legal Aid NSW, *Submission FV 219,* 1 July 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46,* 24 May 2010.

289 P Easteal, *Submission FV 38,* 13 May 2010. See also Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010, which commented on the use of judicial discretion in relation to aggravating factors in sentencing. AVPLS stated that, in its experience in Victoria, the recognition of family violence as an aggravating factor depends largely on the sensibilities of individual judicial officers.

290 National Legal Aid, *Submission FV 232,* 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Confidential, *Submission FV 184,* 25 June 2010; Confidential, *Submission FV 183,* 25 June 2010; Women's Legal Services NSW, *Submission FV 182,* 25 June 2010; Queensland Law Society, *Submission FV 178,* 25 June 2010; Confidential, *Submission FV 171,* 25 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136,* 22 June 2010; N Ross, *Submission FV 129,* 21 June 2010.

291 J Stubbs, *Submission FV 186,* 25 June 2010; Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010.

Sentencing guidance

13.181 In the Consultation Paper, the Commissions proposed that the Australian Government—in conjunction with state and territory governments, the National Judicial College of Australia, the Judicial Commission of NSW and the Judicial College of Victoria—develop and maintain the currency of a national model bench book on family violence, incorporating a section on sentencing family-violence related offences.[292] This proposal received widespread support from stakeholders.[293] Some submissions commented on the importance of community consultation—in particular with Indigenous Australians—in the development of this resource.[294] Several submissions suggested that the Canadian resource, *Violence and Family Law in Canada: a Handbook for Judges*,[295] would provide an instructive model for the development of similar tools in an Australian context.[296] Others supported the production of a model bench book as part of a national professional development program for judicial officers on family violence.[297]

13.182 Few stakeholders commented specifically on the appropriate body or bodies to develop and maintain the currency of a bench book—or whether it should be a 'model' resource for individual jurisdictions to adapt for their own use, or a single, national product to complement existing jurisdiction-specific resources. The Magistrates' Court and the Children's Court of Victoria expressed the view that:

> We do not see this as a 'model' bench book, but rather a joint state/Commonwealth bench book addressing family violence, sexual assault and family law in all states and

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292 Consultation Paper, Proposal 7–3.

293 Department of Premier and Cabinet (Tas), *Submission FV 236,* 20 July 2010; National Legal Aid, *Submission FV 232,* 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; J Stubbs, *Submission FV 186,* 25 June 2010; Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Women's Legal Services NSW, *Submission FV 182,* 25 June 2010; Queensland Law Society, *Submission FV 178,* 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174,* 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010; Confidential, *Submission FV 171,* 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146,* 24 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136,* 22 June 2010; N Ross, *Submission FV 129,* 21 June 2010; Victorian Government, *Submission FV 120,* 15 June 2010; Commissioner for Victims' Rights (South Australia), *Submission FV 111,* 9 June 2010; P Easteal, *Submission FV 38,* 13 May 2010.

294 Confidential, *Submission FV 184,* 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010.

295 The Canadian bench book is considered in further detail in Ch 31.

296 National Legal Aid, *Submission FV 232,* 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146,* 24 June 2010; Victorian Government, *Submission FV 120,* 15 June 2010.

297 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Victorian Government, *Submission FV 120,* 15 June 2010. A model bench book and a national professional development program were recommendations of the National Council. See 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).

> the Commonwealth. The bench book would require government funding but should be developed by a judicial college or commission.[298]

13.183 While supporting a bench book, Stubbs commented that the pursuit of a national approach may be time-consuming and should not preclude the updating of existing resources in individual jurisdictions.[299]

Summary of the key themes arising from submissions and consultations

13.184 The key theme emerging from submissions and consultations is that—while there is a broad consensus among stakeholders that there is scope to improve the recognition of the features and dynamics of family violence in sentencing—there is significant division about the appropriate form that such recognition should take. In particular, there is division about:

- whether there is a need to reform either substantive sentencing laws,[300] practices[301] or both; and
- the nature of any potential reforms—in particular, the content of any prosecutorial guidelines or training about the appropriate use of representative charges in the family violence context, and the substance of any statutory sentencing factors.[302]

13.185 In addition, the fact that many stakeholders supported a combination of options, without commenting on the relationship between them, requires further consideration of the issues of interaction considered below.

Interactions between sentencing reform options

13.186 Several submissions supported, without explanation, the recognition of a family relationship between the offender and victim as both an aggravating and non-mitigating factor in sentencing.[303] This raises questions about the legal possibility—and practical desirability—of such an approach.

Interactions between sentencing reform options and those on offences

13.187 Some submissions supported both the creation of aggravated offences committed in the context of family violence, and aggravating factors in sentencing

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298 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010.

299 J Stubbs, *Submission FV 186,* 25 June 2010.

300 For example, statutory sentencing factors.

301 For example, the use of representative charges, and measures directed towards the application of existing sentencing laws and principles such as sentencing guidance.

302 That is, whether a family relationship between the offender and victim—or some other circumstance—should constitute an aggravating or non-mitigating sentencing factor; and whether sentencing legislation should expressly recognise courses of conduct as a sentencing factor, and if so how—for example, how uncharged or non-criminal acts of family violence should be treated.

303 See, eg: National Legal Aid, *Submission FV 232,* 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Legal Aid NSW, *Submission FV 219,* 1 July 2010; Confidential, *Submission FV 183,* 25 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46,* 24 May 2010; P Easteal, *Submission FV 38,* 13 May 2010.

basic offences—based upon the same circumstances of aggravation.[304] Another stakeholder suggested that courses of conduct should be recognised in substantive offences rather than in sentencing.[305] This raises questions of procedural fairness in sentencing, and policy questions about the appropriate means of recognising courses of conduct in the criminal law.

Interactions between sentencing reform options, existing sentencing laws and principles, and existing offences

13.188 Given the divergent approaches taken in state and territory sentencing legislation to both sentencing factors and aggravated offences, any uniform sentencing reforms will inevitably raise jurisdiction-specific issues. For example, as one submission suggested, the recognition of new family-violence related sentencing factors may duplicate, or create inconsistencies with, existing sentencing factors in some jurisdictions.[306]

13.189 Similarly, in those jurisdictions with aggravated offences relevant to the family violence context, the imposition of new sentencing factors may duplicate the elements of aggravated offences.

Commissions' views

Recognising courses of conduct in sentencing

Representative charges

13.190 In the Consultation Paper, the Commissions proposed that—to the maximum extent possible in criminal matters involving a course of family-violence related conduct—police and prosecutors should be encouraged to pursue the option of using representative charges as a way of presenting a course of conduct to the court.

13.191 Two issues emerge from this proposal. First, the reference to the use of representative charges to the 'maximum extent possible' raises the policy question of the circumstances in which it is appropriate to use representative charges in the prosecution of family-violence related offences. The second issue is the implementation of any such policy position by way of prosecutorial guidelines, education and training.

13.192 The Commissions do not make any recommendations in respect of the policy underlying the use of representative charges in the prosecution of family-violence related offences. Representative charging is properly a matter for prosecutorial discretion in individual cases, based upon an assessment of the evidence and the public interest. The Commissions agree that the matters of concern identified by stakeholders—including the efficient conduct of trials and the maintenance of procedural fairness towards accused persons—are relevant to the exercise of prosecutorial discretion. Any presumptive policy position favouring the use or non-use

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304 See, eg, Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Confidential, *Submission FV 183,* 25 June 2010; Confidential, *Submission FV 164,* 25 June 2010.

305 Office of the Director of Public Prosecutions NSW, *Submission FV 158,* 25 June 2010.

306 Ibid.

of representative charges in the family violence context would undermine such discretion, and may produce outcomes that are contrary to the public interest. Similarly, the Commissions consider that decisions to pursue alternatives to representative charges—such as 'charging all charges' or relying upon course of conduct-based offences where available—must be made on a case-by-case basis.

13.193 The Commissions' reference to the use of representative charges 'to the maximum extent possible' is directed towards encouraging the routine consideration of representative charges in the prosecution of family-violence related offences *within* the existing decision-making framework, to ensure that they are used wherever appropriate. Prosecutorial guidelines, education and training on the use of representative charges in the family violence context are an appropriate means of developing expertise and promoting consistency in prosecutorial decision-making in this context. The Commissions acknowledge that charge negotiations and negotiations relating to statements of agreed facts are integral to the use of representative charges. These are appropriately the subject of prosecutorial guidelines, education and training in the family violence context. Recommendation 13–2 below reflects these matters. Similarly, the Commissions acknowledge the importance of professional education and training for criminal defence lawyers in conducting charge negotiations and negotiations as to agreed statements of facts in the family violence context.[307]

13.194 The Commissions do not make any recommendations as to whether an admitted or proven course of conduct should be taken into account to place the individual offences charged in a higher range of objective seriousness. While such an approach may be beneficial in enabling sentencing courts to consider family-violence related offending in its full context, the Commissions acknowledge that such an approach will have ramifications beyond the parameters of family violence.

Statutory sentencing factors.

13.195 The Commissions do not make any recommendations about the statutory recognition of a course of conduct as a sentencing factor. While acknowledging the substantial support from stakeholders for this measure, the Commissions consider that it would be premature for two reasons. First, it would be necessary to address the uncertainty identified in ALRC Report 103 about the application of such a provision to uncharged conduct. Secondly, as the provision would be one of general application, it would be necessary to consider its operation beyond the family violence context.

A family relationship as an aggravating or non-mitigating sentencing factor

13.196 The Commissions maintain their views expressed in the Consultation Paper that the existence of a family relationship between an offender and a victim should be prescribed as a non-mitigating factor in sentencing, rather than an aggravating factor.

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307 Issues of training and education are considered in Ch 31. Further issues of relevance to the prosecution of family-violence related offences are considered in Ch 32 on specialisation.

A family relationship should not be an aggravating factor in sentencing

13.197 The Commissions recommend that a family relationship between the offender and the victim should not be prescribed as an aggravating sentencing factor per se for three reasons. First, while acknowledging the potential educative and denunciatory function of an aggravating sentencing factor, the Commissions have reservations about introducing a legislative requirement that would remove judicial sentencing discretion. Consistent with the Commissions' position on aggravated offences, the universal treatment of a family relationship as an aggravating factor could mandate higher penalties in circumstances where they are not just and appropriate—for example, in the sentencing of child offenders or persons with a mental illness.

13.198 Secondly, the Commissions agree that the designation of a family relationship as an aggravating factor in sentencing is too blunt an instrument to recognise the nature and dynamics of family violence. Such a provision would capture criminal conduct committed outside the family violence context—that is, where the relevant behaviour does not involve elements of coercion or control. Such an approach would also elevate the gravity of violence committed against a family member solely on the basis of the relationship. The Commissions consider that such an approach would undesirably require a value judgment about the relative severity of offences committed against family members, as opposed to those committed against strangers, notwithstanding that the relevant conduct may be identical.

13.199 Thirdly, the Commissions agree that the prescription of a family relationship as an aggravated sentencing factor may involve the duplication of existing sentencing factors—for example, the commission of an offence in the home of another person, in the presence of a child or in the abuse of a relationship of trust or authority. The Commissions agree that such factors already 'address the evil of the offending in the sense that the perpetrator is someone known and trusted and the victim is not safe within their home'.[308]

A family relationship as a non-mitigating factor in sentencing

13.200 The Commissions consider that it would be appropriate for sentencing legislation to provide expressly that the commission of an offence in the context of a family or domestic relationship should not be treated as a mitigating factor. The Commissions agree that the mere existence of a family relationship should not, of itself, diminish the seriousness of an offence. To treat such factors as mitigating would undesirably appear to trivialise family violence.

13.201 The Commissions acknowledge concerns expressed by stakeholders that this approach may preclude the recognition of a family relationship as a mitigating factor in some circumstances in which mitigation may be appropriate. This could include, for example, family violence victims who commit crimes under duress or in the course of self-defence. However, the Commissions consider that the existence of a family relationship is not the relevant mitigating factor in such cases, but rather the

308 Office of the Director of Public Prosecutions NSW, *Submission FV 158,* 25 June 2010.

circumstances of duress or self defence. The recognition of a family relationship as a non-mitigating factor would not displace existing sentencing discretion. In addition, the commission of an offence under duress or in self-defence would ordinarily form the basis of a defence, and may inform prosecutorial decisions not to lay charges or prosecute such offences.

13.202 Accordingly, the Commissions endorse the ALRC's view in ALRC Report 103 that sentencing legislation should not distinguish between aggravating and mitigating factors, but rather prescribe factors that should not be treated as either aggravating or mitigating.

13.203 However, the Commissions acknowledge that such an approach is contrary to the approaches taken in some state and territory sentencing legislation. If jurisdictions continue the practice of prescribing aggravating and mitigating sentencing factors, the Commissions consider that such factors must target the dynamics of family violence with greater precision than the mere existence of a family relationship. These factors may include, for example, the abuse of a relationship of trust or authority between the offender or the victim, the commission of an offence in a person's home, or the commission of an offence as part of a course of conduct—provided that the application or otherwise of such a provision to uncharged conduct is made clear.

13.204 The Commissions do not make any formal recommendations about specific aggravating factors that may apply in the family violence context, should jurisdictions continue the practice of expressly designating aggravating and mitigating factors. In part, this is because it would be necessary to consider the potential application of such factors beyond the family violence context. In addition, a uniform or nationally consistent approach would be a complex exercise requiring significantly further consideration, given the divergent approaches taken by individual jurisdictions to aggravating sentencing factors and aggravated offences.

13.205 In particular, consideration of a uniform or consistent approach would require a review of the aggravated offences and sentencing factors in individual jurisdictions, in order to identify and avoid potential duplication. This would be necessary to:

- prevent 'double counting' where a particular circumstance constitutes both an element of an aggravated offence and an aggravated sentencing factor;
- avoid infringing the *De Simoni* principle, which would operate to prevent a sentencing court from taking into account aggravating sentencing factors that also comprise the elements of a more serious offence; and
- ensure that any new aggravating sentencing factors do not duplicate or contradict existing provisions.

13.206 Given the jurisdiction-specific nature of these reviews, the Commissions consider that they are matters for further consideration by state and territory governments, under the auspices of a national coordinating body such as SCAG.

13.207 The Commissions consider, however, that if jurisdictions continue the practice of designating certain sentencing factors as aggravating, it would be preferable for such factors to be capable of applying equally to family and non-familial violence, for example, the commission of an offence in abuse of a relationship of trust or authority.

The relationship between aggravating and non-mitigating sentencing factors

13.208 The Commissions note that several submissions favoured the recognition of a family relationship between the offender and victim as both an aggravating and non-mitigating sentencing factor. However, the Commissions consider that it is not possible to mandate the same circumstance as both aggravating and non-mitigating. The designation of an aggravating factor would operate to increase an offender's culpability and justify a higher maximum penalty in all cases. The same factor cannot simultaneously be treated as a basis for neither increasing nor decreasing culpability. However, it may be possible for a family relationship to be recognised as a non-mitigating factor and another family-violence related circumstance, for example, abuse of trust, to be considered an aggravating factor.

The relationship between sentencing factors and offences

13.209 Some stakeholders proposed various combinations of new sentencing factors and aggravated offences. As identified in the discussion of submissions and consultations above, these included:

- the creation of an aggravating sentencing factor and aggravated offences based upon the same circumstance of aggravation—namely, a family relationship—with the intention that the aggravating sentencing factor would operate only in those cases where there is no charge or conviction upon an aggravated offence;[309]
- the creation of a non-mitigating sentencing factor, and the creation of aggravated offences, both of which are based upon the same circumstance—namely a family relationship;[310] and
- the creation of aggravated offences based upon a relationship of coercion and control between the victim and the offender, and the designation of a family relationship as a non-mitigating sentencing factor.[311]

13.210 The Commissions emphasise the importance of recognising potential interaction issues arising from the *De Simoni* principle and the avoidance of double counting. In particular, the Commissions make the following observations on proposed combinations:

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309 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010.
310 Ibid.
311 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146,* 24 June 2010.

- the *De Simoni* principle would preclude the creation of an aggravated sentencing factor that operates in those cases where there is no charge or conviction upon an aggravated family-violence related offence that is based upon the same circumstance of aggravation. In such cases, the offender should be charged with the aggravated offence;[312]
- the *De Simoni* principle would, however, technically permit a non-mitigating sentencing factor also to form the basis of an aggravated offence,[313] however the Commissions question the utility of this approach. Where an offender is charged with an aggravated offence, the circumstance of aggravation self-evidently cannot be taken into account as a mitigating factor in sentencing. The Commissions reiterate their reservations about the prescription of a family relationship as a circumstance of aggravation in either offences or sentencing;
- it would be possible for an aggravated offence to operate in conjunction with an aggravating sentencing factor, where the respective circumstances of aggravation are purposively distinct;[314] and
- it would not be possible, however, for an aggravated offence to operate in conjunction with an aggravated sentencing factor where the circumstances of aggravation are identical, or purposively the same. This would result in the double counting of the circumstances of aggravation of the offence.

Sentencing guidance

13.211 The Commissions' view remains that a national bench book on family violence could play a significant and valuable role in guiding judicial officers in sentencing in family violence matters. Such a resource could draw attention to the particular features and dynamics of family violence of which judicial officers should be aware in sentencing. It would also consolidate the guidance contained in existing case law and research and present it in an accessible format. Such guidance would promote both national consistency and consistency within individual states and territories. This matter is the subject of Recommendation 13–1(b) below.

13.212 In particular, as noted in Chapter 12, there is merit in providing courts with guidance about particular issues arising in sentencing for breaches of protection orders. The Commissions consider there would be merit in providing courts with guidance about the particular repercussions on victims of imposing fines on offenders for family-violence related offences. The Commissions further consider that a national bench book could improve consistency in the identification and consideration of relevant sentencing factors in the family violence context.

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312 As proposed in Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010.

313 As proposed in Ibid.

314 As proposed in Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146,* 24 June 2010.

13.213 The Commissions agree with those stakeholders who emphasised the importance of a participatory and consultative approach to the development of a national bench book—including with Indigenous Australians. As discussed in Chapter 31, the Commissions acknowledge the importance of recognising the particular impacts of family violence upon persons identifying with specific cultural, linguistic and social groups.

13.214 The Commissions also concur that the judicious use of existing international resources would assist in identifying best practice and applying it in the Australian context. In this respect, the Canadian bench book, *Violence and Family Law in Canada: a Handbook for Judges,* may provide a useful starting point for the development of an Australian resource.[315]

13.215 The Commissions agree with the submission of the Magistrates' Court and the Children's Court of Victoria that there is merit in a single, national resource consolidating all relevant state, territory and Commonwealth laws.[316] This approach would promote consistency and the sharing of experience to a greater extent than would be possible using jurisdiction-specific resources. The Commissions acknowledge, however, that such an initiative may be time and resource intensive. The development of a national bench book should not preclude the ongoing updating of existing resources in individual jurisdictions. Rather, it should be an additional, complementary resource. The Commissions further consider that it would be desirable for existing state and territory judicial resources to cross-refer to the national bench book to promote awareness of this resource.

Recommendation 13–1 The national family violence bench book (see Rec 31–2) should include a section that:

(a) provides guidance about the potential relevance of family-violence related evidence to criminal offences and defences—for example, evidence of a pre-existing relationship between the parties, including evidence of previous violence; and

(b) addresses sentencing in family violence matters.

Recommendation 13–2 Federal, state and territory police, and Commonwealth, state and territory directors of public prosecution respectively, should ensure that police and prosecutors are encouraged by prosecutorial guidelines, and training and education programs, to use representative charges wherever appropriate in family-violence related criminal matters, where the charged conduct forms part of a course of conduct. Relevant prosecutorial guidelines, training and education programs should also address matters of charge negotiation and negotiation as to agreed statements of facts in the prosecution of family-violence related matters.

315 See also Ch 31.
316 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010.

Recommendation 13–3 State and territory sentencing legislation should provide that the fact that an offence was committed in the context of a family relationship should not be considered a mitigating factor in sentencing.