

# Women who kill in response to domestic violence:

**How do criminal justice systems respond?**



## **Women who kill in response to domestic violence: How do criminal justice systems respond?**

**A multi-jurisdictional study by Linklaters LLP for Penal Reform International**

### **EXECUTIVE SUMMARY**

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**This executive summary and accompanying table, 'Multi-jurisdictional summary responses', is intended to provide a high level summary only. For the more complete responses, please see the memoranda individually prepared for each jurisdiction at: [www.penalreform.org/resource/women-who-kill-in-response-to-domestic-violence/](http://www.penalreform.org/resource/women-who-kill-in-response-to-domestic-violence/).**

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We promote alternatives to prison which support the rehabilitation of offenders, and promote the right of detainees to fair and humane treatment. We campaign for the prevention of torture and the abolition of the death penalty, and we work to ensure just and appropriate responses to children and women who come into contact with the law.

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## **EXECUTIVE SUMMARY**

# Women who kill in response to domestic violence:

**How do criminal justice systems respond?**

**Report on Australia, Brazil, Hong Kong, India,  
Japan, Mexico, Poland, Spain and the United States**

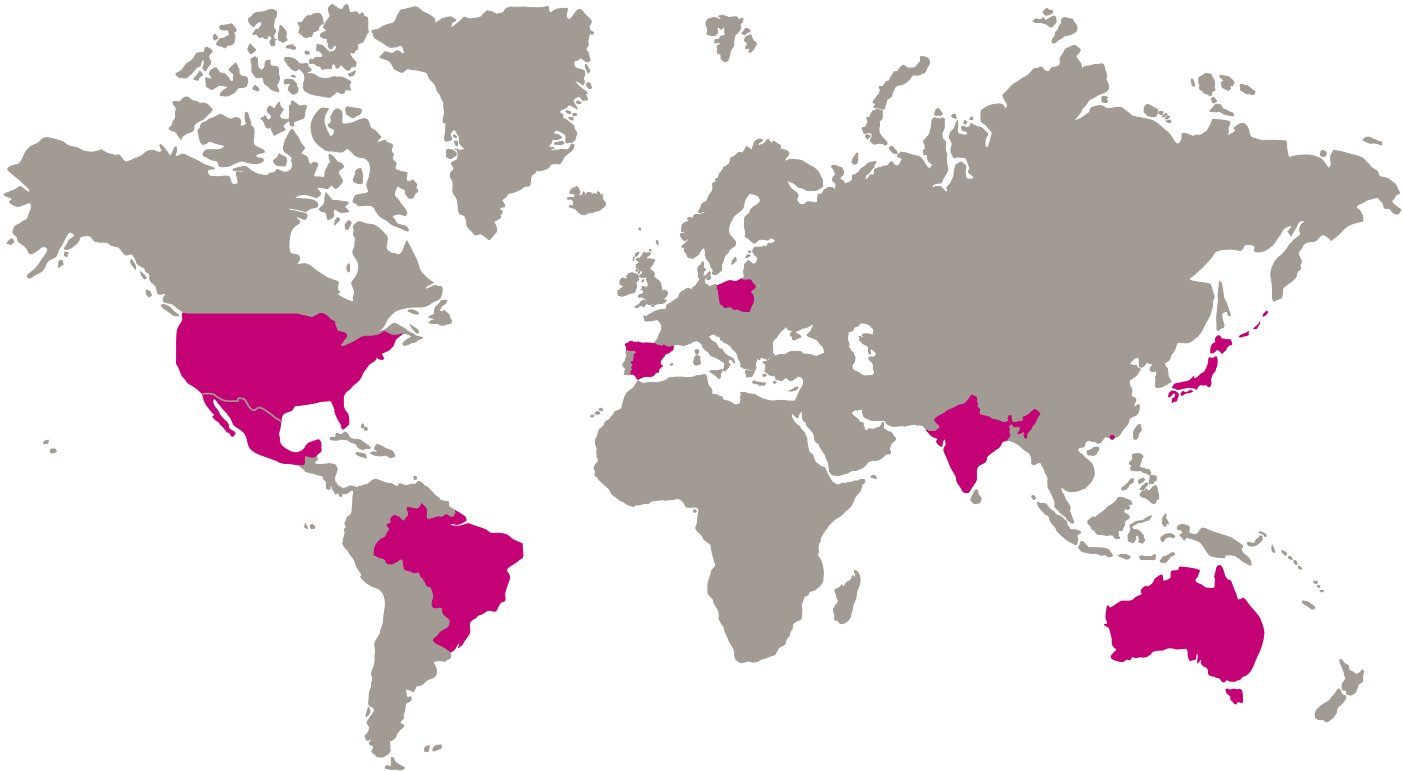
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# Jurisdictions surveyed

Australia, Brazil, Hong Kong, India, Japan, Mexico, Poland, Spain and the United States



# Executive summary

## Background

Where women are imprisoned for violent offences, there is often a background of domestic and/or sexual abuse, which, in many cases, motivates the crime.

Two psychological phenomena have been recognised in the context of violence against women: a) “battered woman syndrome”, describing the psychological mind-set and emotional state of female victims of abuse (developed by Dr. Lenore E. Walker), which explains why women often stay in abusive relationships; and b) the “slow burn reaction”, where women in a situation of abuse tend to not react instantly to the abuse, partly for psychological reasons but also because of the physical mismatch between the abuser and the victim, which makes an imminent response seem futile or even more dangerous to the victim. In 2012, two thirds of the victims of intimate partner/family-related homicide were female, and almost half of all female victims (47%) of homicide were killed by their intimate partner or a family member(s), compared to less than 6% of male homicide victims.

In countries where research is available in relation to women accused or convicted of offences against life (assault, manslaughter or murder), research demonstrates that their experience of domestic and sexual abuse plays a considerable role in the commission of the offence. In many cases, a woman’s experience of abuse directly motivated the crime. A UN report on Kyrgyzstan noted that 70% of women convicted of killing a husband or other family member had experienced a “longstanding pattern of physical abuse or forced economic dependence”. Similar statistics from countries as disparate as Jordan, South Africa, the United States and Argentina demonstrate that this a global phenomenon, extending across countries and regions, traversing culture and levels of development.

Rule 61 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (“the Bangkok Rules”) requires that courts have the power “to consider mitigating factors such as lack of criminal history and relative non-severity and nature of the criminal conduct, in the light of women’s caretaking responsibilities and typical backgrounds”, which includes the high proportion who have experienced violence.

This report surveys nine jurisdictions to consider how closely national law in each of those jurisdictions reflects the principles enshrined in the Bangkok Rules and, in particular, Rule 61. The jurisdictions covered have been deliberately chosen to cover a range of continents and cultures, namely: Australia, Brazil, Hong Kong, India, Japan, Mexico, Poland, Spain and the United States.

This Executive Summary summarises our findings on a global basis and highlights key trends as well as examples of what we consider to be best practice. Annex 1 shows the responses to the key questions asked of us, presented in table form. Annexes 2-10 provide more detail on each of the nine subject jurisdictions.\*

The research on which this work is based was carried out through 2015. While every effort has been made to ensure this report is an accurate reflection of the law in the jurisdictions covered, there may have been developments between research and publication which are not captured.

Linklaters would like to express its gratitude to all volunteers who have made this report possible. A full list of acknowledgements is contained at the end of this report.

## Overview of findings

While our research suggests there is a global awareness of the issues of battered woman syndrome and the slow burn reaction, legislative and judicial attitudes towards and the treatment of female offenders who commit violent crimes against their abusers vary widely. We have examined the relevance of a history of abuse both in assessing culpability and in sentencing, and further specific examples on each of these are set out below.

In the majority of the jurisdictions reviewed, there is no specific legislative basis for a history of abuse to be considered as a mitigating factor and therefore requests for more lenient treatment have been brought within the existing framework of the criminal law. Typically, offenders have sought to couch their pleas for more lenient treatment in terms of existing defences. Attempts by victims of abuse to rely on self-defence, temporary insanity and provocation (where available), have been met with varying degrees of success in different jurisdictions.

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\* To read the individually prepared memoranda for each jurisdiction, go to [www.penalreform.org/resource/women-who-kill-in-response-to-domestic-violence/](http://www.penalreform.org/resource/women-who-kill-in-response-to-domestic-violence/).

In many jurisdictions, existing defences have proved ill-adapted to the situation of a woman suffering from battered woman syndrome or the slow burn reaction.

In a small number of the jurisdictions considered, most notably in a number of Australian states, there have been legislative amendments to the criminal law to facilitate more lenient treatment of women who commit violent crimes against their abusers. These amendments take various forms, from introduction of new defences specifically available to victims of abuse (for example, in Queensland, Australia), to the amendment of existing defences so that they are better adapted to dealing with victims of abuse (for example, in Victoria, Australia).

While some legal systems have been willing to adapt the existing law or even create new law to deal with victims of abuse, other systems appear reticent to expand beyond the traditionally established parameters. Those legal systems that have adapted have been sympathetic to the view that a violent reaction may be the result of a prolonged period of abuse, rather than one single triggering event.

In practice, in all jurisdictions considered, defendants can present evidence of a history of abuse. However, only some jurisdictions' laws explicitly confer a right to adduce such evidence, and the extent to which it is taken into account as a mitigating factor differs dramatically across the jurisdictions. In some jurisdictions, significant precedent and case law has developed, showing that a history of abuse can be grounds for reducing the gravity of culpability and/or sentence of a female offender. For example, in US courts, defendants are able to refer to expert testimony to help juries to understand the behavioural pattern of abused women and how that abuse may affect the defendant's actions and conduct; in the Australian state of Queensland, a specific partial defence to a charge of murder has been introduced of "killing for preservation in the context of an abusive relationship".

However, even in jurisdictions in which helpful precedents exist, the absence of a specific legislative (or quasi-legislative) basis for dealing with a history of abuse in most jurisdictions raises a risk that evidence of abuse is considered or treated inconsistently between cases, particularly in legal systems which do not operate on the basis of the doctrine of precedent.

## Relevance of a history of abuse in establishing culpability

In almost all of the jurisdictions considered, a history of abuse is not a defence in its own right. As such, defendants generally use a history of abuse to establish one or more limbs of an existing defence (for example a history of abuse may lead a court and/or jury to conclude that the defendant's actions were reasonable when acting in self-defence).

Practice has developed in a number of the jurisdictions that we considered whereby courts (including higher courts) have recognised that defences such as self-defence or provocation should be available to female offenders with a history of abuse. There is no clear "preferred defence" which can be identified across all jurisdictions covered.

### For example:

- In **Australia**, the most commonly used defence in all states and territories is self-defence. However, the courts have broad discretion in defining the requirements for relying on self-defence successfully. In particular, some states and territories require an element of spontaneous reaction to an offence. The Australian state of Victoria has introduced legislation to allow for the introduction of "social framework evidence" that permits evidence of the nature and dynamics of domestic violence to be adduced.
- In the **United States**, self-defence appears to be the main defence that is relied upon by defendants – evidence of abuse may be a factor in determining the reasonableness of a defendant's actions or whether they honestly believed that they were in danger of death or injury. Certain courts and states are split on whether a history of abuse might also be relevant when establishing a defence of duress.
  - **New Jersey**, for example, was the only state (of those considered by this report) where the law explicitly regards a history of abuse as being relevant to substantiate a defence of duress (which is only a partial defence that might reduce a murder charge to a manslaughter charge).
  - **Texas State Law** also recognises abuse as being capable of substantiating other defences, such as the defence of "deadly force in defence of a person" (i.e. self-defence) or "deadly force in defence of a third person".
  - **Florida** is the only jurisdiction (of those considered by this report) that appears to codify battered woman syndrome as a separate head of defence to criminal charges, and which requires advance notice to the prosecution prior to trial.
  - **Illinois State Law** also considers whether a history of abuse would be a factor in deciding whether the defendant was guilty of voluntary manslaughter rather than murder.
  - There are also examples in **California State Law** of historic crimes being reassessed because evidence of intimate partner battering would have led to the defendant being guilty of a lesser offence.
- In **India** and **Hong Kong**, defendants most commonly attempt to rely on the defence of provocation, which is only a partial defence to murder in both jurisdictions, resulting in a reduction of the gravity of the offence to manslaughter. The courts in India have recognised a history of abuse (including "slow burn/sustained

provocation” incidents) as being relevant to, and on some occasions conclusive, regarding the availability of a provocation defence.

- In **Poland**, self-defence and insanity have been relied upon by female offenders who have suffered a history of abuse, but the practice is less well established. Where these defences are relied upon, a history of abuse may assist with establishing some of the conditions for these defences, for example, abuse as relevant background to show that self-defence was justified and proportionate. However, Polish law provides courts with significant discretion to reduce the culpability of a defendant, including a line of case law that exists whereby a history of abuse is relevant as to whether a defendant is liable for “privileged” murder, which has more lenient minimum and maximum sentences. Furthermore, Polish legislation allows courts to apply “extraordinary mitigation”, whereby the guilt or culpability of a defendant is treated as being mitigated by extenuating circumstances (which may include a history of abuse). Courts have relied on the concept of “extraordinary mitigation” where a history of abuse has been alleged and full and/or partial defences have not been available.

## Relevance of a history of abuse in sentencing

Sentencing procedure varies between the jurisdictions considered by this report. Some jurisdictions (namely Hong Kong, India, Japan and Spain) do not have official sentencing rules or guidelines, whereas Australia, Brazil, Mexico, Poland and the United States (both at a federal and state level) do. In general, criminal courts in the jurisdictions considered by this report have considerable flexibility in sentencing, irrespective of whether formal sentencing guidelines exist.

In those jurisdictions considered by this report, where formal sentencing guidelines do exist, there are no examples of sentencing guidelines that specifically refer to a past history of abuse as a factor to be considered in sentencing. However, the guidelines can be applied very broadly, meaning that a history of abuse can be (and, in some cases, has been) taken into consideration under more general principles set out in each of the various sentencing guidelines.

- In **Poland**, courts have used their wide discretion to consider “general” factors in sentencing to enable them to take into consideration a history of abuse. This has led to the imposition of reduced sentences or the suspension of sentences.
- In **Mexico**, the court can consider a wide range of factors when determining culpability (favourably for the defendant), including family relationships with the victim of the offence and any other relevant circumstances.
- In the **United States**, judges have wide discretion under both the Federal Sentencing Guidelines and under state law, thereby allowing a wide range of mitigating factors to be taken into account. In practice, this has allowed a past history of abuse to be used as a mitigating factor at sentencing in some cases.
  - Courts in **Illinois** may consider a history of domestic violence relevant to sentencing.
  - Courts in **New Jersey** have treated battered woman syndrome as a mitigating factor at sentencing, in spite of the fact that this is not specifically provided for by the New Jersey Penal Code.
  - In **California**, defendants can present mitigating evidence at all phases of a trial. Furthermore, parole assessments are allowed to be influenced by whether the defendant has suffered abuse from a partner. As such, offenders with a history of abuse may be eligible for early parole.
  - The penal code in **New York** explicitly permits derogation from mandatory minimum sentences if there is evidence of abuse (and if that abuse was a factor in the crime committed) and the defendant is a member of the family or the household of the victim. This allows courts the discretion to choose a sentence from a range of years and also allows a parole board to consider the release date in the future in the context of the abuse suffered by the defendant.
  - Courts in **Texas** have indicated that evidence (which, under Texan law, would include expert evidence) about battered woman syndrome is admissible to be considered as a mitigating circumstance at sentencing.
  - In **Florida**, judges have considerable discretion in sentencing, and guidelines even contemplate a total departure from permitted or recommended sentences if the circumstances reasonably justify mitigating (or aggravating) the sentence.
- In **Brazil**, the rules on sentencing can be applied widely, thereby allowing such factors as a history of abuse to be taken into consideration. In one case, a woman’s sentence was reduced on the grounds that her history of abuse meant that she committed her crime because of a “reason of relevant social or moral value”.
- In **Australia**, sentencing guidelines and policy do not expressly permit a past history of abuse to be considered. However, the courts across all states typically rely on the courts’ broad power to take into account all relevant factors in sentencing, taking relevant case law into consideration.
  - In **New South Wales**, criminal courts have broad statutory discretion to consider any factor that affects the relative seriousness of the offence.
  - In **Victoria**, a general principle applies whereby the court must take into account any aggravating or mitigating factor, including the offender’s background and past history, in order to assess culpability.



- In **Western Australia**, the mandatory life term for murder has now been repealed and non-custodial sentences have been imposed for manslaughter committed by victims of abuse.
- In **Queensland**, a history of abuse has successfully been used as a mitigating factor in sentencing for manslaughter, leading to a lesser sentence.
- Under sentencing legislation in **South Australia**, courts must consider the circumstances of the offence, the antecedents of the defendant, or any other relevant matter. The court also has a statutory power to set a non-parole period shorter than the mandatory period if “special reasons” exist.
- In **Tasmania**, judges have a broad discretion to consider mitigating factors for custodial offences and, although provocation has been repealed as a statutory defence, case law shows that it can still be considered in the context of sentencing. Further, the Tasmanian Sentencing Advisory Council has listed family violence as one of its current projects.
- Although life sentences are mandatory for murder convictions in the **Northern Territory**, the court may fix a shorter non-parole period than the statutory minimum of 20 years if there are exceptional circumstances to justify such a decision. One of the factors that the court must consider is whether the victim’s conduct substantially mitigated the conduct of the offender. In relation to other violent crimes, the court has a broad statutory power to consider all relevant circumstances.
- In the **Australian Capital Territory**, legislation gives the court discretion to take into account any relevant factor, including, among other things, the nature and circumstances of the offence, the physical or mental condition of the offender, the degree to which the offence was the result of provocation, duress or entrapment and the reasons for committing the offence.

In those jurisdictions considered by this report, where formal sentencing guidelines do not exist, it is still possible for a history of abuse to be considered in sentencing by virtue of legal provisions not set out in formal sentencing guidelines.

- In **Spain**, if circumstances exist that are “similar” to those which might allow a defence to be established, those circumstances can constitute a mitigating factor for the purposes of sentencing.
  - In **Japan**, a wide range of statutory penalties are available in relation to each criminal offence, thereby allowing judges and juries considerable flexibility in determining the sentence to be imposed in each case. This would therefore enable a past history of abuse to be considered in sentencing.
  - In **India**, the courts have recognised “sustained” provocation as a defence to murder. In those cases, such recognition has allowed for a reduced sentence to be imposed in the context of a past history of abuse.
- The weight which is given to a history of abuse (and, consequently, the extent to which the sentence will be reduced) varies between each of the jurisdictions considered by this report. Even within each of the jurisdictions, the extent to which the court will give weight to a history of abuse will often vary, depending on the facts of each case.
- In some cases, a specific statutory reduction in the sentence may be applicable if the past history of abuse is considered to be a mitigating factor under one of the broader sentencing principles available under the law of the jurisdiction.
- In **Brazil**, if the crime was committed because of “social or moral value or overwhelming emotion”, the sentencing guidelines allow for the sentence to be reduced by between one-sixth and one-third. As noted above, a past history of abuse has previously been taken into consideration to establish that the woman’s offence was indeed committed because of a relevant “social or moral value”.
  - In **Spain**, if a mitigating circumstance exists, the court will award a sentence in accordance with the lower half of the punishment scale applicable to the crime (unless one or two aggravating factors also exist).
  - In **Australia**, there is no legislation or guidance that expressly sets out the weight to be given to a past history of abuse. However, certain examples have been identified to demonstrate weight being given to a past history of abuse in sentencing.
    - In **New South Wales**, case law suggests that a past history of abuse, including battered woman syndrome, has in practice been considered in sentencing, thereby resulting in short, or indeed non-custodial, sentences.
    - In **Victoria**, although there is no express law or guidance as to the weight to be attached to any evidence of a past history of abuse, a report by the Victorian Law Reform Commission has recommended, among other things, further guidance from the Court of Appeal on sentencing principles in the context of domestic violence victims who commit violent crimes.
    - In **Western Australia**, where provocation has been established in the context of manslaughter, a non-custodial sentence has been handed down.
    - In **Queensland**, courts have acknowledged that victims of seriously abusive relationships who respond violently against their abusers are generally considered to deserve at the very least some mitigation of punishment to reflect reduced culpability.
    - The **Tasmanian** Court of Criminal Appeal has held that a sentencing judge should take any provocation into account when determining a sentence by giving such provocation “appropriate” weight.

## ANNEX 1:

# Multi-jurisdictional summary responses

The table below sets out a summary of the responses to specific questions in relation to the legal position of women who have been convicted of committing a violent crime against a male abuser.

Please note that these responses are intended to provide a high level summary only. For the more complete responses, please see the memoranda individually prepared for each jurisdiction at: [www.penalreform.org/resource/women-who-kill-in-response-to-domestic-violence/](http://www.penalreform.org/resource/women-who-kill-in-response-to-domestic-violence/).

## 1. Establishing the crime

### QUESTION 1

**Can a past history of abuse be pleaded as a full and/or partial defence if a woman is charged with a violent crime against her abuser (for example, can it be used to establish self-defence, provocation, temporary insanity or any other defence)?**

#### Australia

Yes, each state and territory has its own criminal law, but all states and territories allow a past history of abuse to be pleaded in defence.

There has been significant law reform across Australia in response to a perception that “traditional” defences to violent crimes tend to operate to the advantage of men and to the disadvantage of women suffering from battered woman syndrome and the slow burn response. A non-exhaustive list of examples is outlined below.

#### Queensland:

In 2010, Queensland introduced a partial defence to murder or killing for preservation in the context of an abusive relationship.

#### Self-defence:

Self defence has been used by many female offenders, but in several states reforms have been introduced to seek to make the defence more accessible to women who kill following a history of abuse.

*Continued overleaf...*

#### Brazil

No, the Brazilian Penal Code does not provide any full or partial defences based solely on a history of past abuse. However, a history of abuse may be relevant to establish other defences if the other requisite conditions for those defences are also met.

#### Violent emotion:

Mitigating circumstances arise in the case of a “crime committed under the influence of violent emotion (“violenta emoção”), caused by an unjust act of the victim”. As an “unjust act” is not defined, it is not clear how broadly this provision could be interpreted. Whilst this would provide some defence to a woman whose crime was triggered by an act committed by her abuser immediately preceding her crime, it is unclear whether this would suffice to give rise to a defence based on a past history of abuse alone.

*Continued overleaf...*

#### Hong Kong

There are no specific legislative or common law defences available to women charged with violent crimes such as attempted murder, manslaughter and wounding. More general defences, such as self-defence, are difficult to rely upon and have not been successful when established solely by a history of abuse.

#### Provocation and diminished responsibility:

A partial defence is available if (a) a person is provoked and (b) where a person suffers from diminished responsibility. These defences can reduce a charge of murder, which would lead to a mandatory life sentence if convicted, to that of manslaughter. In determining a sentence for the conviction of manslaughter, a judge can take into account mitigating circumstances such as a history of abuse.

*Continued overleaf...*

#### India

Past abuse can be pleaded in support of full or partial defences by a female offender.

#### Grave and sudden provocation:

An offence can be classified a culpable homicide not amounting to murder if there was provocation (including words and gestures in certain circumstances) from the deceased that was sufficiently “grave and sudden” to deprive the accused of her power of self-control. This is the defence usually pleaded by female offenders with a history of abuse, but it is not available if time lapsed between provocation and the criminal act.

*Continued overleaf...*

#### Japan

No, the Criminal Code does not provide for any defence based solely on a history of past abuse. A past history of abuse may however be taken into account in establishing an imminent threat where the defendant commits a crime in self-defence, or in establishing the defence of insanity.

#### Self-defence:

Self-defence provides a full defence only in the case of (a) the existence of “imminent and unlawful infringement”; and (b) “an act unavoidably performed to protect the rights” (i.e. the appropriateness of the defensive act). The requirement for a “present or imminent” threat usually means that this defence is not available for a past history of abuse.

*Continued overleaf...*

#### Mexico

Yes, if the defendant is deemed to have suffered a mental pathology. However, each of the 31 independent states has its own criminal code.

#### Permanent or transitory mental pathology:

A full defence is available if the defendant totally lacked the capacity to understand her criminal behaviour or to act accordingly, whereas limited capacity could be a mitigating factor. Although battered woman syndrome and a slow burn reaction are generally not considered mental pathologies in Mexico, a federal court held that a judge must order immediate psychological analysis if a woman accused of murder has suffered gender-based violence from her victim due to a family relationship, and therefore could rely on the defence or mitigating factor.

*Continued overleaf...*

#### Poland

No, but a history of abuse may be relevant to establishing an offence of “privileged” murder.

It is exceptional for the defences of self-defence, temporary insanity or partial insanity to be established by a history of abuse alone.

#### Privileged murder:

A lesser sentence applies if murder was committed under the influence of strong mental agitation justified by the circumstances, but it is not a defence *per se*.

#### Self-defence:

A full defence applies if the defendant’s actions were a justified and proportionate response to an immediate danger caused by an attack. This does not apply to slow burn reaction cases.

*Continued overleaf...*

#### Spain

Section 20 of the Spanish Criminal Code sets out three possible grounds for full exemption.

#### Temporary mental disorder:

A full defence is available if the accused’s actions were caused by a psychological disturbance arising from external events, which could include abuse.

#### Self-defence:

A full defence is available if the woman’s actions were an immediate reaction to a specific act of aggression by her abuser (i.e. not a reaction to a historical event(s)) and was done in self-defence or defence of another (for example, a child).

#### Insurmountable fear:

A full defence is available if the accused suffered fear resulting from a past or present situation capable of generating in her an emotional state of such intensity that her normal faculties are impaired, leading to a loss of will or ability to control herself.

*Continued overleaf...*

#### USA

Each state has its own criminal laws. A person charged in a federal court can be charged with a federal crime or a state law crime. In general, federal courts have held that a history of abuse may be relied on to support certain defences, such as self-defence. Federal courts are split on whether a history of abuse may be relied on to support a defence of duress; some courts approve of the use of battered woman syndrome to support a defence of duress, while others do not.

#### Texas:

A history of abuse is not expressly a defence, but a woman charged with murdering her abuser is permitted to offer evidence of “family violence” suffered at the hands of the deceased in connection with the justifications of: (a) self-defence; (b) deadly force in defence of person; and (c) defence of a third person.

*Continued overleaf...*

**QUESTION 1**  
*Continued***Australia**  
*Continued*

For example, in Victoria, 2014 legislative reforms introduced simpler tests for self-defence and new jury directions in respect of family violence.

**Diminished responsibility though an abnormality of mind:**

In the Northern Territory and the Australian Capital Territory, diminished responsibility is a partial defence to murder. This doctrine reduces the offence to manslaughter if the offender can establish that he/she was suffering from an abnormality of mind that substantially impaired his or her mental responsibility for the act or omission.

**Brazil**  
*Continued***Self-defence:**

A full defence is only available if the victim employed only the force necessary to repel the aggression, and if the crime was committed immediately following or during the course of an act of abuse by the abuser (against either the woman or a third party, such as her child). A past history of abuse alone would not suffice. It is therefore unlikely that self-defence would apply in battered woman syndrome or slow burn reaction cases.

**Hong Kong**  
*Continued*

The partial defence of diminished responsibility is available to women suffering from such abnormality of mind (which could stem from abuse) as a substantial impairment of their mental responsibility.

**Self-defence:**

A full defence is available but is more likely to succeed when the woman's actions were committed during a battering incident. Severe bodily harm inflicted on a woman, particularly one who was unable to defend herself from prior attacks, would support the defence of self-defence.

**Insanity:**

A full defence is available if the defendant proves that they were suffering from a defect of reason, stemming from a disease of mind, at the time of the offence. Battered woman syndrome is not recognised as a sufficient cause for the defence of temporary insanity.

**India**  
*Continued***Self-defence:**

Self-defence operates as an exemption only if: (a) there is reasonable apprehension of grievous hurt or death; (b) the act is proportional to the injury suffered; and (c) there is no time to seek recourse to the public authorities.

**Legal insanity:**

This defence is available if the accused was of unsound mind at the time of the offence and was therefore incapable of knowing the nature of the act.

**Sustained provocation:**

The lower courts have introduced a defence which applies if the accused has been subject to a series of acts spread over a period of time, the last of which is the "straw breaking the camel's back", albeit perhaps a "trifling" one. However, this has not yet been tested in the Supreme Court.

**Japan**  
*Continued***Insanity:**

A full defence is available if an abused woman suffered insanity or diminished capacity, although these provisions do not explicitly address a prior history of abuse.

**Mexico**  
*Continued***Self-defence:**

Although this is a defence under Mexican law, it does not usually apply in battered woman syndrome or slow burn reaction cases.

**Poland**  
*Continued***Temporary (full) insanity:**

A full defence is available if, at the time of the offence, the defendant is incapable of recognising the significance of her actions as a result of mental disease, mental disability or another mental disturbance, but history of abuse alone will not suffice.

**Spain**  
*Continued***Criminal liability may be aggravated if:**

(a) the crime was premeditated; (b) the accused used a disguise to commit the crime; (c) there was abuse of superiority; or (d) the accused took advantage of a place or time or abused a position of confidence.

"Kinship" is usually treated as an aggravating factor in crimes against persons and sexual freedom.

**USA**  
*Continued*

Texas courts have agreed that evidence of abuse and expert testimony about battered woman syndrome is relevant in cases where women kill their abusers, but in a number of cases involving abused women who killed their husbands, the women were not granted the defence.

**New York:**

A history of abuse is not expressly a defence to a criminal act, but evidence of battered woman syndrome has been held to be relevant in the context of certain defences, including self-defence and duress.

**New Jersey:**

A history of abuse is not expressly a defence to a criminal act. However, evidence of domestic abuse or battered woman syndrome is relevant in the context of certain defences, including self-defence and duress, and to assist juries in related credibility determinations by explaining why an abused woman would continue to live with an abuser.

**California:**

A history of abuse is not expressly a defence to a criminal act. However, evidence of domestic abuse or "intimate partner battering" is relevant in the context of a claim to self-defence (which can provide a full defence to murder or result in a conviction of voluntary manslaughter).

## QUESTION 2

**Are there any examples in case law in which a woman charged with a violent crime against a male family member pleaded one of the defences identified above?**

**Australia**

Yes, significant case law has developed under which victims of abuse have used traditional defences and in many states and territories legislative reform has either developed new defences or reformed the requirements of existing defences to make them more readily available to victims of abuse.

**Brazil**

Yes, in one case a woman successfully argued self-defence immediately after being assaulted by her husband with whom she had endured an abusive relationship. Another woman unsuccessfully argued self-defence and was convicted as it was held that she had not repelled imminent aggression because the incident between her and her abusive husband had ceased.

**Hong Kong**

Yes, in the case of provocation and diminished responsibility. A number of cases discussed minor incidents that the court agreed were, in combination with a history of abuse, capable of provoking the defendants. No other cases were found where any of the other defences were successfully applied.

**India**

Yes. A Supreme Court case set the parameters to determine "grave and sudden" provocation, which have been followed in the High Court since. The "sustained" provocation defence was introduced by the lower courts; in one case it was successfully used to set aside the murder charge and reduce the sentence, and in another case it was used to successfully apply for anticipatory bail.

**Japan**

Yes. One case studied a woman who had a history of abuse but committed the crime at the point at which her common-law husband had ceased to beat her. The court still recognised that an "imminent and unlawful infringement" existed, but ruled her attack was not "unavoidably performed", and so concluded that her act was excessive self-defence. Another case detailed a defendant whose history of abuse was credited as the reason for her state of diminished mental capacity.

**Mexico**

There is no public access to cases or any database that allows access to cases that provide a precedent on this subject, nor to any similar case from which to draw analogies.

**Poland**

Yes. In one case, a woman unsuccessfully argued self-defence; her actions were not held to be proportionate because, although her husband had threatened her, he had not physically made an attempt on her life. However, self-defence was successfully argued (in a different case) where the woman killed her husband with the knife he was using to attack her.

**Spain**

Yes. However, Spanish courts very rarely find grounds for exemption from liability. In the cases reviewed, the accused women failed to successfully establish any of the defences despite their history of abuse or experience of very recent violence by the male family member.

**USA**

Yes. Collectively, there is extensive case law from both state courts and federal courts in which the above defences have been brought.

## QUESTION 3

**Does national law otherwise explicitly mention prior (domestic / sexual) violence as a mitigating factor relevant to guilt or innocence in case of a violent offence against an abuser?**

**Australia**

In most Australian jurisdictions, Criminal Code legislation has been reformed to better deal with women accused of violent crimes who have suffered a history of abuse at the hands of the victim, but the legislation is framed in general terms. However, Queensland law does include explicit references to a history of domestic violence in a specially developed defence to murder of killing for preservation in the context of an abusive relationship. One of the elements of this defence is that "the deceased has committed 'serious acts of domestic violence' against the accused in the course of an 'abusive domestic relationship'".

**Brazil**

No. The Brazilian Penal Code does not explicitly mention prior domestic or sexual violence alone as a mitigating factor relevant to guilt or innocence in cases of a violent offence against an abuser.

**Hong Kong**

Other than the partial defences of provocation and diminished responsibility, Hong Kong law does not mention a history of abuse as a mitigating factor relevant to the guilt or innocence in a case of a person charged with a violent offence against her abuser.

**India**

A past history of abuse does not have a correlating defence but the "sudden and grave" provocation defence, a "sustained" provocation defence or general defence for persons of unsound mind may apply in such cases.

**Japan**

No. The Japanese Criminal Code does not contain any provisions which explicitly mention prior (domestic or sexual) violence as a mitigating factor relevant to guilt or innocence in case of a violent offence against an abuser.

**Mexico**

Neither local nor federal criminal codes in Mexico mention a history of past abuse as a mitigating factor. However, depending on the jurisdiction (municipal, state or federal), a history of abuse may be used as a partial defence and may be considered to be a mitigating factor.

**Poland**

No, but the history of abuse may affect the overall assessment of the level of a defendant's guilt or culpability, which could result in a lesser penalty (within the thresholds set for a particular offence by law).

**Spain**

Spanish national law makes no further mention of prior domestic or sexual violence as a mitigating factor relevant to guilt or innocence in cases of a violent offence against an abuser.

**USA**

On a national level, the law does not explicitly mention prior domestic or sexual violence as a mitigating factor relevant to guilt or innocence. However, it is a defendant's constitutional right to present evidence that is exculpatory, which includes the right to offer evidence of prior domestic and/or sexual violence. This may be relevant in the context of certain justifications, but it is not a defence in its own right. However, the Florida Rules of Criminal Procedure codifies battered spouse syndrome as a defence to criminal charges.

## QUESTION 4

**If national law does not explicitly mention a history of abuse as a mitigating factor, are there any cases where a history of abuse has been taken into consideration in practice?**

**Australia**

Most Australian states and territories have brought in legislative reforms to better tailor the criminal law to dealing with cases of violent crime(s) – in particular murder – following a history of family violence. While there is common law precedent under existing defences, in practice these new laws which are “for purpose” now tend to be the most frequently used defences by women who have committed crimes against their abusers.

**Brazil**

Yes, although there are no such cases available that have been used by a Jury Court, there are some cases available (reported in the media rather than having been issued by the Jury Court) that demonstrate a history of abuse having been taken into account. Brazil does not, however, have the doctrine of precedent.

**Hong Kong**

No, the only cases where a history of abuse is taken into consideration are those where the defence of provocation is applied.

**India**

There is no specific mitigating factor in the Indian Penal Code, but latitude is given to the judge for sentencing purposes. Anecdotal evidence shows that history of abuse is considered on a case-by-case basis, but is subject to the discretion of the judge.

**Japan**

Yes, although history of abuse alone is not sufficient. Generally, Japanese courts do not take a history of abuse into account unless the facts and circumstances constitute other defences. In such cases, women who committed violent crimes against their long-term abusers were given statutory reduced sentences or were exculpated because their guilt was assessed to be limited by a history of abuse.

**Mexico**

There is no public access to cases or any database that allows access to cases that provide a precedent on this subject, nor to any similar case from which to draw analogies.

**Poland**

Yes, there are several cases where the defendant was given a lesser sentence because her guilt was assessed to be limited by a history of past abuse. There are also cases where a history of abuse was taken into consideration by the courts when applying “extraordinary mitigation of punishment”, which may result in a lesser penalty, or (in the case of less serious offences or attempted murder) no penalty at all.

**Spain**

Yes, however, in the particular case reviewed, it was held that the mitigating factor “similar” to “passionate state” was negated by the aggravating circumstance of kinship because the victim was the accused’s spouse.

**USA**

Yes, collectively, there is extensive case law from both state courts and federal courts in which the above defences have been brought.

## 2. Sentencing

## QUESTION 5

**Do sentencing guidelines allow a past history of abuse to be considered if a woman is convicted of a violent crime against her abuser?**

**Australia**

Across the Australian jurisdictions, while there have been some significant reforms in the laws governing defences to homicide (and other violent crimes), sentencing guidelines and policy in most jurisdictions have not been amended to expressly permit a past history of abuse to be considered.

**Brazil**

Yes, although the Brazilian Penal Code does not specifically mention a history of abuse as a mitigating factor, the courts rely on the rules on sentencing contained in the Code, which can be applied more widely. A penalty can be reduced due to any “relevant circumstances” that occurred before or after the crime. The Brazilian Penal Code does not specify what constitutes “relevant circumstances”, so it is unclear whether a history of abuse alone would suffice.

*Continued overleaf...*

**Hong Kong**

There is little legislation or regulation relating to sentencing. The courts have designated “tariff cases” for guidance in sentencing certain types of crime. Murder is subject to a mandatory life sentence, whilst there are certain crimes for example, attempted murder, manslaughter and wounding, where the circumstances are so variable that there are no tariff cases to provide guidelines on sentencing.

**India**

India does not have formal sentencing guidelines but some cases have recognised “sustained” provocation as a defence to murder, thereby reducing the sentence.

**Japan**

There are no official sentencing rules or guidelines in Japan. A range of statutory penalties are stipulated for each criminal charge, meaning that judges and juries are able to determine the sentencing for each case. In such cases, a past history of abuse can be taken into account for the purpose of sentencing.

**Mexico**

The National Criminal Procedure Code provides that the court should consider the degree of culpability, taking into account factors such as the characteristics of the criminal conduct, the motivation for the conduct, and the defendant’s age, social and cultural conditions, family relationships with the victim and any other relevant circumstances for the individualisation of the sentence.

**Poland**

Yes, although sentencing laws do not explicitly mention history of abuse as a factor to be considered in sentencing, courts have a wide discretion to consider certain general factors, such as the reasons for the crime. On this basis, courts have imposed lower sentences based on a history of abuse. Courts also have the power to suspend a sentence in certain circumstances; a history of abuse has been found to be relevant in this context.

**Spain**

Spain does not use sentencing guidelines and case law does not provide for any special sentencing criteria for women convicted of a violent crime(s) against their abuser. However, under Section 21 of the Spanish Criminal Code, if (a) the defences above cannot be fully established but exist in part; or (b) situations exist which are “similar” to those established under Section 21, the circumstances may constitute mitigating factors which can be reflected in sentencing.

**USA**

In most states considered, a history of abuse was not explicitly provided for in sentencing guidelines. However, a defendant has the right, under the federal constitution and Californian law, to present mitigating evidence at all phases of the trial.

In addition, different states have additional specific provisions. For example, in California, the Board of Parole Hearings is authorised to recommend a commutation of sentence or a pardon if there is evidence of intimate partner battering and its effects, if the criminal behaviour was the result of that victimisation.

In New York, a history of domestic abuse can lead to the relaxation of mandatory sentencing guidelines.

**QUESTION 5**  
*Continued***Australia****Brazil**  
*Continued***Hong Kong****India****Japan****Mexico****Poland****Spain****USA****Social or moral value or overwhelming emotion:**

There is no specific definition of what might constitute a “reason of relevant social or moral value”, so this is determined on a case-by-case basis. Although the reaction must follow provocation, the provocation does not need to be immediately prior to the defendant’s act, allowing a certain degree of flexibility in requisite timing. It is unclear whether this provision would encompass slow burn responses. History of abuse has been taken into consideration and a sentence lessened because a woman’s crime was committed by reason of relevant moral or social value.

**QUESTION 6****What weight may be given to any such history of abuse in sentencing?****Australia**

The different Australian jurisdictions have generally not explicitly specified the weight to be given to a history of abuse, but rather have largely preferred to rely on the broad powers of the courts to take into account all relevant factors in sentencing. It is the development of case law that provides guidance as to how these factors affect sentencing decisions.

**Brazil**

Some weight may be given to a history of abuse in sentencing, although this is not specifically referred to in the rules on sentencing. If the crime was deemed to have been committed because of “social or moral value or overwhelming emotion”, the sentence may be reduced by between one-sixth and one-third.

**Hong Kong**

There is not yet sufficient case law in relation to female abuse victims to come to a definitive view on the weight that may be given to any such history of abuse in sentencing. The weight that is given to any history of abuse will be at the discretion of the court and, if the offence is sufficiently serious, a history of abuse may have less weight as a mitigating factor.

**India**

This depends on the facts of the case – in some cases the courts have taken a history of abuse into account and reduced the sentence given to the defendant.

**Japan**

Minimal weight is given to a past history of abuse in sentencing. It was referred to in some cases as a mitigating factor but statistics demonstrate that there is no significant difference in terms of the possibility of securing a suspended sentence with respect to whether or not there is a history of abuse committed by the victim.

**Mexico**

Under local criminal codes the judge should consider the particular circumstances of the victim, such as the relationship between the victim and the offender, the culpability of the offender and the general circumstances that may have motivated the criminal act. A history of abuse can therefore be factored into sentencing. However, it may only be pleaded as a mitigating factor and not as a complete release from criminal liability.

**Poland**

The courts can give such weight to a history of abuse as they think is appropriate, which may result in a lesser or no sentence.

**Spain**

A history of abuse is not in itself a mitigating factor and will only affect sentencing where the court finds that the above forms part of one of the defences described above. Under sentencing rules, if one mitigating circumstance exists, the court will award a sentence in line with the lower half of the punishment scale applicable to the crime, but if one or two aggravating factors are established, the court will award a sentence which falls within the top half of the punishment scale.

**USA**

In each of the states considered in this report, there is no specified weight to be given to a history of abuse in sentencing. In each state, the court has broad discretion to sentence the defendant on the facts of each case, within the scope of the state’s relevant guidelines and the constitution.

### 3. General

#### QUESTION 7

**Are there any statistics disaggregated by gender on how many defendants charged with violent offences are sentenced in lower courts as opposed to at a higher court following appeal?**

#### Australia

The vast majority of criminal offences, including violent offences, are heard in lower courts and the sentences delivered are not appealed. While no statistics were found on this particular point, some helpful gender-based sentencing statistics are available from the Sentencing Advisory Council of Victoria. These statistics are mixed, but overall show that in Victoria women are less likely to commit violent crimes, less likely to be sentenced to imprisonment and, when imprisoned, receive shorter average terms.

#### Brazil

None found.

#### Hong Kong

The sentencing statistics available are not broken down between the lower and the upper courts. However, due to the sentencing limits (sentencing occurs at the upper court for any crimes for which sentencing is over seven years), the approach of the corresponding court can often be inferred.

The Census and Statistics Department of the Government of the Hong Kong Special Administrative Region compiles statistics on the different types of crime and breaks down the statistics by gender. The Women's Commission also highlights key statistics of women (and men) in Hong Kong.

#### India

No direct statistics were found but an article describes gender bias against women in the lower courts.

#### Japan

None found.

#### Mexico

None found.

#### Poland

No. However, there are general statistics collected by the Polish Ministry of Justice which set out the number and type of committed crimes and sentences.

#### Spain

There are no public statistics on these issues.

#### USA

No. One study found that there are no statistical studies that address all of the following factors: (1) the number of women in the United States who kill, (2) of those, the percentage who kill spouses or lovers, (3) of those, the percentage who claim to have been battered by the deceased, and (4) of those, the percentage who claim to have acted in self-defence.

#### QUESTION 8

**Is there any other academic or judicial discourse around battered woman syndrome or a slow burn reaction and its links with violent crime which is not mentioned above?**

#### Australia

Each Australian state and territory has its own independent Law Reform Commission, and there is also a federal Australian Law Reform Commission. Many of these Law Reform Commissions have written reports on the issue of how the relevant criminal justice system responds to female offenders who have suffered a history of abuse, and in many cases, these reports have led to legislative reform.

#### Brazil

Although they do not specifically reference battered woman syndrome or slow burn reaction, an article by Isabel Murray of the BBC and a report by Bárbara Musumeci Soares both note that a history of abuse is prevalent among the female prison population in Brazil, including abuse during childhood or adolescence.

#### Hong Kong

Yes, Section 8.1.1 of the 2013 Hong Kong Women in Figures Report (published by the Women's Commission) discusses statistics surrounding spouse/cohabitant battering cases, and the relationship between batterer and victim.

#### India

"Nallathangal Syndrome" (or battered woman syndrome) has been used in case law to reduce the sentences of women who are charged with violent crimes.

#### Japan

Academic discourse does exist that insists that a continuous history of abuse should be deemed as an ongoing infringement against a woman's freedom (which will automatically fulfil the "imminent and unlawful infringement" requirement of the defence of self-defence). Case law has not yet recognised this thesis.

#### Mexico

None found.

#### Poland

Both academics and organisations representing women's rights in Poland have discussed the concepts of slow burn reaction and battered woman syndrome, and links with violent crime against the abuser. One study states that the woman's sense of grievance may grow in tension over the years of regular abuse until it finds its uncontrolled outcome in an act of violence.

#### Spain

Academics have considered this question and discussed the concept of battered woman syndrome and the more general concept of abuse syndrome. These have often been with reference to Western (mostly common law) jurisdictions. No publications exist within a judicial context.

#### USA

Across each of the states there is a wide range of scholarship on the psychology of battered woman syndrome and battered women. In a judicial context, there is extensive discourse around the Sheehan case (New York).

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\* To read the individually prepared memoranda for each jurisdiction, go to [www.penalreform.org/resource/women-who-kill-in-response-to-domestic-violence/](http://www.penalreform.org/resource/women-who-kill-in-response-to-domestic-violence/).



To read the individual memoranda on the jurisdictions covered in this research, please visit: [www.penalreform.org/resource/women-who-kill-in-response-to-domestic-violence/](http://www.penalreform.org/resource/women-who-kill-in-response-to-domestic-violence/).

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