

# Women who kill in response to domestic violence:

**How do criminal justice systems respond?**



**Linklaters**

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

**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**

Penal Reform International and Linklaters LLP would like to thank Advocates for International Development (A4ID) for brokering this research and to the Linklaters staff who volunteered their time.

This publication may be freely reviewed, abstracted, reproduced and translated, in part or in whole, but not for sale or for use in conjunction with commercial purposes. Any changes to the text of this publication must be approved by Penal Reform International. Due credit must be given to Penal Reform International and to this publication. Enquiries about reproduction or translation should be addressed to [publications@penalreform.org](mailto:publications@penalreform.org).

This publication was produced with the financial assistance of Linklaters LLP. The contents of this document are the sole responsibility of Penal Reform International and Linklaters LLP.

**Linklaters LLP**

One Silk Street  
London  
EC2Y 8HQ  
United Kingdom

Telephone: +44 (0) 20 7456 2000  
Twitter: @LinklatersLLP

[www.linklaters.com](http://www.linklaters.com)

**Penal Reform International**

Email: [info@penalreform.org](mailto:info@penalreform.org)  
Twitter: @PenalReformInt

[www.penalreform.org](http://www.penalreform.org)

© Penal Reform International / Linklaters LLP 2016

Cover photo: Alessandro Scotti, Kyrgyzstan. Used with kind permission of the UN Office on Drugs and Crime.

All internet sources were accessed between March and December 2015.

**Penal Reform International (PRI) is an independent non-governmental organisation that develops and promotes fair, effective and proportionate responses to criminal justice problems worldwide.**

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.

We currently have programmes in the Middle East and North Africa, Sub-Saharan Africa, Eastern Europe, Central Asia and the South Caucasus, and work with partners in South Asia.

**Linklaters** is a global law firm with 29 offices across 20 countries. Linklaters advises the world's leading companies, financial institutions and governments, helping them to achieve their objectives by solving their most complex and important legal issues. Linklaters' pro bono practice is integral to the firm's Collective Responsibility approach to corporate responsibility and every year, Linklaters spends over 25,000 hours on pro bono matters for over 160 pro bono clients.

# 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**

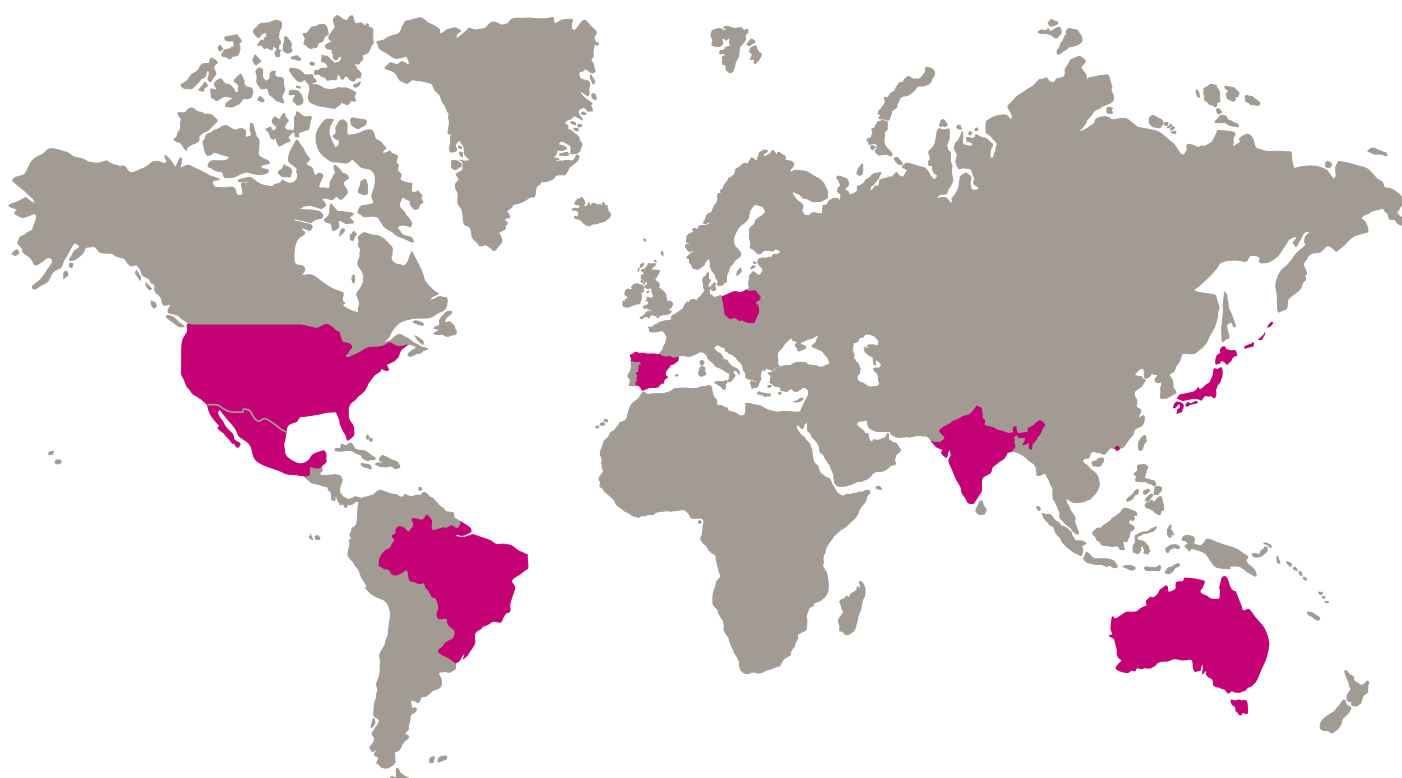
A multi-jurisdictional study by Linklaters LLP  
for Penal Reform International

# Contents

<b>Jurisdictions surveyed</b>	<b>3</b>
<b>Executive summary</b>	<b>4</b>
Background	4
Overview of findings	4
Relevance of a history of abuse in establishing culpability	5
Relevance of a history of abuse in sentencing	6
<b>Annex 1: Multi-jurisdictional summary responses</b>	<b>8</b>
<b>Annex 2: Australia</b>	<b>20</b>
<b>Annex 3: Brazil</b>	<b>44</b>
<b>Annex 4: Hong Kong</b>	<b>49</b>
<b>Annex 5: India</b>	<b>55</b>
<b>Annex 6: Japan</b>	<b>59</b>
<b>Annex 7: Mexico</b>	<b>62</b>
<b>Annex 8: Poland</b>	<b>65</b>
<b>Annex 9: Spain</b>	<b>70</b>
<b>Annex 10: The United States</b>	<b>74</b>
<b>Acknowledgements</b>	<b>94</b>

# 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.



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 underlying memoranda that have been individually prepared for each jurisdiction, in Annexes 2 to 10.

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...

<b>QUESTION 1</b> <i>Continued</i>	<b>Australia</b> <i>Continued</i>  For example, in Victoria, 2014 legislative reforms introduced simpler tests for self-defence and new jury directions in respect of family violence.  <b>Diminished responsibility though an abnormality of mind:</b> 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.	<b>Brazil</b> <i>Continued</i>  <b>Self-defence:</b> 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.	<b>Hong Kong</b> <i>Continued</i>  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.  <b>Self-defence:</b> 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.  <b>Insanity:</b> 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.	<b>India</b> <i>Continued</i>  <b>Self-defence:</b> 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.  <b>Legal insanity:</b> 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.  <b>Sustained provocation:</b> 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.	<b>Japan</b> <i>Continued</i>  <b>Insanity:</b> 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.	<b>Mexico</b> <i>Continued</i>  <b>Self-defence:</b> Although this is a defence under Mexican law, it does not usually apply in battered woman syndrome or slow burn reaction cases.	<b>Poland</b> <i>Continued</i>  <b>Temporary (full) insanity:</b> 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.	<b>Spain</b> <i>Continued</i>  <b>Criminal liability may be aggravated if:</b> (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.	<b>USA</b> <i>Continued</i>  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.  <b>New York:</b> 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.  <b>New Jersey:</b> 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.  <b>California:</b> 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.

<div>QUESTION 5</div> <div>Continued</div>	Australia	<div>Brazil</div> <div>Continued</div> <div>Social or moral value or overwhelming emotion:</div> <div>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.</div>	Hong Kong	India	Japan	Mexico	Poland	Spain	USA
<div>QUESTION 6</div> <div>What weight may be given to any such history of abuse in sentencing?</div>	Australia	Brazil	Hong Kong	India	Japan	Mexico	Poland	Spain	USA



3. General

<p>QUESTION 7</p> <p><b>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?</b></p>	<p><b>Australia</b></p> <p>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.</p>	<p><b>Brazil</b></p> <p>None found.</p>	<p><b>Hong Kong</b></p> <p>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.</p> <p>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.</p>	<p><b>India</b></p> <p>No direct statistics were found but an article describes gender bias against women in the lower courts.</p>	<p><b>Japan</b></p> <p>None found.</p>	<p><b>Mexico</b></p> <p>None found.</p>	<p><b>Poland</b></p> <p>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.</p>	<p><b>Spain</b></p> <p>There are no public statistics on these issues.</p>	<p><b>USA</b></p> <p>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.</p>
<p>QUESTION 8</p> <p><b>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?</b></p>	<p><b>Australia</b></p> <p>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.</p>	<p><b>Brazil</b></p> <p>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.</p>	<p><b>Hong Kong</b></p> <p>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.</p>	<p><b>India</b></p> <p>"Nallathangal Syndrome" (or battered woman syndrome) has been used in case law to reduce the sentences of women who are charged with violent crimes.</p>	<p><b>Japan</b></p> <p>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.</p>	<p><b>Mexico</b></p> <p>None found.</p>	<p><b>Poland</b></p> <p>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.</p>	<p><b>Spain</b></p> <p>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.</p>	<p><b>USA</b></p> <p>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).</p>

## ANNEX 2:

## Australia

## Introduction

In Australia, most criminal law matters are governed at the state level, rather than the federal level. On the subject of women who have been charged with violent crimes in response to domestic violence, each state and territory has adopted a slightly different approach, although there are a number of similarities across jurisdictions. A number of jurisdictions are in the process of, or have recently undergone, law reform in this area and do take into account the approaches of other Australian and non-Australian jurisdictions. We have addressed each part of this annex on a jurisdiction-by-jurisdiction basis.

A Model Criminal Code has been developed by the Standing Committee of Attorneys-General Model Criminal Code Officers Committee, and was published in 2009, in an effort to move towards greater harmonisation across jurisdictions. While the Model Criminal Code is not binding on any jurisdiction (as the federal government does not have express power to legislate on general criminal law matters), it is intended to serve as a guide for each jurisdiction. Some jurisdictions have adopted certain parts of the Model Criminal Code, while others have not.

Across the country there has been a great deal of law reform work and academic consideration of the law's approach to the sentencing of female victims of abuse who have been charged with violent crimes. In 2010, the Australian Law Reform Commission published a wide-ranging report entitled "Family Violence – A National Legal Response" (the "**ALRC Report**").<sup>1</sup> Chapter 14 of the ALRC Report considers the various approaches taken by each jurisdiction in recognising family violence in homicide defences. Submissions to the ALRC indicated that there is strong support for the principle of recognition of the dynamics of family violence. However, on balance, stakeholders considered the then-current approaches to homicide defences inadequate to address the circumstances of family violence. A summary of the ALRC's conclusions are set out below.

Victoria has carried out the most comprehensive reforms to directly address concerns about insufficient recognition of family violence in homicide defences and sentencing. The Victorian Law Reform Commission ("**VLRC**")

produced their final report in 2004 following a review of the law of defences to homicide generally,<sup>2</sup> in which the VLRC proposed a broad range of reforms including the abolition of the partial defence of provocation, the re-introduction of the partial defence of excessive self-defence, changes to evidence allowed in homicide trials and changes to the way in which culpability is taken into account at sentencing. These led to a first round of amendments dealing with a history of domestic violence suffered by an accused in the *Crimes (Homicide) Act 2005* (Vic). These amendments were further refined and replaced with the current legislative provisions in 2014. These provisions are summarised below.

Other states are currently reviewing their approaches, particularly in respect of the operation of the statutory defences. For example, on 26 April 2005, the West Australian Attorney-General referred the law of homicide to the Law Reform Commission of Western Australia (the "**LRCWA**"), to consider (amongst other things) the defences to homicide, including self-defence and provocation.<sup>3</sup> As a consequence, amendments were made to the *Criminal Code* (WA) in 2008, including a requirement that these amendments be reviewed five years after their implementation. In October 2013, the West Australian Attorney-General commenced a review of the operation and effectiveness of these amendments to the law of homicide. The review remains ongoing at the present time.

## 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)?**

## 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?**

1. ALRC Report 114, 11 November 2010 (hereinafter the "**ALRC Report**").

2. Victorian Law Reform Commission, *Defences to Homicide: Final Report*, 18 November 2004.

3. Law Reform Commission of Western Australia, "A review of the law of homicide", September 2007.

**QUESTION 3:**

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

**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?**

The ALRC Report reviewed the approaches to the recognition of family violence in homicide defences and noted that several jurisdictions have given substantial consideration to recognising family violence in the context of defences to homicide. A number of important statutory reforms have resulted from this, including:

- reforms to the defence of self-defence, including the removal of the requirement for the threat to be imminent (Western Australia);
- reforms to the defence of provocation, including the removal of the requirement for the defendant to have “acted on the sudden and before there was a time for his passion to cool” (Northern Territory), and the removal of the requirement for the provocative conduct of the deceased to have occurred immediately prior to the act or omission causing death (for example, New South Wales);
- the abolition of the defence of provocation in part because of its unsuitability for female victims of family violence (Victoria, Western Australia, Tasmania);
- expanding the defence of self-defence to take family violence into account, including express provision for the leading of evidence about family violence (Victoria); and
- creating a new defence of family violence (Queensland).

With the exception of the Queensland legislation, most reforms have not introduced a separate defence to accommodate victims of family violence.<sup>4</sup>

## Self-defence

### Common law position

In every jurisdiction in Australia, self-defence is a complete defence to murder and other serious crimes against the person. The common law doctrine of self-defence was articulated by the High Court of Australia as a two-limbed test:<sup>5</sup>

- the accused person genuinely believed that it was necessary to do what they did (subjective test); and
- the accused person had reasonable grounds for that belief (objective test).

The reasonableness of the accused's belief is assessed based “upon the circumstances as he [or she] perceived them to be” rather than “the belief of the hypothetical person in his [or her] position”<sup>6</sup> and accordingly, “a jury may consider evidence of the surrounding circumstances, all facts within the accused’s knowledge, the personal characteristics of the accused, and the prior conduct of the victim”.<sup>7</sup> Whether the conduct was engaged in self-defence is a matter for the jury to decide. The relevant questions to be put to the jury were set out in *R v Katarzynski* [2002] NSWSC 613 ([22]-[23]) as follows:

- is there is a reasonable possibility that the accused believed that his or her conduct was necessary in order to defend himself or herself; and
- if there is, is there also a reasonable possibility that what the accused did was a reasonable response to the circumstances as he or she perceived them.

The first issue is determined from a completely subjective point of view considering all the personal characteristics of the accused at the time he or she carried out the conduct. The second issue is determined by an entirely objective assessment of the proportionality of the accused’s response to the situation that the accused subjectively believed he or she faced. The Prosecution will negate self-defence if it proves beyond reasonable doubt that either (a) the accused did not genuinely believe that it was necessary to act as he or she did in his or her own defence or (b) what the accused did was not a reasonable response to the danger, as he or she perceived it to be.

Under section 2.3.17 of the Model Criminal Code, the self-defence test reflects the above common law position. It does not explicitly refer to domestic violence or other matters as surrounding circumstances to be taken into account.

The common law formulation of the defence has been said to at least theoretically be capable of taking into account a history of family violence.<sup>8</sup> However, there have been a number of critiques of the application of the doctrine of self-defence in practice in Australia for largely “excluding the experience of battered women and undermining their claims to reasonableness”.<sup>9</sup> Commentators have noted that certain issues that may influence a jury’s decision making on whether or not something is reasonable in the circumstances of a particular case but which are not express requirements are:

- the immediacy and seriousness of the threat;
- the proportionality of the threat; and
- the necessity of the accused’s actions given the available avenues to escape the threat or to call for outside help.

4. ALRC Report at [14.72-14.73].

5. *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645.

6. *R v Hawes* (1994) 35 NSWLR 294, 306; see also *R v Hendy* (2008) 191 A Crim R 81, 87; *R v Portelli* (2004) 10 VR 259, 272, as cited in ALRC Report at [14.6].

7. For example, *R v Wills* [1983] 2 VR 201; *R v Hector* [1953] VLR 543; *R v Besim* (2004) 148 A Crim R 28, as cited in ALRC Report at [14.7].

8. ALRC Report at [14.11].

9. A Hopkins and P Eastaugh, “Walking in Her Shoes: Battered Women who Kill in Victoria, Western Australia and Queensland” (2010 – in press) 35(3) *Alternative Law Journal*, as cited in ALRC Report at [14.11].

In light of the above, it becomes difficult for an accused person to successfully fulfil the reasonableness test and argue self-defence in the absence of a spontaneous encounter. Due to the typical disparity in strength between men and women, women typically (a) wait for a moment of surprise or (b) attack with help. Men on the other hand have been shown to act spontaneously more frequently than women and have therefore been more successful in fulfilling the test for self-defence across various jurisdictions in Australia.

### New South Wales

The legislative formulation of self-defence in New South Wales<sup>10</sup> follows the common law test and is broadly consistent with the Model Criminal Code. If this defence is raised by the accused, the burden of proof falls on the prosecution to prove beyond reasonable doubt that the act was not in self-defence.

Examples of case law in New South Wales include:

#### ***R v Terare* (Unreported<sup>11</sup>, NSWSC, 20 April 1995):**

Doris Terare was charged with the murder of Peter Golusin. She stabbed him in the course of a struggle. There was evidence that both parties had been violent. The accused was intoxicated when she stabbed the deceased. A doctor provided evidence of battered woman syndrome. Levine J accepted that the accused was trying to leave the relationship when the struggle began. She was acquitted on the basis of self-defence.

#### ***R v Hickey* (Unreported, NSWSC, 14 April 1992):**

Hickey was acquitted of the murder of her ex *de facto*. Evidence was presented of a long history of violence by the deceased against the accused and their children. Hickey had left the relationship three weeks prior to the killing and had obtained an Apprehend Violence Order (which the deceased ignored). On the night of the killing, the deceased tried to prevent Hickey from taking the children, threw her on the bed and attempted to strangle her. After he had stopped his attack, she stabbed him with a knife. Expert evidence concerning battered woman syndrome was admitted without objection from the Prosecution. This was the first New South Wales Supreme Court decision to specifically consider battered woman syndrome.

### Victoria

In Victoria, the test for self-defence is substantially the same as under the common law and in New South Wales.<sup>12</sup> In the course of its review of the defences to homicide in the early 2000s, the VLRC had considered

various models for reform to directly address the experience of domestic violence victims who kill, including the:

- “battered woman syndrome” model, which would require that the offender was suffering from battered woman syndrome when she killed;
- “self-preservation” model, which would apply where the woman honestly believes that there is no protection or safety from the abuse and so kills in the belief that this is necessary for self-preservation; and
- “coercive control” model, which would focus on the person’s need to free themselves from circumstances of coercive control.<sup>13</sup>

Most submissions to the VLRC supported focussing on making self-defence work for women rather than the introduction of an abuse-specific defence. The VLRC agreed and felt that it was possible to redefine self-defence to make it operate in a way that takes adequate account of women’s experiences of violence through reforms to evidence and clarification of the scope of the defence.<sup>14</sup>

Prior to these legislative changes, *Osland v R* (1998) 197 CLR 316 (an appeal from the Supreme Court of Victoria) was the first case before the High Court of Australia which accepted that evidence of battered woman syndrome could be brought to establish self-defence. Kirby J stated that “Self-defence may indeed be relevant to a case where an abusive relationship is established by the evidence”.<sup>15</sup> Lethal conduct could be in self-defence “where there was no actual attack on the accused underway but rather a genuinely apprehended threat of imminent danger sufficient to warrant conduct in the nature of a pre-emptive strike.”<sup>16</sup> However, it was found that there was clear evidence that the domestic violence experienced had abated in the years preceding the death and that it was plainly open to the jury to determine that *Osland*’s conduct was premeditated and effected with “calm deliberation” rather than reasonably necessary to remove further violence.

The law was first amended to better deal with family violence in the Crimes (Homicide) Act 2005. Recent legislative reforms introduced in 2014<sup>17</sup> specify the range of evidence that can be adduced about the history of the relationship and the nature of violence in the relationship to prove both the subjective (a belief in the necessity of using force) and the objective (the existence of reasonable grounds for the belief) elements of the test. These provisions also allow for the introduction of “social framework evidence” that permits evidence of the nature and dynamics of domestic violence to be introduced with

10. *Crimes Act 1900* (New South Wales) s 418.

11. See <http://www.law.uq.edu.au/documents/afjp/Battered-Woman-Syndrome-for-print.pdf> for a brief summary of the unreported case.

12. Note that the statutory defence in s 322K of the *Crimes Act* (Vic) 1958 applies to murder only. The common law test continues to apply to all other crimes.

13. VLRC Report at [3.15].

14. VLRC Report at [3.16 – 3.26].

15. *Osland v R* (1998) 197 CLR 316 at 381-382.

16. *Ibid.*

17. *Crimes Act 1958* (Vic) ss 322J and 322M.



a view to dispelling myths about domestic violence that exist in the community. Extracts of these provisions are set out in Appendix 1 to this annex.

In addition, changes to the *Jury Directions Act 2013* (Vic) were also introduced in 2014. The amendments created a new jury direction that may be given where self-defence or duress are raised in the context of family violence. Extracts of these provisions are also set out in Appendix 1.

Since the introduction of the *Crimes (Homicide) Act 2005* (Vic) there have been nine cases involving women who have killed in response to family violence. Two of the cases did not proceed to trial:

- on 27 March 2009, the then Director of the Victorian Office of Public Prosecutions dropped a murder charge against a young woman from Shepparton accused of murdering her stepfather who had sexually abused her. He said there was no reasonable prospect that a jury would convict her and outside the court her lawyer said “[t]he legal defence in this case have always taken the view that a jury would find this to be a legally justifiable homicide”; and
- on 6 May 2009, a Magistrate dismissed the murder charges against Freda Dimitrovski, accused of killing her husband, Sava Dimitrovski, after a three-day committal hearing. Freda Dimitrovski’s lawyer, Ian Hill QC, said: “recent changes to the Crimes Act made self-defence in family violence cases acceptable under law”.<sup>18</sup>

In the remaining seven cases, two of the women (Karen Black and Jemma Edwards) pleaded guilty to defensive homicide (see below), and three women (Melissa Kulla Kulla, Elizabeth Downie and Veronica Hudson) pleaded guilty to manslaughter. One woman (Eileen Creamer) was found guilty at trial of defensive homicide and another (Jade Kells) was found guilty of manslaughter (by an unlawful and dangerous act) at trial. A table summarising the cases is set out in Appendix 2.

## Western Australia

Older statistics from Western Australia suggest that self-defence was previously not commonly relied upon. Between 1983 and 1988, there were ten cases in Western Australia of women suffering from battered woman syndrome who were accused of killing their violent partner. A self-defence plea was used directly in two cases and peripherally in two others, and was successful in only one case. Provocation was, however, relied on by seven of the ten women.

Since the LRCWA review of defences to homicide, the law of self-defence has been amended to expressly state (unlike other jurisdictions) that threat does not need to be imminent. This amendment was proposed by the LRCWA as one reform to make the defence more available to women who are victims of domestic violence.

In Western Australia, a harmful act (which would include assaulting or killing a person) is lawful if done in self-defence. An act is done in self-defence if:

- the person believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent; and
- the person’s harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and
- there are reasonable grounds for those beliefs.<sup>19</sup>

## Queensland

The Queensland formulation of self-defence is distinct from that of other jurisdictions in that it does not expressly recognise that an act must be reasonable and it requires acts of self-defence to be undertaken in response to an unlawful assault.

Section 271 of the *Criminal Code 1899* (Qld) provides:

- When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.
- If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person cannot otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

The ALRC notes that:

*“The requirement for defensive action to be taken in response to an assault means that evidence of family violence is relevant in the more limited context of assessing the accused person’s reaction to a particular assault that precipitated the killing. ...*

*This requirement has been criticised as fundamentally inconsistent with the dynamics of family violence – in particular that killings in response to family violence usually stem from ongoing patterns of abuse and often occur in non-confrontational circumstances. It has been argued that – by effectively viewing the reasonableness requirement through the prism of a response to an assault – the Queensland formulation of self-defence reduces the likelihood that victims of family violence who kill their abusers will be able to meet the conditions of self-defence.”<sup>20</sup>*

18. K Stevens, “Breakthrough Case — Dismissed Murder Charge Defence Successful Under New Laws”, *Shepparton News*, 8 May 2009, 3, cited in Department of Justice (Vic), “Defensive Homicide: Review of the Offence of Defensive Homicide” (Discussion Paper, August 2010) 31–2 at [108]–[109].

19. *Criminal Code 1913* (WA) s 248.

20. ALRC Report [14.24 – 14.25].

In response to these criticisms, Queensland has introduced a separate partial defence for killing for preservation in the context of an abusive relationship (see Section 132B of the *Evidence Act 1977* (Qld)).

In Queensland, there is also express consideration of the context of domestic violence in the rules of evidence. Section 132B 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 violent offences (including murder). However, this provision has been criticised as redundant because relevant evidence is, by definition, generally admissible.

Examples of case law relating to self-defence in Queensland include:

***R v Falls* (Unreported, QSC, 2010):**

In this case, the jury was directed on the partial defence of preservation. However, the accused was ultimately acquitted of murder on the basis of self-defence. Falls killed her husband, Rodney. In her testimony she graphically recounted a detailed history of abuse. Falls had made a number of statements to the police during the relationship and had tried to leave. On one occasion police assisted her to leave Queensland but Rodney found her so she returned, fearful of what he would do to her family. In the weeks preceding the killing the violence escalated and Rodney threatened to kill one of the children. Ultimately, Falls laced her husband’s evening meal with crushed Temazepam tablets and shot him twice as he dozed in a chair. She was assisted by others in disposing of his body. Applegarth J directed the jury on both the preservation defence and self-defence and she was acquitted of murder on the basis of self-defence.

***R v Irsigler* (Unreported, QSC, 28 February 2012):**

Irsigler killed her husband in 2001. In 2012 she pleaded not guilty to both murder and interfering with a corpse. Assisted by others, she burnt his body and spread the ashes on a farm. In her evidence at trial, Irsigler described a long history of abuse at the hands of the deceased. On many occasions she had called the police or tried to leave. Several days before the killing the deceased returned to the family home and held Irsigler and their daughter hostage for three days. On the fourth day Irsigler managed to escape and obtained a gun for protection so that she could collect her belongings. She returned to the house with a friend. Upon their arrival, Watkins set upon the friend and Irsigler shot Watkins, killing him. While self-defence was the focus of the defence case, the preservation defence was raised as a “fall-back” option. Irsigler was acquitted of homicide but found guilty of interfering with a corpse. She was sentenced to 18-months imprisonment, fully suspended.

## South Australia

In South Australia, the doctrine of self-defence is substantially similar to the common law position.<sup>21</sup> The legislation does not make express reference to a context of domestic violence.

Examples of case law considering self-defence in South Australia include:

***R v Kontinnen* (Unreported, SASC, 27 March 1992):**

Kontinnen was charged with murder and pleaded self-defence. Legoe J directed the jury to consider provocation if they rejected self-defence. On the night of the killing, Kontinnen and the deceased were in the house with another woman and a child. Kontinnen gave evidence that the accused told her that he was going to sleep and that when he woke up all three of them would be dead. Legoe J considered the evidence on battered woman syndrome and observed:

*“The battered wife syndrome, as such, is not the defence. If you are looking for a defence, do not just look at the battered wife syndrome. It is part of the history of what the defence put into the whole case, ultimately, of course, to point out to you and to argue...that the Crown have failed to prove its case beyond reasonable doubt because, if I may put it very simply, the situation that the accused was in the early hours of that Monday morning, was a cumulated set of circumstances, a cumulated attitude of mind, which had been built up in the way in which she had been treated by the deceased.”<sup>22</sup>*

***R v Runjanjic and Kontinnen* (1991) 56 SASR 114:**

In a related case to the above, two women were found guilty of false imprisonment and causing grievous bodily harm with intent. At trial, the defendants raised the defence of duress, contending that their wills had been overborne by fear of a man (Hill) who was the partner of both defendants and the *de facto* partner of one of them. They sought to call expert evidence on battered woman syndrome. The trial judge ruled the evidence inadmissible. On appeal, the Full Court referred to a number of international cases on the issue of battered woman syndrome. The court ultimately allowed the appeal and set aside the convictions, ordering a new trial. The court considered that “the situation of the habitually battered woman is so special and so outside ordinary experience that the knowledge of experts should be made available to courts and juries”.

***R v Taylor* (Unreported, SASC, 3 February 1994):**

On the night of the killing, the deceased “punched, kicked and half strangled” the accused, leaving her “lying on the floor in a state of considerable distress”. Taylor went upstairs and loaded her husband’s rifle. She shot the deceased while he was watching television. There was clear medical evidence that Taylor had been the “victim of a major assault” on the night of the killing and the trial judge had no doubt about the brutality of the relationship.

<sup>21</sup> *Criminal Law Consolidation Act 1935* (SA) s 15(1).

<sup>22</sup> *R v Kontinnen* (Unreported, SASC, 27 March 1992) p13 at [14].



The cumulative course of conduct, including the violence on the night of the killing, could not form the basis for a plea of self-defence as it was said that the response was “excessive”. Taylor pleaded guilty to the lesser charge of manslaughter.

## Tasmania

In Tasmania, the doctrine of self-defence is substantially similar to the common law position.<sup>23</sup> The legislation does not make express reference to a context of domestic violence. There have been no case law examples of self-defence being pleaded in the context of domestic violence by the deceased.

The Tasmania Law Reform Institute (the “TLRI”) has recently sought submissions<sup>24</sup> on the law of self-defence, which raises a number of questions regarding reforms specific to female abuse victims, including:

- reform to facilitate reception of evidence of family violence in relation to this defence; and
- specifying that imminence is not necessary where self-defence is raised in the context of family violence.

In addition, the TLRI has asked whether certain partial defences should be introduced, including (relevantly):

- if the killing is for self-preservation in an abusive domestic relationship (similar to the Queensland partial defence in section 304B of the *Criminal Code* (Qld)); and
- diminished responsibility.

The TLRI acknowledges in its issues paper that there is “widespread agreement that the ‘nature and dynamics of domestic violence should be recognised in homicide defences’”.<sup>25</sup> At the time of research, the final report from the TLRI had not yet been published.

## Northern Territory

In the Northern Territory, the doctrine of self-defence is substantially similar to the common law position.<sup>26</sup> The legislation does not make express reference to a context of domestic violence.

Examples of case law considering self-defence in the context of domestic violence include:

### ***R v Secretary* (1996) 5 NTLR 96:**

The accused was acquitted on re-trial of the homicide of her *de facto* partner by reason of self-defence. Secretary had been mentally and physically abused by the deceased over a significant period of time. On the night of the homicide, the deceased assaulted and threatened to kill the accused. The deceased made a final threat against the accused then went to sleep. The accused shot him

while he was sleeping. The Court ruled that self-defence should have been left to the jury. The case turned on whether the assault by the deceased (constituted by the deceased’s threat to the accused immediately before he went to sleep) was a continuing one. The court observed: “I see no reason why the assault should have been regarded as spent merely because the deceased was temporarily physically unable to carry out his threat.” This characterisation enabled the accused to raise the defence of self-defence.

### ***R v Tassone* (Unreported, NTSC, 16 April 1994):**

The accused was charged with attempted unlawful killing. She shot her violent husband (who survived) while he was sleeping after he had assaulted and raped her. Her evidence was that she was terrified of his extreme and unpredictable violence, that she had unsuccessfully tried to leave him on a number of occasions and now believed that there was no escape from him, and that the rape had “upped the ante” in the sense that it demonstrated a new level of violence towards her. The general and ongoing threat that he presented to her, which was demonstrated by his past behaviour towards her, was satisfactory to the jury and she was acquitted on the basis of self-defence.

## Australian Capital Territory

In the Australian Capital Territory, the doctrine of self-defence is substantially similar to the common law position.<sup>27</sup> The legislation does not make express reference to a context of domestic violence.

While there have been no recent cases considering the application of self-defence raised by an abuse victim, there have been a handful of decisions considering the use of expert evidence of battered woman syndrome in the context of the defence of duress, which also requires the element of reasonableness:

### ***Winnett v Stephenson* (ACT Magistrates Court, unreported, 19 May 1993, Burns M):**

This case is an instance where expert evidence of battered woman syndrome was allowed in order to establish a defence of duress. As with the defence of self-defence, reasonable behaviour is an element of duress. Expert evidence was necessary to show that what constitutes reasonable behaviour for a battered woman differs from reasonable behaviour as defined by the standard of a white middle class male.<sup>28</sup>

### ***R v Lorenz* (1998) 146 FLR 369:**

In this case, evidence of battered woman syndrome was accepted by the court, but the defence of duress was not established. The Court held that: “A diagnosis of battered woman syndrome does not of itself give rise to any

23. *Criminal Code* (Tas) s 46.

24. TLRI Issues Paper No. 2 dated November 2014, final report pending.

25. *Id* at [2.1.4].

26. *Criminal Code 1983* (NT) (Schedule 1 to the *Criminal Code Act* (NT)), s 43BD.

27. *Criminal Code 2002* (ACT) s 42.

28. We were unable to locate a copy of this decision, however it was discussed here: [http://www.aic.gov.au/media\\_library/conferences/medicine/peasteal.pdf](http://www.aic.gov.au/media_library/conferences/medicine/peasteal.pdf).

defence... Nonetheless, evidence that such a person may have had a psychological condition of this kind may be relevant to several defences known to the law.”<sup>29</sup>

## Provocation

### New South Wales

New restrictions to the defence of provocation were introduced in New South Wales in 2014 following a Legislative Council Select Committee inquiry into the partial defence of provocation.<sup>30</sup>

The *Crimes Amendment (Provocation) Act 2014* (New South Wales) introduced the partial defence of extreme provocation. That Act substituted a new section 23 into the Crimes Act 1900 (New South Wales), which had previously dealt with the partial defence of provocation.

Prior to the substitution, the partial defence of provocation was available where:

- the act causing death was the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased towards or affecting the accused (subjective test); and
- the conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm (objective test).

The new partial defence of extreme provocation, however, adds the requirement that the provocative conduct on the part of the deceased must have been a serious indictable offence.

Accordingly, the defence is only available if the act of the accused was done in response to the conduct of the deceased and that conduct:

- (a) was a serious indictable offence (that is, an offence punishable by imprisonment for life or for five years or more); and
- (b) caused the accused to lose self-control (a subjective test); and
- (c) could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased (an objective test).<sup>31</sup>

Conduct does not amount to extreme provocation if the conduct was a non-violent sexual advance or the accused incited the conduct to provide an excuse to use violence.<sup>32</sup>

However, the conduct of the deceased may constitute extreme provocation even if the conduct did not occur immediately before the act causing death.<sup>33</sup>

The new defence also specifies that evidence of self-induced intoxication cannot be taken into account in determining whether the act was done in response to extreme provocation.<sup>34</sup>

If there is any evidence that the act causing death was done in response to extreme provocation, the burden of proof is on the prosecution to prove beyond reasonable doubt that the act was not done in response to such conduct.<sup>35</sup>

The reform of the defence of provocation was precipitated by widespread community outrage following the outcomes of a series of murder cases which were widely regarded as partly legitimating killings committed in anger.<sup>36</sup>

The most high profile of these cases was *Singh v R* [2012] NSWSC 637, in which Chamanjot Singh was charged with the murder of his wife, Manpreet Kaur, who was strangled before having her throat cut eight times with a box-cutter blade. The defendant pleaded not guilty to murder but guilty to manslaughter, on the grounds of provocation. The Crown did not accept his plea and the matter proceeded to a trial with a jury. There was a “long history of marital disharmony and domestic violence that characterised their relationship”. On the night of the killing, the defendant said that the deceased then told him that she had never loved him and was in love with someone else, and threatened to have him removed from the country. The defendant became “enraged”, and gave evidence that he held the deceased by the throat while she slapped him, before taking hold of the box cutter that was nearby. He said that he had no recollection of the events that followed. The jury acquitted the offender of murder but convicted him of manslaughter on the basis of the partial defence of provocation. He was sentenced to eight years imprisonment, with a six year non-parole period.

Another case which drew public criticism was *R v Won* [2012] NSWSC 855, in which the jury was asked to decide if the act of finding a spouse in bed with someone else could have induced an ordinary person in the position of Won to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm. *R v Won* resulted in a sentence of imprisonment for seven years and six months with a non-parole period of five years.

It is as yet unclear how the recent reforms will affect the ability of victims of domestic abuse to rely upon it, though its narrowing would indicate that it is likely to be available

29. *R v Lorenz* (1998) 146 FLR 369 at 375.

30. See *Defences and Partial Defences to Homicide*, Legislative Council Select Committee on the partial defence of provocation – Inquiry into the partial defence of provocation, July 2012 [https://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/d4e8270a20723e92ca257a31001d1a4b/\\$FILE/Briefing%20paper.pdf](https://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/d4e8270a20723e92ca257a31001d1a4b/$FILE/Briefing%20paper.pdf).

31. Section 23(2), *Crimes Act 1900* (New South Wales).

32. Section 23(3), *Crimes Act 1900* (New South Wales).

33. Section 23(4), *Crimes Act 1900* (New South Wales). We note that this also formed part of the old defence of provocation prior to the reforms.

34. Section 23(5), *Crimes Act 1900* (New South Wales).

35. Section 23(7), *Crimes Act 1900* (New South Wales).

36. See <http://www.abc.net.au/news/2014-03-05/nsw-legislation-to-limit-27defence-of-provocation27-for-murde/5300490> and <http://www.smh.com.au/nsw/provocation-defence-in-the-dock-after-husband-escapes-murder-charge-20120710-21u3k.html>.

as a defence in fewer cases. While the following cases were decided prior to the reform of the defence, they are nonetheless useful examples of how courts in New South Wales have taken into account a past history of abuse:

***R v Hill* (1981) 3 A Crim R 397:**

The appellant was convicted of the murder of her *de facto* husband. Evidence at the trial showed the shooting to have been a crisis – a sudden and final stage in which the provocative and intolerable conduct of the deceased had brought her to breaking point. The case was defended at the trial primarily upon the ground of self-defence, and the defence of provocation was not relied upon although it was put before the jury by the trial judge. On appeal it was argued that the conviction of murder should be found to be unsafe and unsatisfactory in light of the history of violence and the fact that the jury wrongly focused on self-defence rather than provocation. The Court of Appeal held that in light of the undisputed history of the relationship, the Court was required to intervene as it considered that a miscarriage of justice had occurred. The conviction of murder was reduced to manslaughter and a four-and-a-half year prison sentence was imposed.

***R v King* [1998] NSWSC 289:**

The accused pleaded guilty to the manslaughter of her husband. The Prosecution accepted the plea on the basis that there had been provocation. The accused had been married to the deceased for nine years and had been subject to domestic violence during that time. On the night of the deceased's death, the deceased started physically and verbally abusing the accused. Eventually, the deceased walked into the bedroom and the accused followed him and stabbed him once with a knife. She immediately called for help. Studdert J found that provocation caused the accused to lose her self-control and imposed a six year prison sentence.

***R v Chhay* (1994) 72 A Crim R 1:**

The appellant in this case was convicted of murder. The Prosecution's case was that she had killed her husband while he was asleep. The appellant had been the victim of a long period of physical and verbal abuse by her husband and there had been a violent quarrel, with threats and taunts from the husband, a few hours before he died. The appellant's main defence at the trial was self-defence, based on her statement that her husband was attacking her with a knife when she killed him. The appellant raised the defence of provocation at trial, but the trial judge ruled that it was only available to be considered by the jury if they accepted the story of the knife attack (which they did not). At issue was whether the trial judge should have left provocation to the jury on a wider basis.

The Court of Appeal held that:

- to establish a defence of provocation, it is essential that at the time of the killing there was a sudden and temporary loss of self-control caused by the provocation. However, there is no requirement that the killing immediately follow upon the provocative act or conduct of the deceased. The loss of self-control can develop after a lengthy period of abuse, and without the necessity for a specific triggering event; and
- the combination of the history of the deceased's conduct towards the appellant, the taunts and threats made to her on the evening of his death and the fact that the appellant was a quiet and submissive person would have entitled the jury to conclude that when the appellant killed the deceased, her actions were as a result of a loss of self-control. The trial judge erred in refusing to put the issue of provocation to the jury on this wider basis.

## Victoria

Provocation was abolished as a partial defence to murder in Victoria in 2005<sup>37</sup> as part of a suite of reforms following a report of the Victorian Law Reform Commission into Defences to Homicide.<sup>38</sup> As well as the abolition of provocation, those reforms introduced, among other things, the new offence of defensive homicide.<sup>39</sup>

In proposing that the defence of provocation be abolished, the Law Reform Commission considered arguments that the defence of provocation is gender biased and unjust and that the suddenness element of the defence (as reflected by the sudden loss of self-control) is more reflective of male patterns of aggressive behaviour.<sup>40</sup>

## Western Australia

Provocation was abolished as a partial defence to murder in Western Australia in 2008<sup>41</sup> following the recommendations of the LRCWA in their report Project 97, Final Report: Review of the Law of Homicide, September 2007.<sup>42</sup>

However, provocation was retained as a defence to a charge of assault.<sup>43</sup> The defence is only available in circumstances where the accused has acted suddenly after the provocation and before there is time for passion to cool, provided that the force used is not disproportionate to the provocation and is not intended nor likely to cause death or grievous bodily harm.

The questions of whether (a) any act or insult is sufficient to constitute provocation for the purpose of the defence, (b) in any case a person provoked was actually deprived

37. See section 3B, *Crimes Act 1958* (Vic).

38. See <http://www.lawreform.vic.gov.au/projects/defences-homicide/defences-homicide-final-report>.

39. Defensive homicide is discussed further below.

40. See 3.38-3.52, Defences to Homicide: Options Paper, Victorian Law Reform Commission, 1 September 2003: <http://www.lawreform.vic.gov.au/projects/defences-homicide/defences-homicide-options-paper> and 2.18-2.25, Defences to Homicide: Final Report, Victorian Law Reform Commission, 1 November 2001 <http://www.lawreform.vic.gov.au/projects/defences-homicide/defences-homicide-final-report>.

41. By section 12, *Criminal Law Amendment (Homicide) Act 2008* (WA).

42. [http://www.lrc.justice.wa.gov.au/P/project\\_97.aspx](http://www.lrc.justice.wa.gov.au/P/project_97.aspx).

43. See section 246, *Criminal Code Act Compilation Act 1913* (WA).

of the power of self-control as a result of the provocation and (c) the force used was proportionate to the provocation, are questions of fact.

Provocation in the context of the defence is defined to mean any wrongful act or insult of such a nature as to be likely, when done to an ordinary person (or in the presence of another person under the care of or in a familial relationship with that person) to deprive that person of the power of self-control and which induces him to assault the person who has done the provocative act.<sup>44</sup>

Further, a lawful act is not provocation to any person for an assault, nor is an act done in consequence of an incitement given to induce the provocative act and thereby furnish an excuse for an assault.<sup>45</sup>

Prior to its abolition as a defence to murder, a survey of Western Australian cases between 1983 and 1988 was conducted, showing that provocation was successfully relied on by women who killed their partners in the context of domestic violence. There was a background of domestic violence in 10 of the 13 cases identified in the survey. Provocation was raised in seven of those cases; in two others it was not available because the charge was attempted murder.<sup>46</sup>

In their final report, the LRCWA referred to their examination of 25 Western Australian cases which showed much less reliance on provocation by women who had killed their abusive partners. Provocation was not relied upon by any women who pleaded not guilty and went to trial. It was the sole basis of only one plea of guilty to manslaughter, and was mentioned in three other pleas in mitigation. Provocation was raised in four out of a total of 19 sentencing hearings where women had pleaded guilty to manslaughter (in the other cases the basis of the plea was lack of the requisite intention for murder or wilful murder).

The LRCWA did, however, note that they were aware of some older cases in which provocation was relied on in circumstances where a victim of domestic violence killed the perpetrator, such as *R v Gilbert* (Unreported, 4 November 1993, Western Australian Supreme Court) in which the accused relied on self-defence, provocation and lack of intent (and led evidence of battered woman syndrome) at trial. The accused was an Aboriginal woman from a remote community who had killed her partner. He had been violent to her and her children for a number of years. She was convicted of manslaughter on the basis

of provocation, the provocation stemming from the physical abuse that the deceased had inflicted on the accused. A non-custodial sentence was imposed.

While they noted that to some extent provocation had developed to accommodate victims of domestic violence (for example, through recognition that provocation may be cumulative and fear, as well as anger, has been included as a basis for loss of self-control),<sup>47</sup> the LRCWA nonetheless recommended that the defence of provocation be abolished.

The LRCWA criticised the “suddenness” requirement of the defence, noting that it is more descriptive of male patterns of behaviour, and that women generally do not respond to provocative conduct in that way. For that reason, the LRCWA concluded that the test for provocation is particularly problematic for women who kill in the context of domestic violence.

Similarly, the LRCWA noted that the concept of proportionality does not easily fit with the dynamics of a violent relationship. The victim of domestic violence is often smaller and weaker than the perpetrator. If the nature of the relationship is not understood, it might appear that an attack with a weapon (particularly where the deceased is unarmed) is not proportional to the conduct of the deceased.<sup>48</sup>

Following these recommendations, the defence of provocation was abolished in 2008. Self-defence was also broadened to include circumstances where the defendant was responding to a threat of force that was not imminent.<sup>49</sup>

## Queensland

Provocation is a partial defence to murder in Queensland.

In 2008, the Queensland Government commissioned a review of the partial defence of provocation, which ultimately led to the retention and reform of the defence in November 2010 through the *Criminal Code and Other Legislation Amendment Act 2010*.

The review by the Queensland Law Reform Commission (the “QLRC”) came in the wake of several high profile cases which had engendered community concern surrounding the defence to male perpetrated intimate partner homicides. The QLRC recommended that provocation continue to be available as a partial defence despite their view that, “*On occasions the defence appears to indulge human ferocity. The defence operates*

44. See section 245, *Criminal Code Act Compilation Act 1913 (WA)*.

45. See section 245, *Criminal Code Act Compilation Act 1913 (WA)*.

46. See p 278, Law Reform Commission of Western Australia in their report “Project 97, Final Report: Review of the Law of Homicide”, September 2007 [http://www.lrc.justice.wa.gov.au/P/project\\_97.aspx](http://www.lrc.justice.wa.gov.au/P/project_97.aspx).

47. See p280, , Law Reform Commission of Western Australia in their report “Project 97, Final Report: Review of the Law of Homicide”, September 2007 [http://www.lrc.justice.wa.gov.au/P/project\\_97.aspx](http://www.lrc.justice.wa.gov.au/P/project_97.aspx).

48. See p279, , Law Reform Commission of Western Australia in their report “Project 97, Final Report: Review of the Law of Homicide”, September 2007 [http://www.lrc.justice.wa.gov.au/P/project\\_97.aspx](http://www.lrc.justice.wa.gov.au/P/project_97.aspx).

49. *Criminal Law Amendment (Homicide) Act 2008 (WA)*.



*in favour of those in positions of strength at the expense of the weaker ... Generally, those who respond to provocation with sudden and violent rage are those who can, namely, those with the capacity to overpower the deceased because of their size and strength.”<sup>50</sup>*

The QLRC recommended that section 304 of the Criminal Code 1899 (Qld) be amended to:<sup>51</sup>

- remove the “suddenness” requirement (particularly in light of the fact that the common law has developed to accommodate a delay between the provocation and the fatal act of a defendant);
- redefine what conduct may amount to provocation; or
- change the objective hypothetical “ordinary person” test to a “reasonable person” or “person of ordinary tolerance and self restraint” test.

It has also been proposed that the defence be recast to shift the onus of proof to the defendant who must make out the partial defence on the balance of probabilities.

Following the reforms in 2010, section 304 of the Criminal Code 1899 (Qld) provides that the defence is limited to circumstances where the accused kills “*in the heat of passion caused by sudden provocation and before there is time for the person’s passion to cool*”.<sup>52</sup>

The defence is not available if the sudden provocation is based on words alone other than in circumstances of extreme or exceptional character.<sup>53</sup>

The defence of provocation will not be available, other than in circumstances of a most extreme and exceptional character, if (a) a domestic relationship exists between two persons, (b) one person unlawfully kills the other person and (c) the sudden provocation is based on anything done by the deceased or that the accused believes the deceased has done to either (i) end the relationship (even where the relationship has ended prior to the sudden provocation and killing happening),<sup>54</sup> (ii) change the nature of the relationship or (iii) indicate in any way that the relationship may, should or will end or that there may, should or will be a change to the nature of the relationship.<sup>55</sup>

Regard may be had to any history of violence that is relevant in all the circumstances in establishing that the circumstances of the case are of an extreme and exceptional character.<sup>56</sup>

## South Australia

Provocation is available in common law as a partial defence to murder in South Australia.

The Legislative Review Committee into the Partial Defence of Provocation (the “**Committee**”) released its final report to Parliament in December 2014.<sup>57</sup> The Committee was formed to consider a legislative amendment to the common law partial defence of provocation in South Australia. The amendment was largely focused on abolishing the “gay panic defence”. The Committee ultimately held that the defence of provocation is still appropriate and relevant and declined to introduce amendments to limit its operation on the basis that it would be unjust to remove the availability of the provocation defence in circumstances which involve a high degree of provocation. While the Committee did not wish to narrow this observation to specific examples, it did note that the defence may also apply to victims of serious domestic abuse. Examples of case law considering provocation in South Australia include:

### **R v Narayan [2011] SASCF 61:**

The defendant’s charge was reduced from murder to manslaughter by reason of “extreme provocation” in the context of an abusive relationship.

### **R v R (1981) 28 SASR 321:**

The defendant learned that her husband had been assaulting their two daughters. Thirty-six hours later, she killed him. The trial judge held that self-defence could not apply in this case as there was no imminent threat to human life posed by the victim. The trial judge refused to allow the issue of provocation to go to the jury.

On appeal, the Court held that the issue of provocation should have been left to the jury and that cumulative acts of provocation could be considered. In this case, seemingly innocuous words said by the deceased to the defendant could, when considered in light of the history of their relationship and the accused’s conduct, amount to a provocative act.

## Tasmania

In 2003 Tasmania became the first state to abolish the partial defence of provocation.<sup>58</sup> Prior to its abolition, provocation was successfully pleaded in three cases: *R v Gardner* (1979); *R v Franke* (1983) and *R v Cornick* (1987). The types of arguments raised in each of these cases may now be relevant as mitigating factors in sentencing.

50. See K Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective*, Palgrave Macmillan, 2014.

51. [http://www.qlrc.qld.gov.au/\\_data/assets/pdf\\_file/0006/372948/WP63.pdf](http://www.qlrc.qld.gov.au/_data/assets/pdf_file/0006/372948/WP63.pdf).

52. Section 304(1) *Criminal Code 1899 (QLD)*.

53. Section 304(2) *Criminal Code 1899 (QLD)*.

54. Section 304(5) *Criminal Code 1899 (QLD)*.

55. Section 304(3) *Criminal Code 1899 (QLD)*.

56. Section 304(6) *Criminal Code 1899 (QLD)*.

57. <https://www.parliament.sa.gov.au/HouseofAssembly/BusinessoftheAssembly/RecordsandPapers/TabledPapersandPetitions/Pages/TabledPapersandPetitions.aspx?TPSelectedView=3&tpsa=0&tpsp=1&tpss=provocation>.

58. See transcript of *Insight* episode “Provoked: Is the defence of provocation allowing killers to get off lightly?” (6 November 2012) featuring the Tasmanian Director of Public Prosecutions: <http://www.sbs.com.au/news/insight/tvepisode/provoked>.

Despite the repeal of provocation as a statutory defence, provocation can still be taken into account in sentencing. In *Tyne v Tasmania* [2005] TASSC 119 the Tasmanian Court of Criminal Appeal held that the repealed section should be disregarded and that a sentencing judge should take any provocation into account when determining a sentence by giving it appropriate weight:

*“There is no longer any reason to impose a sentence for manslaughter instead of murder because of provocation. Provocation is taken into account in the exercise of the sentencing discretion for murder.”*

While this case does not deal with a female offender, given that prior to the repeal of section 160 of the Criminal Code (Tas), provocation had been upheld in cases where women lashed out at their abusers, this case could certainly be relevant for sentencing purposes.

### Northern Territory

Provocation has been retained in the Northern Territory<sup>59</sup> as a partial defence under section 158 of the *Criminal Code 1983* (NT) (the “**Criminal Code (NT)**”)

In its October 2000 paper, the Law Reform Committee of the Northern Territory recommended abolishing the defence which was formerly found in section 34 from the Criminal Code (NT), on the basis that the concept of battered wife syndrome and how provocation ought to be tested was outdated and did not recognise (for example) that the torment suffered by a victim at the hands of his or her abuser does not always lead to an “immediate” reaction. A victim can, over time, become so humiliated that they lose self-control and kill their abuser, even if such a killing does not take place immediately after an act of abuse.

This recommendation was ultimately adopted in 2006 through reformulation of the defence set out in section 158 of the Criminal Code (NT) which makes the provocation defence consistent with the general decree in section 23 of the Code, which states that “a person is not guilty of an offence if any act, omission or event constituting that offence done, made or caused by him was authorized, justified, or excused”. The reforms allow juries to impose an objective test as to whether the provocation was sufficient to have induced an ordinary person to have so far lost self-control as to have formed an intent to fight back.

Pursuant to section 158 of the Criminal Code 1983 (NT), a person who would, apart from this section, be guilty of murder must not be convicted of murder if the defence of provocation applies.<sup>60</sup>

The defence of provocation applies if:

- (a) the conduct causing death was the result of the defendant's loss of self-control induced by conduct of the deceased towards or affecting the defendant; and
- (b) the conduct of the deceased was such as could have induced an ordinary person to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased.<sup>61</sup>

Grossly insulting words or gestures towards or affecting the defendant can be conduct of a kind that induces the defendant's loss of self-control.<sup>62</sup>

“Suddenness” is not a requirement of the defence, and the Criminal Code (NT) specifically states that a defence of provocation may arise regardless of whether the conduct of the deceased occurred immediately before the conduct causing death or at an earlier time.<sup>63</sup>

However, the conduct of the deceased consisting of a non-violent sexual advance or advances towards the defendant is not, by itself, a sufficient basis for a defence of provocation. However, it may be taken into account together with other conduct of the deceased in deciding whether the defence has been established.<sup>64</sup>

In deciding whether the conduct causing death amounted to provocation, there is no rule of law that provocation is negated if:

- (a) there was not a reasonable proportion between the conduct causing death and the conduct of the deceased that induced the conduct causing death; or
- (b) the conduct causing death did not occur suddenly; or
- (c) the conduct causing death occurred with an intent to take life or cause serious harm.<sup>65</sup>

The defendant bears the evidential burden in relation to the defence of provocation.<sup>66</sup>

### Australian Capital Territory

Provocation is a partial defence to murder in the Australian Capital Territory. Section 13 of the *Crimes Act 1900* (ACT) (the “**Crimes Act**”) provides that if an act or omission causing death occurred under provocation, the jury shall acquit a defendant accused of murder and find them guilty of manslaughter.

An act or omission causing death shall be taken to have occurred under provocation if:

- (a) the act or omission was the result of the accused's loss of self-control induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused; and

59. Self Defence and Provocation, Report of the Law Reform Committee of the Northern Territory, October 2000 <http://www.nt.gov.au/justice/policycoord/lawmake/lawref.shtml>.

60. Section 158(1), Schedule 1, *Criminal Code Act (NT)*.

61. Section 158(2), Schedule 1, *Criminal Code Act (NT)*.

62. Section 158(3), Schedule 1, *Criminal Code Act (NT)*.

63. Section 158(4), Schedule 1, *Criminal Code Act (NT)*.

64. Section 158(5), Schedule 1, *Criminal Code Act (NT)*.

65. Section 158(6), Schedule 1, *Criminal Code Act (NT)*.

66. Section 158(7), Schedule 1, *Criminal Code Act (NT)*.



(b) the conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill the deceased or be recklessly indifferent to the probability of causing the deceased's death.<sup>67</sup>

"Suddenness" is not a requirement, and the Crimes Act specifically states that conduct of the deceased may constitute provocation whether that conduct occurred immediately before the act or omission causing death or at any previous time.<sup>68</sup>

A non-violent sexual advance by the deceased towards the accused is not sufficient, by itself, to be conduct which is capable of causing an ordinary person in the position of the accused to lose self-control. However, it may be taken into account together with other conduct of the deceased in deciding whether there has been provocation.<sup>69</sup>

For the purpose of determining whether an act or omission causing death amounted to provocation, there is no rule of law that provocation is negated if:

- (a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission;
- (b) the act or omission causing death did not occur suddenly; or
- (c) the act or omission causing death occurred with any intent to take life or inflict grievous bodily harm.<sup>70</sup>

If, during a trial for murder, there is evidence that the act or omission causing death occurred under provocation, the onus of proving beyond reasonable doubt that the act or omission did not occur under provocation lies with the prosecution.<sup>71</sup>

## Other defences dealing with past abuse

Other defences such as duress, necessity and diminished responsibility are available in certain circumstances in some Australian jurisdictions. In addition, as part of their recent law reform packages, a number of jurisdictions in Australia have sought to craft defences to take into account past abuse. These are set out as follows.

### New South Wales

#### Excessive self-defence

In New South Wales, "excessive self-defence" is a partial defence to murder. This doctrine reduces the offence to manslaughter where the offender's use of force was not

a reasonable response in the circumstances as he or she perceived them, but the person believed the conduct was necessary to defend himself or herself or another person to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.<sup>72</sup> In other words, this partial defence is available when the objective limb of the self-defence doctrine is not satisfied.

#### Diminished responsibility / substantial impairment by abnormality of mind

In New South Wales, "diminished responsibility" was replaced with the partial defence of "substantial impairment by abnormality of mind" in 1998. This partial defence reduces a charge of murder to manslaughter where at the time of the conduct causing the death, the offender's capacity to understand events, or to judge whether their actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from an underlying condition and the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.<sup>73</sup>

This partial defence only arises where all other issues on a charge of murder, including self-defence and provocation, have been resolved in favour of the Prosecution. Further the partial defence is limited to an underlying condition which is defined as "a pre-existing mental or physiological condition other than a condition of a transitory kind".<sup>74</sup>

### Victoria

The offence of "defensive homicide" was introduced in Victoria in 2005 as part of a wider package of homicide law reforms, including the abolition of the partial defence of provocation. Its introduction was largely based on the need to offer a "halfway" homicide category for persons who kill in response to prolonged family violence.<sup>75</sup> The offence applies where an accused killed, believing the conduct to be necessary to defend himself or herself or another from the infliction of death or serious injury, but where he or she did not have reasonable grounds for that belief.

The offence was subsequently repealed by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* as part of a suite of reforms which included one introduction of simpler tests for self-defence and new jury directions on family violence. A review conducted by the Victorian Department of Justice acknowledged that since its introduction, the offence of defensive homicide had not operated as intended and so the Victorian Department of Justice recommended it be abolished.<sup>76</sup>

67. Section 13(2), *Crimes Act 1900* (ACT).

68. Section 13(2), *Crimes Act 1900* (ACT).

69. Section 13(3), *Crimes Act 1900* (ACT).

70. Section 13(4), *Crimes Act 1900* (ACT).

71. Section 13(5), *Crimes Act 1900* (ACT).

72. Section 421, *Crimes Act 1900* (New South Wales).

73. Section 23A, *Crimes Act 1900* (New South Wales).

74. Section 23A(8), *Crimes Act 1900* (New South Wales).

75. See <http://theconversation.com/victorian-homicide-law-reforms-ensure-just-responses-to-violence-28305>.

76. *Defensive Homicide: Proposals for Legislative Reform* (Consultation Paper, September 2013) xi, 35 [2.9.1] (Proposal 1), <http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/criminal+law/defensive+homicide+-+proposals+for+legislative+reform+-+consultation+paper>.

Analysis of convictions for defensive homicide revealed that most cases since 2005 have involved a male defendant(s) who has killed a male victim outside the context of family violence.

According to Victorian Attorney-General, Robert Clark, the law “was supposed to help family violence victims, but instead it’s been hijacked by violent men who’ve been able to get away with murder”.<sup>77</sup>

One case which highlighted concerns about the gendered operation of the law of homicide and precipitated repeal of the offence of defensive homicide was *R v Middendorp* [2010] VSC 202.<sup>78</sup> In that case, a Victorian Supreme Court jury acquitted Luke Middendorp of murder after he fatally stabbed his former female partner, Jade Bowndes, four times in the back after she came at him with a knife. Moments after he stabbed her, Middendorp was heard by witnesses to have said that she was a “filthy slut” who “had it coming” and “got” what she “deserved”. The jury accepted his version of events that he stabbed his ex-partner in “self-defence” and convicted him of defensive homicide.

### Western Australia

In Western Australia, “excessive self-defence” is a partial defence to murder. This doctrine reduces the offence to manslaughter where the offender satisfied the subjective limb of the self-defence test, but the act is not a reasonable response by the person in the circumstances as the person believed them to be.<sup>79</sup>

### Queensland

#### Killing for Preservation

In 2010, the *Criminal Code 1988* (Qld) was amended to insert section 304B, which set out a new partial defence to murder of killing for preservation in the context of an abusive relationship.

Section 304B provides that murder will be reduced to manslaughter if:

- (a) the accused unlawfully killed the deceased in circumstances that would constitute murder;
- (b) the deceased had committed “serious acts of domestic violence” against the accused in the course of an “abusive domestic relationship”;
- (c) the accused believed that it was necessary to do the act or make the omission causing death, in order to preserve him or herself from death or grievous bodily harm; and

- (d) the accused had reasonable grounds for that belief, having regard to the abusive domestic relationship and all the circumstances of the case.

The terms “domestic violence” and “domestic relationship” are defined in the *Domestic and Family Violence Protection Act 1989* (Qld).

This new defence has not yet been tested at common law, but it has nonetheless been the subject of considerable criticism from legal stakeholders and academics.<sup>80</sup>

#### Diminished responsibility

Section 304A of the *Criminal Code 1988* (Qld) sets out the defence of diminished responsibility which, if successfully made out, will reduce a charge of murder to manslaughter. Pursuant to that section, when a person who unlawfully kills another person under circumstances which, but for the provisions of that section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of “arrested or retarded development of mind” or inherent causes or induced by disease or injury) to substantially impair the person’s capacity to understand what the person is doing, or the person’s capacity to control the person’s actions, or the person’s capacity to know that the person ought not to do the act or make the omission, the person is guilty of manslaughter only.

In *R v Ney* (2011) (Unreported, QSC, 8 March 2011), Ney killed her partner, Haynes. Initially charged with murder when she began her trial in 2010, she pleaded not guilty on the basis of self-defence or that she was guilty of manslaughter pursuant to the preservation defence (under section 304B of the Criminal Code). Her defence lawyer, when opening the case, told the jury that Ney had experienced demeaning and humiliating violence and abuse at the hands of the deceased. The defence lawyer said that Haynes had assaulted Ney on the night she killed him.

On day six of a proposed two-week trial, the jury was discharged. According to newspaper reports, jury deliberations had been disclosed to someone not on the jury panel. The matter was returned to court in March 2011 and a plea of guilty to manslaughter, based on diminished responsibility (section 304A of the Criminal Code) was accepted. Two expert reports identified Ney’s alcohol and substance abuse and multiple traumas she suffered in a series of violent relationships. While Dick AJ was not confident that all the violence Ney described was

77. See <http://www.abc.net.au/news/2014-06-22/vic-dumps-law-that-allowed-men-to-27get-away-with-murder27/5541670>.

78. <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSC/2010/202.html?stem=0&synonyms=0&query=middendorp>.

79. Section 248(3), *Criminal Code 1913* (WA).

80. See K Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective*, Palgrave Macmillan, 2014; Boe, “Domestic Violence in the Courts: re-victimising or protecting the victims?” (Paper presented at the National Access to Justice and Pro Bono Conference, Brisbane, 27–28 August 2010) <http://www.nationalprobono.org.au/ssl/CMS/files/cms/NA2JPBC2010-Boe.pdf>; M Edgely and E Marchetti, “Women who kill their abusers: How Queensland’s new abusive domestic relationships defence continues to ignore reality” (2011) 13 *Flinders Law Journal* 125; P Eastaugh and A Hopkins, “Walking in Her Shoes: Battered Women Who Kill in Victoria, Western Australia and Queensland” (2010) 35(3) *Alternative Law Journal* 132; E Sheehy, J Stubbs and J Tolmie, “Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand, 34 *Sydney Law Review* 467.

a reality, she was prepared to act on the basis that Ney's perception was that Haynes was violent to her. A nine year custodial sentence was imposed.

### South Australia

In South Australia, "excessive self-defence" is a partial defence to murder. This doctrine reduces the offence to manslaughter where the offender has acted with a genuine belief that their action was necessary and reasonable (the subjective test of the self-defence doctrine), but the conduct was not reasonably proportionate to the threat.<sup>81</sup>

### Tasmania

There are no other specific defences available in Tasmania.

### Northern Territory

In the Northern Territory, "diminished responsibility" is a partial defence to murder. This doctrine reduces the offence to manslaughter where the offender's mental capacity was substantially impaired at the time of the conduct causing death, the impairment arose wholly or partly from an underlying condition and the offender should not, given the extent of the impairment, be convicted of murder.

Expert and other evidence may be admissible to enable or assist the tribunal of fact to determine the extent of the offender's impairment at the time of the conduct causing death.

### Australian Capital Territory

In the Australian Capital Territory, "diminished responsibility" is a partial defence to murder. This doctrine reduces the offence to manslaughter where the offender can establish that he/she was suffering from an abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent cause or whether it was induced by disease or injury) that substantially impaired his or her mental responsibility for the act or omission.

## 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?**

#### QUESTION 6:

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

As part of the consultation process for the ALRC Report, it was submitted that homicide defences should not be treated in isolation, and that any forms of recognition should also include evidentiary rules and sentencing law and policy.<sup>84</sup>

The VLRC Report summarises some of the key concerns raised by academics and commentators regarding the gender-biased nature of the sentencing process due to inadequate recognition of the social realities of domestic violence. In particular the VLRC Report cites Stubbs and Tolmie who raised concerns that:

*"myths and stereotypes about domestic violence may significantly shape sentencing outcomes ... The sentencing process may reproduce such stereotypes in a setting where there is little prospect for challenge, and unless there is a legal error or a manifestly excessive sentence, there will be little room for appeal."*<sup>85</sup>

Examples of the ways in which this can manifest are:

- a court may not give sufficient weight to a history of violence in a relationship because it does not recognise the connection between the killing and prior violence;
- if a woman uses physical force in self-defence the court may characterise the situation as one of mutual violence or "family disfunction" rather than as a response to a continuing pattern of violence;
- women who fight back or "are not passive and helpless or who do not otherwise conform to accepted stereotypes" may be judged more harshly than women who are depicted as helpless victims;
- the social factors which lead people in particular communities to react violently may be insufficiently recognised; and
- women who abuse alcohol or drugs, or abuse or neglect their children, may be less favourably treated than women who "cope" better, even though the woman's negative behaviour may be caused or related to the fact she has been in a violent relationship.<sup>86</sup>

Across the Australian jurisdictions, while there have been some significant reforms in the law 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. Rather, jurisdictions have largely preferred to rely on the broad powers of the courts to take into account all relevant factors in sentencing and it is the development of case law that provides guidance as to how these factors affect sentencing decisions.

### New South Wales

In New South Wales, sentencing guidelines do not explicitly allow a past history of abuse to be considered if a woman is convicted of a violent crime against her abuser. However, under section 21A of the *Crimes (Sentencing Procedure) Act 1999* (New South Wales), the court is given a broad discretion to consider any

81. Section 15, *Criminal Law Consolidation Act 1935* (SA).

82. Section 159, *Criminal Code 1983* (NT).

83. Ibid.

84. ALRC Report at [14.78].

85. Julie Stubbs and Julia Tolmie, "Defending Battered Women on Charges of Homicide: The Structural and Systemic Versus the Personal and Particular" in Wendy Chan, Dorothy Chunn and Robert Menzies (eds) *Women, Mental Disorder and the Law* (2004), 12.

86. VLRC Report at [7.47].

objective or subjective factor that affects the relative seriousness of the offence. There are no rules, guidelines or legislation on the weight that may be given in sentencing to any such history of abuse, however the cases below serve as judicial guidance on the approach that has been taken by New South Wales courts.

***R v Bogunovich* (1985) 16 A Crim R 456:**

In this case the accused pleaded guilty to the manslaughter of her husband. The Prosecution accepted the plea because there had been provocation. The accused and her sons had been subject to extreme domestic violence by her husband over a period of 13 years. On the night of his death, she went to collect the deceased from a club where he had been drinking. In the car park, the deceased physically assaulted her, so the accused went back to the car and took out a knife and stabbed him. Maxwell J stated:

*"I am unable to find any valid reason for the imposition of a custodial sentence. I am quite satisfied that the deceased's persistent ill-treatment and abuse of the prisoner, and her knowledge of his assaults upon his sons, were such as to render this a special case in which a non-custodial penalty should be imposed."*<sup>87</sup>

The court imposed a non-custodial sentence, with a \$5,000 bond and good behaviour for four years.

***R v Roberts* (Unreported, NSWSC, 31 August 1989):**

The accused pleaded guilty to manslaughter. The Prosecution accepted the plea because there had been provocation. The accused had been subject to severe domestic violence over a number of years and the deceased had previously been charged with her assault. On the day the deceased died, the accused was severely assaulted by him. She drove home, got his gun, returned and shot him in the chest. Hunt J accepted the evidence but said:

*"It has been made very clear by the courts that the taking of a human life, even within the context of domestic violence, will not be viewed with leniency. Not even extreme domestic discord can ever be an excuse for the victim to take the law into her own hands and to extinguish the life of the aggressor."*<sup>88</sup>

However, Hunt J went on to note the circumstances surrounding the case and the fact that deterrence was not a big consideration in this case. The court imposed a non-custodial sentence, including \$1,000 bond and two years good behaviour.

***R v Russell* [2006] NSWSC 722:**

The accused got into a violent argument with her husband. During the course of the argument, she picked up a knife. The deceased screamed at the accused to

stab him. She stabbed him once in the chest. At the hearing, psychiatrists gave evidence of the extreme nature of the violence she had experienced from him. Newman AJ held that "the concept of battered woman syndrome is a factor to be taken into account by way of mitigation not by way of exculpation". The court imposed a sentence of six years' imprisonment.

***R v Woolsey* (Unreported, NSWSC, 19 August 1993):**

The accused pleaded guilty to the manslaughter of her husband. The Prosecution accepted the plea because there had been provocation. On the night of the deceased's death, he had been drinking and had assaulted the children. The accused was scared and took hold of a knife just to "scare him off". The deceased assaulted her and she stabbed him. Two psychologists gave evidence of "chronic domestic violence" and battered woman syndrome. Newman J found that battered woman syndrome was a factor that weighs very heavily in terms of mitigation of sentence. While the accused could not have successfully claimed self-defence, the history of violence led to a non-custodial sentence of four years good behaviour.

**Victoria**

Legislation in Victoria also does not explicitly refer to a past history of abuse as a consideration in the sentencing process if a woman is convicted of a violent crime against her abuser, and there is no express mention of the weight to be attached to any such evidence. However, the general principle is that the court must take into account "the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances".<sup>89</sup> Likewise, the Victorian Sentencing Manual does not appear to refer to a history of domestic violence expressly. However, it does set out a number of general principles in relation to the offender's personal history: "A court must obtain an understanding of an offender's background and past history in order to accurately assess moral culpability".<sup>90</sup> An example of this is *R v Black* [2011] VSC 152, where the judge considered Karen Black's history of family violence (including alleged sexually predatory moves by her husband). In this case the court did not think that the circumstances were such as to put it at the end of the spectrum.

Set out at Appendix 2 is a table which summarises Victorian cases between 2005 to 2013 in which women have killed their intimate partners, including a summary of the history of domestic violence and the outcome and sentence ordered (if any).

In 2004, the VLRC Report made a number of recommendations to address concerns raised above about the sentencing process. These included:

<sup>87</sup>. *R v Bogunovich* (1985) 16 A Crim R 456 at 462.

<sup>88</sup>. *R v Roberts* (Unreported, NSWSC, 31 August 1989) at [9].

<sup>89</sup>. *Sentencing Act 1991 (Vic)*, s 5(2AC)(g).

<sup>90</sup>. <http://www.judicialcollege.vic.edu.au/eManuals/VSM>, available online only.



- professional education for lawyers and judges on the realities of domestic violence;
- the changes to the rules of evidence to ensure expert evidence on the social and economic factors that affect victims of abuse is admissible (see above);
- further guidance from the Court of Appeal on sentencing principles in the context of domestic violence victims who commit violent crimes; and
- better statistical and qualitative information on sentencing which is made accessible to judges.<sup>91</sup>

### Western Australia

There is no express reference made in legislation, regulations or guidelines in Western Australia to past history of abuse being considered where a woman is convicted of a violent crime against her abuser.

Following the release of the LRCWA Report in 2007, Western Australia repealed its requirement for a mandatory penalty of life imprisonment for murder, and have replaced it with presumptive life imprisonment. Under section 279(4) of the *Criminal Code (WA)* the court is not obliged to sentence a person to life imprisonment if:

- that sentence would be clearly unjust given the circumstances of the offence and the person; and
- the person is unlikely to be a threat to the safety of the community when released from imprisonment.

The court must give reasons for not ordering a term of life imprisonment.

As the LRCWA has noted, historically, the harshness of mandatory sentencing for murder has led to the development of the partial defences discussed above. A case that illustrates the approach taken in Western Australia prior to the changes to mandatory sentencing is *R v Gilbert* (Unreported, WASC, 4 November 1993), where the accused was convicted of manslaughter on the basis of provocation, the provocation stemming from the physical abuse the deceased inflicted on the accused. In this case, a non-custodial sentence was imposed.

The LRCWA recommended the change to its mandatory sentencing requirements in conjunction with its recommendations to repeal the partial defence of provocation and to remove the requirement of imminence from the full defence of self-defence. The LRCWA considered the criticisms of partial defences such as provocation for failing to provide sufficient flexibility to take into account all relevant factors and noted that the area of sentencing (rather than substantive defences) is better suited to accommodating the wide variety of circumstances that arise in homicide cases.<sup>92</sup>

### Queensland

Queensland has retained mandatory sentencing of life imprisonment for murder under section 305(1) of the *Criminal Code 1988 (Qld)*. Some commentators have criticised this sentencing regime as it turns self-defence into an “all-or-nothing” defence for victims of domestic violence who kill.<sup>93</sup>

An example of a case where a past history of domestic violence was used as a mitigating factor in sentencing for manslaughter is *R v Mackenzie* [2000] QCA 324, where the accused had been assaulted and sexually abused by her husband. She went upstairs to get a gun and pointed it at the accused to threaten him, thinking it was unloaded. The accused tripped and the gun went off, killing the husband. She immediately called police and later pleaded guilty to manslaughter. The Court sentenced her to eight years’ imprisonment, but she appealed on the basis that she should have been advised by her legal counsel to plead self-defence, and that the sentence was manifestly excessive. The Court of Appeal found that the determination of an appropriate sentence in this case was difficult as the offence was one of criminal negligence and yet the applicant was a victim of serious and prolonged domestic violence. The Court found that self-defence could not be made out but that a lesser sentence of five years was appropriate. McMurdo P observed that victims of seriously abusive relationships (often called “battered persons”), who respond with violence against their abusers, are generally considered to deserve at the very least some mitigation of punishment to reflect reduced culpability.

### South Australia

In South Australia, there are no express provisions to allow the taking into account of past history of abuse, where a woman is convicted of a violent crime against her abuser. Nevertheless, in a more general manner, section 10 of the *Criminal Law (Sentencing) Act 1988 (SA)* outlines sentencing considerations, including but not limited to the circumstances of the offence, the antecedents of the defendant, or “any other relevant matter”. A history of abuse may fall into this scope, but this section does not appear to have been tested specifically in relation to a history of abuse.

It is to be noted that although there is a mandatory minimum non-parole period for a number of violent offences in South Australia, section 32A of the *Criminal Law (Sentencing) Act 1998 (SA)* provides that the court can fix a shorter period if satisfied that “special reasons” exist. Again this does not appear to have been tested, but could include a history of abuse against women who commit violent crimes against their abusers.

The weight that is to be attributed to any history of abuse, in sentencing a woman who commits a violent crime against her abuser, has not been specifically judicially considered.

91. VLRC Report, [7.53 – 7.60].

92. LRCWA Report, Chapter 7, pp 309-310.

93. ALRC Report at [14.26].

## Tasmania

In Tasmania, there are no sentencing guidelines that expressly allow a past history of abuse to be considered if a woman is convicted of a violent crime against her abuser. While the *Family Violence Act 2004* (Tas) and the “Safe at Home” initiative do consider sentencing issues in respect of abusers, these are not considered in the context of victims.

However, judges have a broad discretion to consider mitigating factors for custodial offences (which covers many violent crimes) under section 12 of the *Sentencing Act 1977* (Tas). Further developments in this area may be expected as the Tasmanian Sentencing Advisory Council has listed family violence as one of its current projects on its website, but no further information is available.

In addition to this, despite the repeal of provocation as a statutory defence, provocation can still be taken into account in sentencing: in *Tyne v Tasmania* [2005] TASSC 119, the Tasmanian Court of Criminal Appeal held that the repealed section should be disregarded and that a sentencing judge should take any provocation into account when determining a sentence by giving it appropriate weight, stating that “*there is no longer any reason to impose a sentence for manslaughter instead of murder because of provocation. Provocation is taken into account in the exercise of the sentencing discretion for murder*”. While this case does not deal with a female offender, given that prior to the repeal of the defence, provocation had been upheld in cases where women attacked their abusers, this could certainly be relevant for sentencing purposes.

## Northern Territory

The *Criminal Code 1983* (NT) provides for mandatory life sentences for murder convictions<sup>94</sup> and the sentencing court is required to fix a minimum non-parole period of 20 years.<sup>95</sup> The court may fix a shorter non-parole period if it is satisfied that there are “exceptional circumstances that justify fixing a shorter non-parole period”.<sup>96</sup>

In determining whether such exceptional circumstances exist, the court must be satisfied that the offender is otherwise a person of good character and is unlikely to re-offend, and that the victim’s conduct substantially mitigated the conduct of the offender.<sup>97</sup>

In the context of other violent crimes, as in other jurisdictions, the *Sentencing Act 1995* (NT) in the Northern Territory does not expressly take into account a history of abuse. However, such matters may be captured under Section 5 of the *Sentencing Act 1995* (NT), which gives the court a broad discretion to consider relevant circumstances. The weight, that is to be attributed to any history of abuse in sentencing, has not been specifically judicially considered in the Northern Territory.

## Australian Capital Territory

There are no specific provisions in the sentencing guidelines for the Australian Capital Territory that allow consideration of a past history of abuse specifically where a woman is convicted of a violent crime against her abuser. However, relevant considerations for sentencing apply in a similar way as they do in other states. Section 33 of *Crimes (Sentencing) Act 2005* (ACT) gives the court discretion to take into account any relevant factor, including (relevantly) the nature and circumstances of the offence, the cultural background, character, antecedents, age and 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. The weight that is to be attributed by courts in the Australian Capital Territory to any history of abuse in sentencing has not been specifically judicially considered.

## 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?**

The vast majority of criminal offences, including violent offences, are heard in lower courts and the sentences delivered are not appealed. In Victoria, for example, the Magistrates’ Court (the lowest in that jurisdiction’s hierarchy) is responsible for around 80% of all people sentenced,<sup>98</sup> and only a handful of its sentences are appealed (usually the most serious cases).

Unfortunately, there do not appear to be any statistics which provide a gender breakdown of sentencing in lower courts as against appellate courts in any of the jurisdictions or at a national level. There are, however, a range of related statistics on sentencing by gender from Victoria. These are outlined below.

The Sentencing Advisory Council of Victoria published data in 2007 outlining the types of sentences imposed, by gender, for murder and manslaughter. In Victoria, the key trend is that women are far less likely than men to commit violent offences, more likely than men to be sentenced to imprisonment (with the exception of manslaughter cases) and, when sentenced to prison, receive shorter average custodial terms than men. The relevant charts are extracted below.

94. *Criminal Code 1983* (NT), ss 157, 161.

95. *Criminal Code 1983* (NT), s 53A. Note that the minimum non-parole period is 25 years in certain circumstances, such as where the victim is a police officer or a child, or where the murder was carried out in the course of a sexual offence.

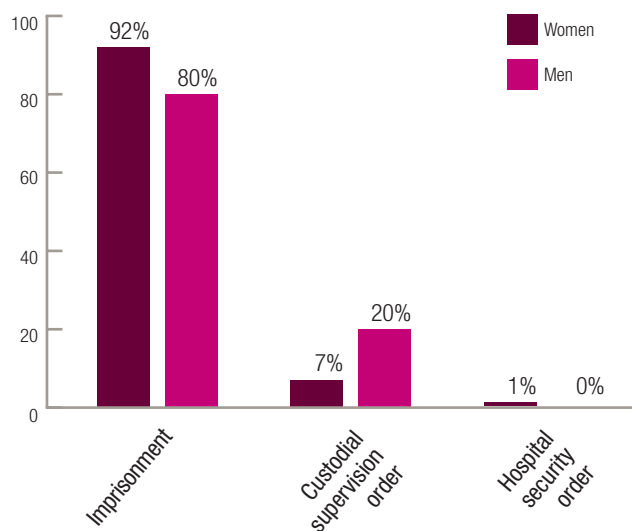
96. *Criminal Code 1983* (NT), s 53A(6).

97. *Criminal Code 1983* (NT), s 53A(7).

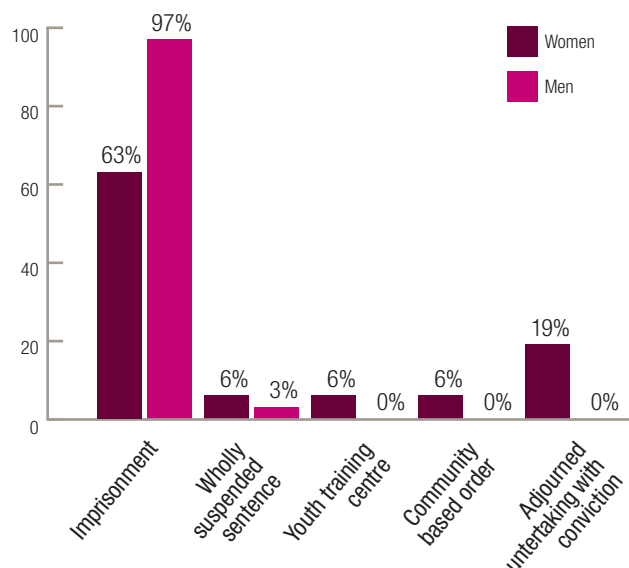
98. Sentencing Advisory Council of Victoria, *Gender Differences in Sentencing Outcomes*, July 2010, p. 19-22.



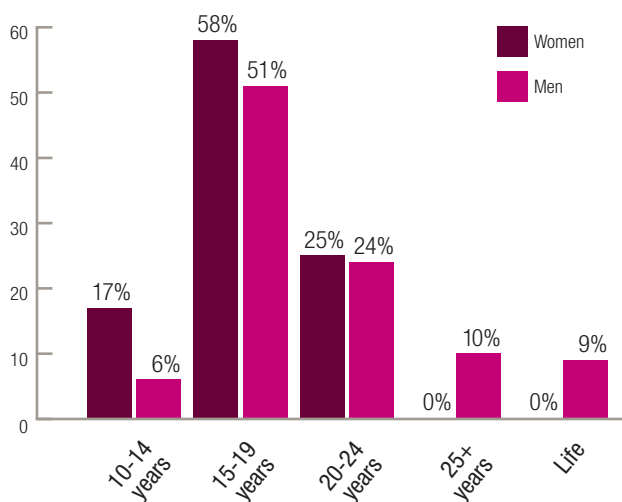
**Chart 1: Sentence types imposed for murder, by gender of offender in Victoria, Australia**



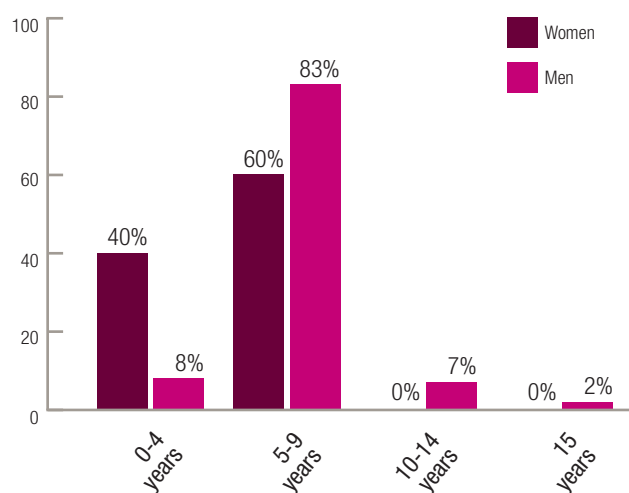
**Chart 3: Sentence types imposed for manslaughter, by gender of offender in Victoria, Australia**



**Chart 2: Length of imprisonment terms imposed for murder, by gender of offender in Victoria, Australia**



**Chart 4: Length of imprisonment terms for manslaughter, by gender of offender in Victoria, Australia**

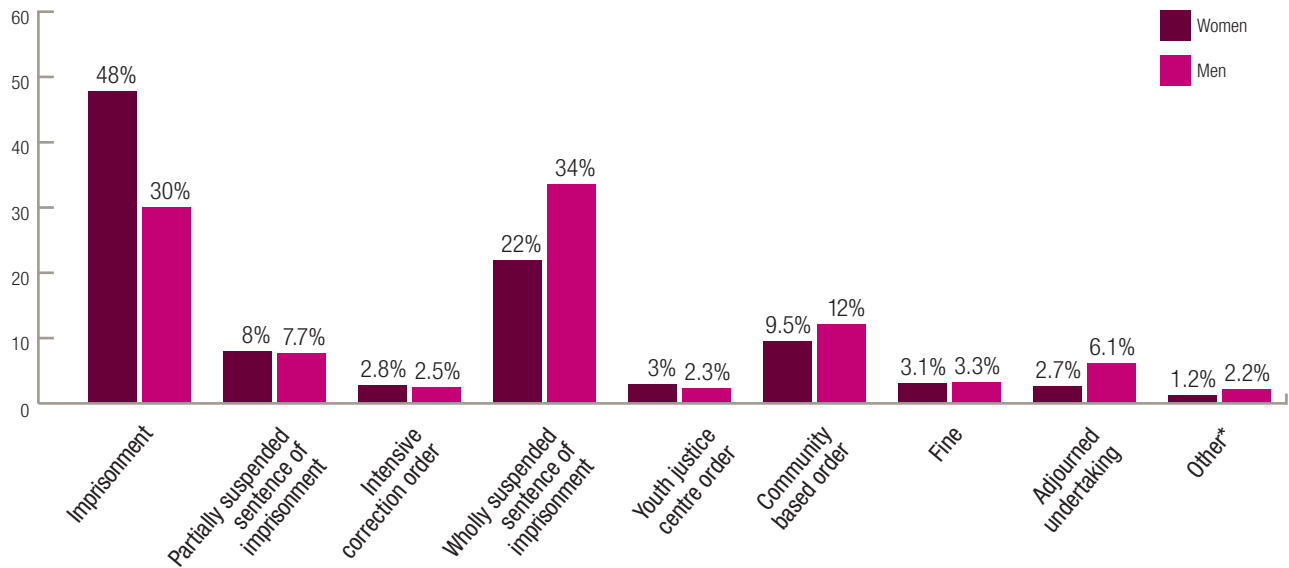


Data published in 2007 by the Sentencing Advisory Council of Victoria.<sup>99</sup>

<sup>99</sup>. Sentencing Advisory Council of Victoria, *Gender Differences in Sentencing Outcomes*, July 2010, p. 19-22.

Similarly, a 2010 publication by the Victorian Sentencing Advisory Council showed significant differences in the types of sentences handed down to male and female offenders in the County and Supreme Courts (the higher courts of Victoria). The key table is extracted below.

**Chart 5: Sentence types imposed by the County and Supreme Courts of Victoria**



Note: “other” includes: indefinite term of imprisonment; combined custody and treatment order; home detention order; youth attendance order; youth supervision order; hospital security order; residential treatment order; restricted involuntary treatment order; custodial supervision order; non-custodial supervision order; good behaviour bond; dismissal; discharge; and conviction and discharge.

**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?**

**ALRC Report recommendations**

In its 2010 report, the ALRC considered the approaches to recognition of family violence in homicide defences and made a number of recommendations, including:

- criminal legislation in each jurisdiction should ensure that defences to homicide accommodate the experience of domestic violence victims who kill;
- each jurisdiction should review their defences to homicide relevant to domestic violence victims who kill;

- an appropriate national body should investigate strategies to improve the consistency of approaches to this issue; and
- criminal legislation should provide guidance about the potential relevance of domestic violence-related evidence in the context of a defence to homicide, and the Victorian approach is an instructive model in this regard.

### Other academic and judicial discussion

Australia has an extensive body of academic literature and judicial commentary in this area, much of which is referred to above or referred to in the reports of the various law reform commissions cited above.

The reports of state- and territory-based law reform commissions provide the most comprehensive overviews of discourse on these issues. The annotated bibliography below sets out some additional items for further reading.

Source	Comment
<i>R v Osland</i> [1998] VR 632 <i>Osland v R</i> (1998) 197 CLR 316	Landmark judicial decision which first addressed battered woman syndrome in Australia, which led to the defensive homicide reforms in Victoria.
Kellie Toole, "Defensive Homicide on Trial in Victoria" (2013) 39(2) <i>Monash University Law Review</i> 473	This article outlines the cases which led to the criticisms of the offence of defensive homicide in Victoria.
Victorian Department of Justice, <i>Proposals for Legislative Reform: Consultation Paper</i> , September 2013	This Government paper led to the abolition of defensive homicide.
Kate Fitz-Gibbon, <i>Homicide Law Reform, Gender and the Provocation Defence</i> (Palgrave MacMillan, 2014)	This is the most comprehensive academic publication which tracks the history of homicide law in relation to female victims of domestic abuse.
Australian Feminist Judgments Project, Battered Woman Syndrome case studies, up to date to September 2014, available at <a href="http://www.law.uq.edu.au/afjp-case-studies">http://www.law.uq.edu.au/afjp-case-studies</a>	The Australian Feminist Judgments Project is a research project jointly run by the University of Queensland, University of Technology, Sydney and University of Kent which investigates the possibilities, limits and implications of a feminist approach to legal decision-making. As part of the project, researchers have prepared this summary of cases relevant to battered woman syndrome and considered feminist academic commentary of the cases where available, noting whether this commentary is neutral, positive or negative. This report also covers recent law reform activity.
Bradfield RJ, "The treatment of women who kill their violent male partners within the Australian criminal justice system", PhD thesis, University of Tasmania (2002), available at <a href="http://eprints.utas.edu.au/1045/">http://eprints.utas.edu.au/1045/</a>	This thesis includes detailed analysis of 65 cases between 1980 and 2000 in which a woman killed her male spouse after domestic violence.

## APPENDIX 1:

## Victorian legislative provisions

**Crimes Act (Vic) 1958****Section 322J Evidence of family violence****1. Evidence of family violence, in relation to a person, includes evidence of any of the following:**

- (a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;
- (b) the cumulative effect, including psychological effect, on the person or a family member of that violence;
- (c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;
- (d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;
- (e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;
- (f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.

**2. In this section:**

- **child** means a person who is under the age of 18 years;
- **family member**, in relation to a person, includes:

- (a) a person who is or has been married to the person; or
- (b) a person who has or has had an intimate personal relationship with the person; or
- (c) a person who is or has been the father, mother, step-father or step-mother of the person; or
- (d) a child who normally or regularly resides with the person; or
- (e) a guardian of the person; or
- (f) another person who is or has been ordinarily a member of the household of the person;

**family violence**, in relation to a person, means violence against that person by a family member;

**violence means:**

- (a) physical abuse; or
- (b) sexual abuse; or
- (c) psychological abuse (which need not involve actual or threatened physical or sexual abuse), including but not limited to the following—
  - (i) intimidation;
  - (ii) harassment;
  - (iii) damage to property;
  - (iv) threats of physical abuse, sexual abuse or psychological abuse;
  - (v) in relation to a child:
    - causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or
    - putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.

**3. Without limiting the definition of violence in subsection (2.):**

- (a) a single act may amount to abuse for the purposes of that definition; and
- (b) a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

**Section 322M Family violence and self-defence****1. Without limiting section 322K, for the purposes of an offence in circumstances where self-defence in the context of family violence is in issue, a person may believe that the person's conduct is necessary in self-defence, and the conduct may be a reasonable response in the circumstances as the person perceives them, even if:**

- (a) the person is responding to a harm that is not immediate; or
- (b) the response involves the use of force in excess of the force involved in the harm or threatened harm.



**2. Without limiting the evidence that may be adduced, in circumstances where self-defence in the context of family violence is in issue, evidence of family violence may be relevant in determining whether:**

- (a)** a person has carried out conduct while believing it to be necessary in self-defence; or
- (b)** the conduct is a reasonable response in the circumstances as a person perceives them.

## **Jury Directions Act 2013 (Vic)**

### **Section 32 Direction on family violence**

**1. Defence counsel (or, if the accused is unrepresented, the accused) may request at any time that the trial judge direct the jury on family violence in accordance with subsection (6) and all or specified parts of subsection (7).**

**2. The trial judge must give the jury a requested direction on family violence unless there are good reasons for not doing so.**

**3. If the accused is unrepresented and does not request a direction on family violence, the trial judge may give the direction in accordance with this section if the trial judge considers that it is in the interests of justice to do so.**

**4. The trial judge:**

- (a)** must give the direction as soon as practicable after the request is made; and
- (b)** may give the direction before any evidence is adduced in the trial.

**5. The trial judge may repeat a direction under this section at any time in the trial.**

**6. In giving a direction under this section, the trial judge must inform the jury that:**

- (a)** self-defence or duress (as the case requires) is, or is likely to be, in issue in the trial; and
- (b)** as a matter of law, evidence of family violence may be relevant to determining whether the accused acted in self-defence or under duress (as the case requires); and
- (c)** in the case of self-defence, evidence in the trial is likely to include evidence of family violence committed by the victim against the accused or another person whom the accused was defending;

[...]

**7. If defence counsel requests that the direction include any of the following matters, the trial judge, subject to subsection (2), must include those requested matters in the direction:**

**(a)** that family violence:

- (i)** is not limited to physical abuse and may include sexual abuse and psychological abuse;
- (ii)** may involve intimidation, harassment and threats of abuse;
- (iii)** may consist of a single act;
- (iv)** may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial;

**(b)** if relevant, that experience shows that:

- (i)** people may react differently to family violence and there is no typical, proper or normal response to family violence;
- (ii)** it is not uncommon for a person who has been subjected to family violence:
  - to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;
  - not to report family violence to police or seek assistance to stop family violence;
- (iii)** decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by:
  - family violence itself;
  - cultural, social, economic and personal factors;

**(c)** that, as a matter of law, evidence that the accused assaulted the victim on a previous occasion does not mean that the accused could not have been acting in self-defence or under duress (as the case requires) in relation to the offence charged.

**8. If the accused is unrepresented, the trial judge may include in the direction any of the matters referred to in subsection (7)(a), (b) or (c).**

**9. This section does not limit any direction that the trial judge may give the jury in relation to evidence given by an expert witness.**

APPENDIX 2:

Table of Victorian cases 2005 to 2013

Cases of women who have killed their intimate partners, 2005-2013<sup>100</sup>

Case citation	Plea/trial	Immediate circumstances of killing	Relationship context	Method of killing	History of family violence	Result/sentence
<i>DPP v Freda Dimitrovski</i> (2009)	N/A	The deceased physically attacked the defendant and her daughter, in the presence of her four-year-old grandson.	Married	Stabbed with pocket knife.	A 30-year history of physical and psychological abuse by the deceased.	Magistrate dismissed the charges in May 2009.
<i>R v Kulla Kulla Melissa</i> (2010) VSC 60	Plea to manslaughter by an unlawful and dangerous act (“ <b>UDA</b> ”)	The deceased made threats to kill, threw an oven tray and picked up a kitchen knife.	<i>De facto</i> relationship (four months)	Stabbed once with kitchen knife.	The deceased had previously been observed acting in threatening manner towards the defendant.	Six years with non-parole of three years.
<i>R v Black Karen</i> (2011) VSC 152	Plea to defensive homicide	Verbal argument, the deceased cornered the defendant in the kitchen and repeatedly jabbed her with his finger.  The defendant said that she believed the deceased was going to sexually assault her.	<i>De facto</i> relationship (five years)	Stabbed twice with kitchen knife.	The defendant described a history of sexual demands, intimidation and threats by the deceased.	Nine years with non-parole of three years.
<i>R v Creamer Eileen</i> (2011) VSC 196	Trial – found guilty of defensive homicide	Verbal argument, the defendant believed the deceased was arranging for her to have sex with other men in his presence.  The defendant also alleged the deceased verbally abused her, hit her vagina with a stick and threatened her with a knife; however, the accuracy of this account was questioned by the sentencing judge.	Married (10 years)	Struck multiple times with stick and stabbed with knife.	The defendant described prior sexual coercion, rape and psychological abuse by the deceased.	Guilty. Defensive homicide. 11 years with non-parole of seven years. Appeal 2012 – dismissed.
<i>R v Downie Elizabeth</i> (2012) VSC 27	Plea to manslaughter by an UDA	The defendant organised two men to assault her ex-husband, in response to him allegedly indecently assaulting her daughter. The defendant was present during the killing.	Ex-partners (divorced five years prior to killing)	Co-accused male stabbed deceased multiple times.	Prior intervention orders against each other. Defendant described the deceased as “intimidating and controlling”.	Six years with non-parole of four years.
<i>R v Kells Jade</i> (2012) VSC 53	Trial – found guilty of manslaughter by an UDA	Verbal argument over a mobile phone and money allegedly stolen by the deceased. The defendant also alleged the deceased had earlier pushed her against a wall and choked her.	<i>De facto</i> relationship (five months)	Stabbed once with kitchen knife.	The defendant described a history of verbal and physical violence by the deceased (according to prosecution, violence was mutual).	Guilty. Manslaughter. Eight years with non-parole of five years.
<i>R v Edwards Jemma</i> (2012) VSC 138	Plea to defensive homicide	The deceased made threats to kill and disfigure the defendant. The defendant also alleged the deceased attacked her with a knife; however, the accuracy of this account was questioned by sentencing judge.	Married (12 years)	Stabbed more than 30 times with kitchen knife. Minor wound also inflicted by spear gun.	Lengthy and well-documented history of the deceased’s physical violence from 1999 onwards. Police called to intervene multiple times.  The deceased was also violent towards his daughter and mother.  Intervention order in June 2010 to protect the defendant against the deceased.  The defendant had one prior conviction for violence towards the deceased in 2005 (pleaded guilty to assault).	Seven years with non-parole of four years nine months.
<i>R v Hudson Veronica</i> (2013) VSC 184	Plea to manslaughter by an UDA	Verbal argument. The deceased accused the defendant of sleeping with other men.	<i>De facto</i> relationship (six years)	Stabbed once with knife.	History of threats, repeated physical violence and controlling behaviour by the deceased.  In 2006, a domestic violence order was taken out against the deceased. He seriously assaulted the defendant in breach of the order, and was sentenced to five years’ imprisonment for causing grievous bodily harm.	Six years with non-parole of three years.

<sup>100</sup>. Domestic Violence Resource Centre Victoria, “Justice or Judgement? The impact of Victorian homicide law reforms on responses to women who kill intimate partners”, Discussion Paper No 9, 2013

## ANNEX 3:

## Brazil

## Introduction

The primary source of Brazilian criminal law is the Brazilian Penal Code (the “**Code**”), which sets out the rules for establishing a criminal act and sentencing. Although case law in Brazil has no binding force and there is no doctrine of precedent, it is persuasive and may therefore have an impact on the interpretation of legislation (including the Code).

In accordance with Article 5, paragraph XXXVIII of the Brazilian Federal Constitution, crimes against life are judged by a Jury Court comprised of seven jurors. A Jury Court’s decision is considered sovereign, and may be amended only under circumstances prescribed by Article 593 III of the Brazilian Code of Criminal Procedure, namely if:

- (a) nullity occurs after the decision is announced;
- (b) the decision of the presiding Judge is contrary to express law or the decision of the jurors;
- (c) there is judicial error or injustice with respect to the application of the punishment or security measure; or
- (d) the decision of the jurors is manifestly contrary to the evidence in the record.<sup>101</sup>

If the defendant is convicted, it is the Judge’s responsibility to set the penalty in accordance with the requirements of the Code, taking into consideration any mitigating and/or aggravating circumstances.

A history of past abuse is not a defence in itself, but may be relevant to establish the defences of self-defence, “violent emotion” or “state of necessity” if the other requisite conditions for those defences are also met (see below). In such cases, the woman must have been in a situation of actual or imminent danger, or an unjust act must have taken place before she committed her offence.

There are cases where a history of abuse has been taken into consideration in practice. For example, Wilma Ruth Modesto Ferreira and Severina Maria da Silva were both acquitted of killing their long-term abusers. Similarly, Elenice Teixeira was granted temporary freedom following her arrest for a crime against her husband on the grounds that she had acted in self-defence.

On the other hand, although a past history of abuse was considered in the case of Maria Quirino (who claimed to have acted in self-defence), she was found guilty of killing her husband. Her appeal was also rejected.

Regarding sentencing, although the Code does not explicitly mention a past history of abuse as a factor to be considered in sentencing, the courts can rely on the rules on sentencing contained in the Code, which can be applied more widely. In particular, the court can consider any “relevant circumstances” surrounding the criminal act or whether the defendant acted on the grounds of social or moral value or under overwhelming emotion.

No quantified weight is given to “relevant circumstances” in sentencing. However, the sentence for a crime committed by reason of social or moral value or overwhelming emotion can be reduced by one-sixth to one-third.

## 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)?**

## 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?**

The Code does not provide any full or partial defences based solely on the history of past abuse. As such, a past history of abuse cannot on its own serve as a basis for the general defences of self-defence or state of necessity unless the other requisite conditions for the defences are also met (see paragraphs below). In practice, this means that a woman with a past history of abuse must have been in a situation of actual or imminent danger or an unjust act must have taken place before she committed her offence, and she cannot rely solely on the fact that she has a past history of abuse. It is therefore not certain whether the defences set out below would apply where a woman’s act is triggered by battered woman syndrome or slow burn reaction.

<sup>101</sup>. <http://www.cidh.oas.org/annualrep/2007eng/Brazil12293eng.htm>, para 55.

## Violent emotion

Articles 65 and 66 of the Code provide that psychological and or physical abuses committed by the victim against their aggressor can be considered mitigating circumstances. Pursuant to Article 65(c), 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”.

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. In practice, it might not therefore apply to a woman whose crime was committed as a result of battered woman syndrome or slow burn reaction.

Unlike self-defence or the state of necessity defence (see paragraphs below), the trigger for the violent emotion defence needs to be an “unjust act” rather than a situation of danger. An “unjust act” is not defined so it is not clear how broadly this provision could be interpreted. As such, this defence might apply in broader circumstances than one in which the woman’s abuser committed, or was about to commit, an act of violence, provided his actions constituted an “unjust act”.

## Self-defence

Article 23 of the Code provides a defence where a crime is committed in self-defence (“legítima defesa”). Under Brazilian law (as set out in the Code and interpreted through legal doctrine in the form of academic analysis), self-defence is considered to be the moderate use of the necessary means to repel unjust actual or imminent aggression to one’s own or to a third party’s rights.

In order for the defence to apply, the victim must have employed only the force necessary to repel the aggression, taking into account the surrounding circumstances. If the woman were to use excessive force, self-defence will not apply and she will be liable to prosecution for her crime.

It does not seem that this defence would apply solely on the grounds that a woman has a past history of abuse. Were the woman’s crime against her abuser to be 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), this defence would be applicable. However, if the aggression is not “actual or imminent” it does not seem that self-defence would apply *prima facie*. It might not be the case, therefore, that self-defence would apply in the case of a woman suffering from battered woman syndrome or slow burn reaction.

## State of necessity

Article 24 of the Code provides that a state of necessity (“estado de necessidade”) can give rise to a defence in certain circumstances. Under Article 24, a state of need arises when (i) a person performs an act that is reasonable to prevent actual danger; (ii) that danger is not caused by the person’s own will and is not avoidable in any other way; and (iii) the right being protected justifies the particular criminal act committed.

Again, this defence is caveated in the sense that the woman’s actions must be reasonable and she must be able to show that she could not have avoided the danger in any other way. As such, it is not clear whether this defence would apply in the case of a woman with battered woman syndrome or slow burn reaction unless her actions against her abuser happened to be taken in a situation where there was actual danger. As such, a past history of abuse alone (as opposed to being considered in conjunction with the occurrence of an imminent threat) might not suffice to give rise to a state of necessity.

Although the woman must also be able to show that the right she was protecting justifies her violent actions against her aggression, it seems likely that protecting her own life could constitute protecting a right that justifies a violent response. However, as there is a requirement for the woman to have been in imminent danger, it is unclear whether or how this defence would apply in circumstances where slow burn reaction or battered woman syndrome has caused her to commit a violent offence.

### QUESTION 3:

**Does the 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?**

The Code does not contain any specific 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. As noted above, the defences available to alleviate guilt of a woman with a past history of abuse require there to have been an unjust act or danger (whether actual or imminent) in order for a possible defence to arise.

### 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?**

There are no cases available that have been issued by a Jury Court that demonstrate the implementation of the Code where a woman has been charged with a violent crime against her abuser. Brazil does not have the doctrine of precedent, and there is no central database or other form of records for finding case law.



However, it is possible to find records of cases from other sources, for example through media reports. In order to obtain a court report, journalists must attend the court and make a record of the proceedings, which are then reported in newspapers or other media sources. Although reported in the media rather than having been issued by the Jury Court, there are some cases available that demonstrate a history of abuse having been taken into consideration in practice.

#### **Wilma Ruth Modesto Ferreira<sup>102</sup>**

On 6 March 2011, Mrs Ferreira stabbed her husband, Edilson da Silva Freitas, in the abdomen at their home. Although he survived to undergo two operations, he subsequently died. The court heard a testimony from Mr Freitas' son, who confirmed that his parents' relationship had been troubled by his father's use of alcohol and cocaine. Mrs Ferreira's niece, who helped to try to save Mr Freitas, confirmed in her testimony that Mr Freitas became aggressive when under the influence of alcohol.

Mrs Ferreira said that she had lived with Mr Freitas, the father of her two children (aged 13 and 15) for 17 years, and that he had been using cocaine and drinking alcohol for approximately five years. Mrs Ferreira said that she was repentant and claimed that she had acted to defend herself from further aggression after having been assaulted by Mr Freitas. After inflicting the injuries, Mrs Ferreira attempted to save her partner and accompanied her niece to the hospital, where Mr Freitas subsequently died.

After five hours of deliberations, the Jury concluded by a majority vote that Mrs Ferreira had acted in self-defence and the case was subsequently dismissed.

#### **Maria Quirino<sup>103</sup>**

In a criminal appeal dated 8 September 2011, Mrs Quirino, now the appellant, requested the review of a decision of a Jury Court sentencing her to thirteen years in prison for the death of her husband, Vilmar Cacheira Quirino, to whom she had been married for twenty years. The court heard that Mr Quirino had a habit of drinking and hurting his wife. Mrs Quirino claimed that she had wanted to separate from her husband but he had issued death threats in response to this.

At around midnight on 8 October 2007, Mr Quirino attacked his wife after returning home from having been drinking, including by gripping her neck, kicking her and calling her profanities. It was also claimed that Mr Quirino went to the car to fetch a bag which he said contained a gun, with which he threatened his wife.

Following this, Mr Quirino went to sleep in the master bedroom. After checking that her father was sleeping, Mrs Quirino's daughter, Susan, went to the kitchen,

took a knife and returned to her room. Mrs Quirino took the knife from her daughter's hand and said that she would do it instead. She left the room and returned to kill him by striking him on the head with a sledgehammer while Susan entertained her four-year-old brother in his bedroom to prevent him from witnessing what was taking place. Susan attempted to take responsibility for her mother's actions because she was concerned that her mother needed to care for the four-year-old child.

Although the jury acquitted Susan, Mrs Quirino's conviction was upheld. The court noted the elements of the defence of self-defence and found that they were not met in this case. It was held that there was no evidence that Mrs Quirino had repelled unfair actual or imminent aggression because the incident between her and her husband had ceased. Mrs Quirino was also found not to have used moderate or necessary means to repel her husband, who was asleep when the blows took place. Due to the fact that her husband was asleep at the time, the previous abuses that he had were not deemed to constitute self-defence.

In this case, the past history of abuse, and indeed the occurrence of abuse not long before Mrs Quirino murdered her husband, was not sufficient to act as a defence.

#### **Elenice Teixeira<sup>104</sup>**

Elenice Teixeira was arrested before trial during investigations for murdering her husband. She subsequently submitted a *Habeas Corpus* appeal for bail on the grounds of self-defence. Mrs Teixeira claimed that she acted in self-defence because she and her husband were having an argument during which he assaulted her. Mrs Teixeira claimed that her husband would also have stabbed her, had she not disarmed him and, tired of his constant aggression, stabbed him.

Mrs Teixeira's appeal for bail was granted in light of the violence to which she had been subjected. The decision states that the criminal act took place because of the constant aggression that Mrs Teixeira had suffered over a long period of time, which was corroborated by the couple's neighbours, who gave a deposition at the police station in charge of the investigations. In light of the specific circumstances of the case, it was also noted that there was nothing to indicate that Mrs Teixeira would repeat this type of criminal conduct because the reason for her previous suffering had now been removed.

#### **Severina Maria da Silva<sup>105</sup>**

Mrs da Silva stood trial accused of having murdered her father, Severino Pedro de Andrade, who had abused her since the age of nine and with whom she had 12 children. Mrs da Silva hired two men to kill her father

<sup>102</sup>. <http://g1.globo.com/pa/para/noticia/2014/10/mulher-que-matou-marido-e-absolvida-por-legitima-defesa-em-belem.html>.

<sup>103</sup>. <http://tj-sc.jusbrasil.com.br/jurisprudencia/20453585/apelacao-criminal-acr-641917-sc-2010064191-7/inteiro-teor-20453586>.

<sup>104</sup>. The case can be found by searching <https://esaj.tjsp.jus.br/pastadigital/sg/abrirConferenciaDocumento.do> using the *Habeas Corpus* number 2206149-09.2014.8.26.0000 and code number 10FF4FD.

<sup>105</sup>. <http://noticias.terra.com.br/brasil/policia/mulher-que-mandou-matar-pai-que-a-abusava-e-absolvida-no-recife.935a325ab6e1b310VgnCLD200000b6cceb0aRCRD.html>.

on 15 November 2005, following his attempt to rape Mrs da Silva's 11 year-old daughter. Following her indictment, Mrs da Silva was imprisoned for one year and six days, but was subsequently allowed to await the judgment in freedom.

Mrs da Silva was acquitted of her father's murder, having pleaded during the proceedings that she had acted in self-defence. Significantly, the prosecutor accepted Mrs da Silva's self-defence argument and did not ask for her to be convicted because there could be no punishment greater than her long years of sexual abuse. Mrs da Silva's defence lawyer said, "This is the first time I have seen such a case, but it is the evolution of women's rights. Society is supportive to Severina because she has already been punished all her life."

#### 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?**

It is the Judge's responsibility to set the penalty for a criminal act in accordance with the requirements of the Code and taking into consideration any relevant and/or aggravating circumstances. The Code does not specifically mention a past history of abuse as a factor to be considered in sentencing of a woman convicted of a violent crime against her abuser. As such, the courts must rely on the rules on sentencing contained in the Code, which can be applied more widely.

#### Relevant circumstances

Under Article 66 of the Code, a penalty can be reduced due to any "relevant circumstances" ("circunstância relevante") that occurred prior to or after the crime, but which are not specifically provided for by law. The Code does not specify what constitutes "relevant circumstances", so it is unclear whether a history of abuse would suffice for Article 66 to apply. Rather, when judging and setting the sentence, the jury and the Judge must take into consideration the circumstances in which the crime took place. This is done on a case-by-case basis.

#### Social or moral value or overwhelming emotion

Additionally, in relation to certain crimes (such as homicide and bodily injury), a defendant's sentence can be reduced if he or she was impelled to commit the offence either by reason of relevant social or moral value, or under the influence of overwhelming emotion, immediately following unjust provocation by the victim. Again, there is no specific

definition of what might constitute a "reason of relevant social or moral value", which means that the Judge and the jury must consider this issue on a case-by-case basis.

In such a case, although the reaction must follow provocation, the provocation does not need to be immediately prior to the defendant's act. Rather, there must be a sequence compatible with the defendant's state of mind. This therefore allows a certain degree of flexibility in the requisite timing. Whilst the defendant's actions do not strictly need to follow immediately from an act of provocation by her abuser, it is not clear whether this leniency in sentencing encompasses slow burn reaction. However, these provisions might be applicable in circumstances where the woman's violent crime took place immediately or shortly after provocation by her abuser, such as an act of violence.

#### The case of Andrea de Oliveira da Silva<sup>106</sup>

As noted above, case law is not binding precedent in Brazil. However, a past history of abuse has previously been taken into consideration by the court when sentencing a woman convicted of a violent crime against her abuser.

On 15 February 2000, Andrea de Oliveira da Silva had been drinking alcohol with her husband but following an argument she killed him by putting poison in his meal. She was sentenced to 11 years and eight months' imprisonment but went on to appeal the duration of the sentence.

The court elevated from one sixth to one quarter the mitigating fraction applied to her sentence, as provided for by Article 121 of the Code in relation to homicides committed by reason of relevant social or moral value, or under the influence of overwhelming emotion, following unjust provocation. In reaching its judgment, the court took into account the deceased husband's history of aggression against Mrs da Silva. The court upheld the appeal and Mrs da Silva's sentence was reduced by one quarter because her 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?**

#### Relevant circumstances

In the event that the Jury Court and Judge accept that relevant circumstances surrounding the offence ought to be taken into consideration pursuant to Article 66 of the Code, there is no specific weight given in sentencing.

<sup>106</sup>. <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=236785>.

### **Social or moral value or overwhelming emotion**

Pursuant to Article 121, paragraph 1 and Article 129, paragraph 4 of the Code, the sentence may be reduced by one-sixth to one-third if the Jury Court and the Judge accept that the homicide and/or bodily injury was committed by reason of relevant social or moral value or under overwhelming emotion immediately following an unjust provocation by the victim.

#### **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?**

There are no available 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.

#### **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?**

**Article by Isabel Murray of the BBC entitled “Violent crime is taboo in women’s prison” dated 19 November 2001<sup>107</sup>**

An article on the BBC website cites that approximately 20% of the 400 inmates at Butantã women’s prison in São Paulo were imprisoned for murder. Of those women, 90% had killed their husband. Cíntia Ferrari, the psychologist responsible for counselling the inmates, says that in most cases where a woman commits homicide there is a history of past violence.

She is cited as saying: “There is a whole history of aggression by the husband, sometimes even death threats. They [the women] then end up killing. They get a burst and they kill.” She explained that the abuse usually goes on for years before coming to this point. “Sometimes they have histories of abuse in adolescence, by father and mother, then they repeat the same life story with the husband and come to that point”.

The article also states that less than 1% of total homicides in the state of São Paulo are committed by women.

**Report entitled “A picture of the women prisoners in the State of Rio de Janeiro”, by Bárbara Musumeci Soares (2002)<sup>108</sup>**

According to a report by Bárbara Musumeci Soares (2002), more than 95% of imprisoned women have been subjected to one of the following types of violence: during childhood, by their parents or tutors; during adulthood, by their husbands and, when imprisoned, by police officers.

<sup>107</sup>. [http://www.bbc.co.uk/portuguese/noticias/2001/011115\\_prisaocrime.shtml](http://www.bbc.co.uk/portuguese/noticias/2001/011115_prisaocrime.shtml).

<sup>108</sup>. As cited by a report entitled “Women and crime: a look at the women incarcerated in Brazil” by Salma Hussein Makk and, Marcelo Loeblein dos Santos: [http://ambito-juridico.com.br/site/index.php?n\\_link=revista\\_artigos\\_leitura&artigo\\_id=8080](http://ambito-juridico.com.br/site/index.php?n_link=revista_artigos_leitura&artigo_id=8080).

## ANNEX 4:

# Hong Kong

## Introduction

There are a number of cases where a woman charged with the murder of her abusive partner has been able to rely on the partial defence of provocation resulting in a conviction for the lesser offence of manslaughter. Furthermore, the courts in sentencing women convicted of manslaughter on the grounds of provocation often take into account the degree of provocation and certain other mitigating factors in the case, although those mitigating factors are ultimately weighed against the facts relating to the gravity of the offence.

There are no specific legislative or common law defences available to women who are charged with any other type of violent crime committed against their abuser, such as attempted murder, manslaughter and wounding. There are a number of general defences that could apply, such as self-defence, but those more general defences can be difficult to rely upon. Furthermore, we have been unable to find examples where such general defences have been successfully relied upon in circumstances where a woman has been charged with a violent crime against her abuser.

Apart from general provisions as to the maximum sentence for a particular crime, there is limited legislation or regulation relating to sentencing, nor is there a designated authority that provides guidance on sentencing. There are a number of cases (called “tariff cases”) that provide guidelines on sentencing for certain offences, however there are no such cases for violent crimes such as attempted murder, manslaughter and wounding. In addition, a conviction of murder carries a mandatory life sentence (unless the accused was under the age of 18 at the time of the offence).

There are a number of online resources that compile statistics on matters such as types of crime committed and arrests, age and gender of the offenders and women incarcerated. However, there is very limited academic or judicial discourse about battered woman syndrome or slow burn reaction and their links with violent crime.

## 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)?**

### 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?**

There are a limited number of full and/or partial defences that can be used by a woman who is charged with a violent crime against her abuser. These defences, as they may be relied upon in such circumstances, are described below.<sup>109</sup>

### Provocation and diminished responsibility

The Homicide Ordinance (Cap. 339) (the “**Homicide Ordinance**”) provides two partial defences to a charge of murder, (a) where a person is provoked, and (b) where a person suffers from diminished responsibility.

The defences of provocation or diminished responsibility only apply as partial defences to a charge of murder and, thereby, reduce the conviction from murder to manslaughter only. Furthermore, similar defences do not apply to other types of violent offences against a person, such as manslaughter, assault occasioning actual bodily harm, wounding or inflicting grievous bodily harm.<sup>110</sup>

However, the defences of provocation and diminished responsibility are important partial defences: a person who is convicted of murder faces a mandatory life sentence, whereas in a case of manslaughter, the judge can take into account mitigating circumstances, such as a past history of abuse, in determining a sentence for a conviction of manslaughter. See below for further discussion on sentencing.

<sup>109</sup>. See Easta, Patricia, *Battered Women Who Kill: A Plea of Self-Defence* (Women and the Law: Proceedings of a conference held 24-26 September 1991), Jackson, Michael, *Criminal Law in Hong Kong* (Hong Kong University Press, 2003) 209-326, Sheehy, Elizabeth A., Julie Stubbs, and Julia Tolmie, *Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations* (1992) and Criminal Procedure Ordinance (Cap 221).

<sup>110</sup>. See Offences Against the Person Ordinance (Cap. 212).



The partial defence of diminished responsibility is set out in section 3 of the Homicide Ordinance. Pursuant to that provision, where a person kills or is a party to the killing of another, that person shall not be convicted of murder if he or she was suffering from such abnormality of mind (whether arising from a condition or arrested or retarded (sic) development of mind or inherent causes or induced by disease or injury) as substantially impaired that person's mental responsibility for his or her acts and omissions in doing or being a party to the killing.

Unlike provocation (described below), where the prosecution bears the onus to negate the defence, the burden of establishing diminished responsibility lies with a defendant who raises the defence. The partial defence of diminished responsibility only applies where a person has an "abnormality of mind" which substantially impairs a person's mental responsibility for their acts. It is a narrower defence than the defence of provocation and does not cover the entire field of significant mental attributes which may affect provocation. This may be the reason why there is a lack of case law where diminished responsibility has been successfully relied upon by a woman who has been charged with killing her abuser.

The partial defence of provocation is set out in section 4 of the Homicide Ordinance, which provides that in circumstances where a person is charged with murder and there is evidence proving that the person was provoked (whether by things done, said, or both) to lose self-control, the jury may find that the provocation was sufficient to show that a reasonable person would have acted as the convicted person did. In determining what a reasonable person would have done, the jury shall take into account everything said and done and the effect such provocation would have had on a reasonable person.

Provocation has two elements: (a) whether the accused was provoked to lose self-control; and (b) the "reasonable person" test. The reasonable person test is an objective test, and the reasonable person in question will be a person having the power of self-control to be expected of an ordinary person of the same sex and age as the accused. However, the reasonable person will also be taken to share such of the accused's characteristics as they think would affect the gravity of the provocation in question.<sup>111</sup>

Even if provocation is not raised by the defendant (because the defendant may instead plead self-defence as a defence), the judge may leave it to the jury to determine whether a person charged with murder should be convicted of manslaughter on the grounds of provocation.

There are a number of cases, including those described below, where a court discusses the availability of provocation as a partial defence in circumstances where a woman who has suffered a past history of abuse has been charged with killing her abuser.

#### ***HKSAR v Coady (No 2) [2000] 3 HKC 570:***

This case involved a woman who killed her partner with whom she had endured an abusive relationship. The type of abuse suffered by the woman included threats to beat and kill her, striking her ankle with a walking stick, certain demands, such as that she visit a topless bar, as well as other behaviour described by the court as "disturbing".

The Court noted that there could be a sudden loss of self-control triggered even by a minor incident if the defendant had endured abuse over a period of time. The Court affirmed a similar approach adopted by the English courts<sup>112</sup> in forming this view.<sup>113</sup>

The Court acknowledged in the present case that, even though the deceased's conduct on the night in question was not, by itself, capable of provoking the accused to lose self-control, it became capable of such when viewed against the abusive nature of the relationship between the accused and the deceased. The Court therefore quashed a conviction for murder and ordered a retrial to consider the lesser charge of manslaughter on the grounds of provocation.

#### ***HKSAR v Li So-Man CACC 609/1999:***

This case involved a woman who killed her husband in circumstances where she had been provoked. At the time of the killing, the accused had been married to the deceased for 18 years and they had been living together with their two children, aged 17 and 11. The deceased's behaviour began to deteriorate in the two years leading up to the killing and the accused associated that behaviour with the victim's alcohol intake and bad temper. In the 12 days before the killing, the accused's son's room had been damaged by the victim and there were several violent episodes, including one occasion when the police were called to the flat.

The Court found that the woman was provoked to a degree which, when looked at in the context of the deceased's behaviour in the 12 days leading up to his death, was more than minimal. The accused was convicted of manslaughter on the grounds of provocation and sentenced to 12 years' imprisonment, reduced to eight years on appeal.

#### ***HKSAR v Nancy Ann Kissel CACC 66/2012:***

The Nancy Kissel murder trial was a highly publicised criminal trial in Hong Kong in which the defendant was convicted of murdering her husband. The defendant claimed that she was an abused wife, and argued self-defence, provocation and diminished responsibility. Although the jury rejected these defences on the grounds that they were not supported by the evidence, the Court discussed the availability of those defences in the context of domestic violence.

<sup>111</sup> *Ho Hoi Shing v HKSAR* FACC 01/2008.

<sup>112</sup> The court referred to the English cases of *R v Ahluwalia* [1992] 4 AL ER 889 and *R v Thornton (No. 2)* [1996] 2 Cr. App. R 108.

<sup>113</sup> The defences of provocation and diminished responsibility under the Homicide Ordinance follow the UK legislation (the *Homicide Act 1957*, as replaced by the *Coroners and Justice Act 2009*). English common law authority in this area would therefore be persuasive in Hong Kong.

The Court noted that the partial defence of provocation only applies in circumstances where there is a sudden and temporary loss of self-control “of the kind that makes a person for the moment not the master or mistress of her mind”. However, the Court confirmed the position that an incident that is trivial in isolation may nonetheless be one which might cause a reasonable person to react explosively in the context of provocation over an extended period of time.

## Self-defence

Self-defence could potentially be successfully invoked as a defence to murder, as well as other violent crimes, by victims who have suffered domestic violence. It is a general defence in common law that excuses the defendant’s wrongful conduct and if successful, results in a full acquittal. A person acts in self-defence if, in all the circumstances, the person believes or may honestly have believed, that the use of force was necessary as that person was faced with an imminent threat of death or bodily harm, and the degree of force was proportionate to that threat.<sup>114</sup> Similar to the defence of provocation, it is up to the prosecution to establish that a person was not acting in self-defence, rather than the onus being borne by the defendant.

A battered woman’s self-defence claim is more likely to succeed when she kills her partner during a battering incident. Any severe bodily injury inflicted upon the woman during a battering incident would strengthen the defendant’s position in establishing that she reasonably believed that she was faced with an imminent threat of death or serious bodily harm when she killed her abuser. Furthermore, a battered woman who was unable to defend herself from prior attacks and suffered severe bodily injury from the attack in question, should be in better position to establish the reasonableness of her resort to deadly force.

In the Nancy Kissel case described above,<sup>115</sup> self-defence was argued in the first instance but abandoned in the retrial as the facts did not support the application of the defence. However, the court noted that that even in cases where the defendant is the initial aggressor, the defendant could avail themselves of the defence of self-defence if the partner’s response to the initial attack was wholly disproportionate.

Notwithstanding the apparent ability for a woman charged with a violent crime against her abuser to rely on self-defence, we have been unable to find any such cases where the defence has been successfully used.

## Insanity

Insanity is a defence in common law to a charge of murder or other violent crime. If the defence of insanity succeeds, the jury will return a special verdict of “not guilty by reason of insanity” pursuant to section 74 of the Criminal Procedure Ordinance (Cap 221) (the “CPO”), and the judge will determine the appropriate order to be made in accordance with section 76 of the CPO. The orders available to the trial judge include a mandatory hospital order, guardianship order, supervision and treatment order, or order for the absolute discharge of the defendant (only in cases where the defendant was deemed to be temporarily insane when the crime was committed, but displays full mental capacity at trial).

To successfully rely on the defence of insanity, the defendant must satisfy the court on the balance of probabilities that they were suffering from a defect of reason, stemming from a disease of the mind, and that they were ignorant as to the nature of the act or that the act was wrong.

In principle, a battered woman’s strong attachment to and dependence on the abuser, combined with helplessness as a result of repeated beatings and her failure to escape, can lead to perceptual distortions that impair mental and emotional capacities. Further, there is evidence that many battered women who kill their abusers are not aware that they have killed until they are informed of this fact by a third party. While the defence of temporary insanity arising from battered woman syndrome has been recognised elsewhere, it has not been recognised in Hong Kong law. Instead the statutory defence of diminished responsibility described above was introduced in Hong Kong due to the recognition that the requirements of insanity present a considerable threshold to surmount.

## Automatism

Automatism is a general defence in common law. When successfully raised, it results in a complete acquittal. To successfully rely on the defence: (a) the action must have been completely involuntary, (b) the involuntariness must have arisen from an external source, and (c) the automatism must not have been self induced.<sup>116</sup> There appear to be no examples where the defence of automatism was successfully raised by a victim of domestic violence in Hong Kong.

## Duress

Although duress cannot be pleaded as a defence to murder,<sup>117</sup> if the charge of murder is reduced to that of manslaughter either on the grounds of diminished responsibility or provocation, the defence of duress can theoretically be applied to acquit the defendant of the underlying charge of manslaughter.

<sup>114</sup>. *R v Owino* [1996] 2 Cr. App. R 128.

<sup>115</sup>. *HKSAR v Nancy Ann Kissel* [2010] HKCFA 5.

<sup>116</sup>. *R v Kemp* (1957) 1 QB 399.

<sup>117</sup>. *R v Pang Shun-Yee* [1988] 2 HKLR 146.

For the defence of duress duress to be successfully invoked, the jury must be satisfied that the defendant was impelled to act as she did because of a reasonable belief in a serious threat of bodily harm, and that a reasonable person would have responded in the same way. There appear to be no cases where the defence of duress has been successfully raised by victims of domestic violence in Hong Kong.

#### QUESTION 3:

**Does the 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?**

Other than the partial defences of provocation and diminished responsibility set out in the Homicide Ordinance described above, Hong Kong law does not specifically mention prior domestic or sexual violence as a mitigating factor relevant to guilt or innocence in a case of a person charged with a violent offence against an abuser.

#### 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?**

Other than cases applying the defence of provocation as described above, we were unable to find any cases where a history of abuse was otherwise taken into consideration by a court in determining the guilt or innocence of a woman who has been charged with committing a violent offence against her abuser.

## 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?**

Consistency of punishment has been described as a “vital constitutional principle” in Hong Kong.<sup>118</sup> However, apart from general provisions as to the maximum sentence for a particular crime, there is little legislation or regulation relating to sentencing. Unlike certain jurisdictions, for example the United Kingdom, Hong Kong does not have a designated authority to provide guidance on sentencing to the courts of Hong Kong. Therefore, most of the guidance that Hong Kong courts have in relation to sentencing is found in case law.

The courts have designated certain cases to be “tariff cases” for certain types of crime, for example, drug trafficking and robbery.<sup>119</sup> In the opinion of the courts, these cases provide comprehensive quantitative guidelines for judges in sentencing for certain types of crime. With the benefit of tariff cases, courts are able to be more consistent when imposing sentences for similar offences and defendants and prosecutors are less likely to appeal any such sentences. Furthermore, the intention is that if likely sentences are known by potential offenders, the objective of general deterrence would be assisted.<sup>120</sup>

As noted above, murder, which is considered to be the most violent crime, comes with a mandatory life sentence. The only exception to this is where a defendant was under 18 years of age at the time of the offence, in which case a court has discretion to impose a lesser sentence.<sup>121</sup>

However, there are certain crimes in which the circumstances are so variable that there are no tariff cases to provide guidelines on sentencing. These include violent crimes such as attempted murder, manslaughter and wounding. In such circumstances, a court will give such weight as it can to the personal characteristics of the offender. However this will be weighed against the gravity of the offence and as such, those personal characteristics may not have much weight.<sup>122</sup>

As noted above, provocation is a partial defence to murder, resulting in a conviction of manslaughter on the grounds of provocation. The degree of provocation may also be treated as a mitigating factor for the purposes of sentencing, i.e. the greater the degree of provocation, the lighter the sentence a court may impose on the offender.<sup>123</sup> Notwithstanding this, there is case law to suggest that no question of leniency may arise if the offence is pre-meditated.<sup>124</sup>

Set out below are a number of examples where the courts have taken into account a prior history of domestic violence or abuse by the victim against the accused when determining the sentence.

#### **HKSAR v Li So-Man [2000] 2 HKLRD 824:**

Please see above for a description of the background to this case. As noted above, a woman was convicted of manslaughter on the grounds of provocation and sentenced to 12 years imprisonment. This was reduced to eight years on appeal.

The appeal judge considered the degree of provocation leading up to the offence when deciding whether to impose a reduced sentence. This was ultimately weighed up by the judge against other factors, including the brutal

<sup>118</sup> *HKSAR v Chan Chun Yee* [2001] 3 HKC605, 611.

<sup>119</sup> A case is designated as a “tariff case” by the Court of Appeal. In the course of hearing appeals against various sentences, the Court of Appeal may, over a period of time, observe a general level of sentence for a particular offence. The Court of Appeal may then, if it considers it appropriate, lay down a set of guidelines to be applied in relation to sentencing for such offences going forward, and thereby designate that case as a “tariff case”.

<sup>120</sup> *HKSAR v Chan Chun Yee* [2001] 3 HKC605, 611.

<sup>121</sup> *Offences Against the Person Ordinance* (Cap.212), section 2.

<sup>122</sup> *HKSAR v Mak Shin* [2002] HKCU 1109 (CACC 322/2001, 19 September 2002, unreported).

<sup>123</sup> *HKSAR v Maria Remedios Coady* CACC000119C/1999.

<sup>124</sup> *R v Lee Kam-lun* (CACC 597/1993, 31 May 1994, Unreported). See also *Sentencing in Hong Kong* (2015), 7th Edition, Grenville Cross SBS, SC and Patrick WS Cheung, the leading text book on sentencing in Hong Kong which is often cited by the courts.

nature of the killing, the fact that the woman had not shown any remorse and the fact that she had contested the case from start to finish, primarily on the grounds of self-defence which was rejected by the jury on the facts.

The appeal judge noted that the circumstances in which manslaughter results from situations involving prior domestic violence, or a highly stressful relationship because of long-term unhappiness, will inevitably involve an infinite variety of factors.

***Secretary of Justice v Chau Wan Fun* [2006] 3 HKLRD 577:**

The defendant pleaded guilty to wounding the victim (her husband) with intent. The victim had resigned from his job at the Jockey Club without consulting the defendant, as a result of which they had to vacate the staff quarters where they lived. During the course of preparing to move, the defendant discovered that her gold and jewellery (worth HK\$23,000) was missing. The defendant had also previously repaid approximately HK\$100,000 of the victim's debts. The victim admitted that he had pawned the defendant's jewellery in order to pay for his debts. The defendant became furious and stabbed the victim with knives, reducing him to a vegetative state. Her defence was that she had a momentary loss of self-control after years of provocation.

At first instance, the judge adopted a starting point of 18 months' imprisonment, which was reduced by one-third to reflect the guilty plea and then further reduced by three months to take into account the defendant's "good character" and to reunite her with her two young children as soon as possible. The Secretary of Justice appealed this sentence on the basis that it was manifestly inadequate. On appeal, the nine month sentence was quashed and replaced with a custodial sentence of three and a half years. The Court on appeal noted that courts cannot be deflected from their duty of imposing sentences appropriate to the gravity of the offence when crimes of violence are committed against a domestic background. It was held that a custodial sentence cannot be so lenient that justice cannot be said to have been done. Upon review, a starting point of six years' imprisonment was adopted, discounted by a third for the guilty plea, and further discounted for time already served.

***HKSAR v Maria Remedios Coady* CACC000119C/1999:**

Please see above for a description of the background to this case. As noted above, the defendant was convicted of murder in the first instance, and on appeal, the court quashed that conviction and ordered a retrial to consider the reduced charge of manslaughter on the grounds of provocation. At the retrial, the defendant pleaded guilty to manslaughter on the grounds of provocation.

In sentencing for manslaughter on the grounds of provocation, the Court noted that manslaughter is one of the rare offences which does not require the Court to state what its starting point for sentencing is. This is due to the overlap between the facts related to the gravity of the offence and those related to the mitigating circumstances for the offender. The Court further noted that culpability for manslaughter can vary greatly, especially when the killing of the deceased has been reduced to manslaughter on the basis of provocation, where the killing was a domestic one and where it was preceded by an abusive relationship which must have caused stress and unhappiness.

The Court held that in the present case, the provoking conduct in question was towards the lower end of the scale, i.e. the provocation was held by the court to be relatively light. Therefore, in sentencing the offender to ten years' imprisonment, the Court noted that the sentence was towards the upper end of the scale for sentences for manslaughter on the grounds of provocation.

**QUESTION 6:**

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

As set out above, much of the guidance in relation to sentencing is to be taken from case law and there is not yet sufficient or developed case law in relation to female abuse victims to establish a definitive view on the weight that may be given to any such history of abuse in sentencing.

The cases which have been discussed above suggest that a history of abuse operates as a mitigating factor to move the sentence to the lower end of an applicable range. However, the weight that is given to that mitigation 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. Courts are mindful of their duty to impose sentences appropriate to the gravity of the offence even when crimes of violence are committed by a woman against her abuser. Further, because of the potential overlap in cases involving domestic abuse between the facts related to the gravity of the offence and those related to mitigation for the offender, there are instances in which the court has further discretion and is not obliged to state its starting point for sentencing (for example, manslaughter).



### 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?**

The sentencing statistics available are not broken down by lower versus upper courts. However, in Hong Kong sentencing occurs at the higher court level for any crimes in which sentencing is sought over seven years. The District Court has an upper limit of seven years and the Magistrate Court has an upper limit of only three years. Therefore, where statistics refer to the type of violent crime the corresponding court responsible for sentencing can often be inferred.

The Census and Statistics Department of the Government of the Hong Kong Special Administrative Region compiles statistics on types of crime and breaks down the statistics by gender. The statistics include arrests by age/gender, offence/gender, reported crime cases with local sex workers, and those admitted to penal institutions by the criteria above.<sup>125</sup>

The Women's Commission in Hong Kong also prepares statistics on "Hong Kong Women in Figures", which highlights key statistics of women (and men) in Hong Kong. The latest edition covered statistics from 2013. Section 8 discusses crime, and pages 62-63 include key statistics on the percentages of women arrested for various types of crime.<sup>126</sup>

In terms of the number of women in prison, the below includes statistics on the number of women versus men in prison in Hong Kong. The percentage appears to be around 20%, and has increased from just over 10% since 2000. This is not broken down by violent versus non-violent offences.<sup>127</sup>

In addition to the statistics referred to above, there is an article which discusses how Hong Kong has the world's highest ratio of women in prison and has some insight on the sentencing procedures in Hong Kong.<sup>128</sup> However, the focus is on non-violent crime and the high statistics are attributed to prostitution charges, with lighter sentences.

#### 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?**

Section 8.1.1 of the aforementioned Women's Commission report specifically discusses statistics surrounding spouse/cohabitant battering cases and breaks them down by gender. It includes statistics surrounding who the abuser is (versus the victim), and the relationship between the two.

The most notable use of battered woman syndrome in Hong Kong was by an American expatriate wife (Nancy Kissel) in the killing of her husband by poisoning him. She was ultimately convicted of murder and sentenced to life in prison, which was reaffirmed upon appeal.<sup>129</sup> This case is discussed in further detail above.

<sup>125</sup>. For details please see [http://www.censtatd.gov.hk/hkstat/sub/gender/crime\\_and\\_justice/index.jsp](http://www.censtatd.gov.hk/hkstat/sub/gender/crime_and_justice/index.jsp).

<sup>126</sup>. For details please see [http://www.women.gov.hk/download/research/HK\\_Women2013\\_e.pdf](http://www.women.gov.hk/download/research/HK_Women2013_e.pdf).

<sup>127</sup>. For details please see <http://www.prisonstudies.org/country/hong-kong-china>.

<sup>128</sup>. The article can be found on <http://www.scmp.com/article/560109/hk-has-worlds-highest-ratio-women-prison>.

<sup>129</sup>. For details please see <http://www.scmp.com/article/740576/kissel-suffered-battered-wife-syndrome-expert-tells-court>. <http://www.bloomberg.com/news/articles/2014-11-06/no-regrets-for-kissel-11-years-after-banker-husband-death>.



## ANNEX 5:

## India

## Introduction

Although there are no specific statutory or common law defences available to women who are convicted of killing their abusive partners, there have been a number of cases in which women have been able to rely on more general statutory or common law defences to appeal their convictions for killing an abusive partner. In addition, Exception 1 to Section 300 of the Indian Penal Code provides for the defence of “grave and sudden provocation”, which has been successfully used by a woman appealing against her conviction of murder for killing her husband (see the case of *Manju Lakra v State of Assam* below).

More recently, the lower courts have considered “sustained provocation” as an extension to this defence (although it has not yet been tested by the Supreme Court). The defence of “sustained provocation” has been applied in favour of two women who (in separate, unrelated cases) were driven to kill their children and then to attempt suicide because of the abuse inflicted on them by their respective husbands (see below). The use of this extension has received some consideration and media commentary.

There are no formal sentencing guidelines in India, therefore there are no specific provisions allowing a woman’s sentence to reflect her past history of abuse. However, a history of abuse might be taken into account at sentencing and, in practice, the application of the “sustained provocation” has led to the reduction of women’s sentences in some cases.

Although there are statistics disaggregated by gender in respect of sentencing in the lower courts, research has identified that gender bias in the lower courts is a problem for female defendants, who regularly encounter poor treatment, including from their own legal counsel.

## 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)?**

## 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?**

## Relevant legislation

Past abuse can be pleaded as a partial defence by a female offender. The defence is usually pleaded either to reduce the sentence awarded to the accused or to obtain some form of interim relief (such as bail) from the court.

Section 300 of the *Indian Penal Code, 1860* (the “**IPC**”) describes those circumstances in which homicide can be termed as a murder (punishable with death or life imprisonment) and when it cannot be termed as a murder (although it is still punishable by life imprisonment or imprisonment of up to 10 years).

One of the circumstances in which a culpable homicide amounting to murder is reduced to culpable homicide not amounting to murder is if Exception 1 to Section 300 of the IPC applies (the “**Exception**”). The Exception provides that in order to ascertain whether the facts of a case give rise to an offence of murder or an offence of culpable homicide not amounting to murder, it is necessary to determine whether the deceased had provoked the accused and, if so, whether the provocation was “grave and sudden” enough so as to deprive the accused of her power of self-control.

Self-defence and insanity are also recognised exceptions to violent crimes (subject to certain conditions). For example, legal insanity can be pleaded as a defence if the accused was of unsound mind at the time of the offence and, as a result, was incapable of knowing the nature of the act. Similarly, self-defence operates as an exception only if: (a) there is a reasonable apprehension of grievous hurt or death, (b) the act is proportional to the injury suffered and (c) when there is no time to seek recourse to the public authorities. However, based on a review of case law (see below), it is noted that female offenders with a history of abuse have usually pleaded sustained or a “grave and sudden” provocation as a defence under the Exception.

## Grave and sudden provocation

### Case law – application of the Exception and “grave and sudden provocation”

The Supreme Court of India in *K.M. Nanavati v State of Maharashtra*<sup>130</sup> laid down the parameters of “grave and sudden” provocation under the Exception. Points to note from the judgment<sup>131</sup> which are relevant to this report are:

- the test of “grave and sudden” provocation is whether a reasonable man, belonging to the same class of society as the accused, if placed in the situation in which the accused was placed, would be so provoked as to lose his self-control;
- in India, words and gestures may also, under certain circumstances, cause “grave and sudden” provocation to an accused so as to bring his act within the Exception;
- the mental background of the accused, created by the previous act of the victim, may be taken into consideration in ascertaining whether the antecedent act caused “grave and sudden” provocation for committing the offence; and
- the fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise, giving room and scope for pre-meditation and calculation.

This judgment has been discussed and applied by the High Courts in India in deciding cases relating to sustained provocation (see below).

The parameters of “grave and sudden” provocation set out above were applied in the case of *Manju Lakra v State of Assam*,<sup>132</sup> where the appellant was subject to unprovoked acts of domestic violence by her husband, the deceased. One day, when the appellant’s husband started beating her, failing to bear any longer the regular beating at the hands of her husband, the accused snatched the piece of wood with which he was beating her and hit her husband. The husband died as a result of his injuries. The lower court found the appellant guilty of murder and sentenced her to undergo life imprisonment and to pay a fine of Rs. 1,000. The appellant lodged an appeal before the High Court.

The High Court held that the case fell within the Exception and reduced the sentence to rigorous imprisonment of five years. The court recognised that there were preceding circumstances reducing the crime to culpable homicide not amounting to murder and imposed a lesser sentence for the offence, taking into consideration that the deceased had facilitated his own death by inviting the fatal response from the accused.

## Sustained provocation

### Case law – “sustained provocation”

The courts have in recent years introduced the defence of “sustained provocation”, which has been applied in cases where the provocation occurs over an extended period, and need not be “grave and sudden”. Several cases (of which many are unreported), including the case of *Poovammal v State of Tamil Nadu*,<sup>133</sup> have suggested that the court could add the “sustained provocation” as one of the Exceptions to Section 300 of the IPC.<sup>134</sup>

In *Suyambukkani v State of Tamil Nadu*,<sup>135</sup> the accused was unable to bear the continued cruelty of her husband and jumped into a well with her two children. She was accused of having killed her children and also attempting suicide. The lower court found her guilty of murder and sentenced her to life imprisonment. In the appeal before the High Court, the counsel for the petitioner contended that the petitioner was “compelled by circumstances to wind up her life and by way of consequence that of her children”.

In terms of the courts’ introduction of “sustained provocation”, paragraph 21 of the judgment states:

*“Though there has been here and there attempts in [earlier] decisions to bring the sustained provocation under Exception 1 to Section 300, I.P.C., there is a cardinal difference between provocation as defined under Exception I and sustained provocation. The only word which is common is “provocation.” What Exception I contemplates is a grave and sudden provocation, whereas the ingredient of sustained provocation is a series of acts more or less grave spread over a certain period of time, the last of which acting as the last straw breaking the camel’s back may even be a very trifling one. We are, therefore, far from grave and sudden provocation contemplated under Exception 1 to S. 300, I.P.C. Sustained provocation is undoubtedly an addition by Courts, as anticipated by the architects of the Indian Penal Code.”*

The Court while discussing the concept of “sustained provocation” observed that “ill-will and premeditation should be both present in a case of murder. The absence of one of them coupled with an important excusing circumstance would transform the offence into a culpable homicide.” The Court set aside the petitioner’s conviction for murder and reduced her sentence.

A similar situation arose in the case of *Amutha v State*.<sup>136</sup> The petitioner was regularly tortured by her husband. After an altercation, unable to bear his harassment, the petitioner threw her two daughters into the well and jumped into the well herself. Her daughters died but she survived.

<sup>130</sup>. AIR 1962 SC 605.

<sup>131</sup>. Paragraph 153, AIR 1962 SC 605.

<sup>132</sup>. 2013(4)GLT333.

<sup>133</sup>. MANU/TN/0189/2012.

<sup>134</sup>. Paragraph 39, MANU/TN/0189/2012.

<sup>135</sup>. 1989 L.W. (Cr.) 86.

<sup>136</sup>. 2014(3)MLJ(Cr)562.

The petitioner was, among other things, charged with the murder of her daughters, and approached the High Court for anticipatory bail. The Court, while discussing the concept of “sustained provocation”, observed that *“in the circumstances, the ‘triggering incident’, namely, the quarrel just before the occurrence and in view of his previous provocative conduct, the petitioner had lost her power of self-control, then she was not master of her mind. Under these circumstances, the petitioner had pushed her daughters into the well.”*

The Court found a *prima facie* case in favour of the petitioner and granted her anticipatory bail.

It is important to note that while the decisions in *Suyambukkani v State of Tamil Nadu* and *Amutha v State* show that the defence of “sustained provocation” has been recognised by the lower courts in India with respect to female offenders who have a history of abuse, there do not appear to be any judgments of the Supreme Court dealing with a similar factual situation.

#### QUESTION 3:

**Does the 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?**

As discussed above, “sudden and grave” provocation is a recognised exception to murder under the Exception. Over the years, the courts in India have in certain cases recognised “sustained provocation” as a defence to murder, thereby reducing the sentence awarded to the accused.

Section 84 of the IPC provides a general defence for persons of unsound mind who did not know that they were doing something unlawful or wrong. It can be argued that prior domestic and/or sexual violence resulted in this state of mind of the accused.

There are arguments by Western feminist lawyers that “in offences involving female victims and female offenders, rhetoric and passion guide the decision instead of objectivity and reason”.<sup>137</sup> There are examples of cases where judicial decisions have been driven by male-centric views and the male accused has benefited from the circumstances taken into account, while a woman’s situation of continued bickering was not taken into account<sup>138</sup> by judges when assessing whether the behaviour of the accused was reasonable in the circumstances.<sup>139</sup>

In *Bachan Singh v State of Punjab* (1982) 3 SCC 24, although the Court did not lay down guidelines on the exercise of judicial discretion when it comes to sentencing for the death penalty, it accepted suggestions of the

*amicus curiae* from Dr. Y. S. Chitale, Senior Advocate, as to what could generally constitute aggravating and mitigating circumstances. The mitigating circumstances included offences committed under the influence of extreme mental or emotional disturbance or extreme provocation. This argument was raised in *Om Prakash v State of Haryana* (1999) 4 SCC 19 and *Ronny v State of Maharashtra* (1998) 3 SCC 625, although it was held that offences were not committed under the influence of extreme mental or emotional disturbance or extreme provocation. These cases did not concern prior violence, but were two cases of murder in the circumstances of present violence.

#### 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?**

There is no specific mitigating factor provided for in the IPC. However, latitude is given to the judge for sentencing purposes. Anecdotal evidence states that history of abuse is considered on a case-by-case basis, but is subject to the discretion of the judge. Please see the cases discussed above.

A broader point to note from publicly available statistics<sup>140</sup> is that almost 70% of women currently in prison in India have not been convicted of an offence, and are still awaiting trial.

Sentencing statistics<sup>141</sup> from 2013 for women show that 5,194 women have been convicted. 1,925 children of the women who are in prison are also lodged in prisons.

At the end of 2013, 10 women were sentenced to capital punishment. 55 female inmates were reported to have died in 2013, with seven of those deaths reported as unnatural.

## 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?**

There are no formal sentencing guidelines in place in India. The IPC sets out the maximum and minimum penalties that an offender can be held liable for.

Over the years, the courts in India have in certain cases recognised “sustained provocation” as a defence to murder, thereby reducing the sentence awarded to the accused.

<sup>137</sup>. Gender Analysis of Indian Penal Code by Ved Kumari. P. 139-160. In *Engendering Law: Essays in Honour of Lotika Sarkar* edited by Amita Dhanda and Archana Parashar. Lucknow: Eastern Book Company, 34, Lalbagh, Lucknow – 1. 1999.

<sup>138</sup>. *Raju v State of Karnataka* (1990) 1 SCC 249; and *State of Haryana v Prem Chand* (1995) 1 SCC 453.

<sup>139</sup>. *Gyarsibai v State* AIR 1953 MB 31.

<sup>140</sup>. Prison Statistics India 2013, National Crime Records Bureau, Ministry of Home Affairs.

<sup>141</sup>. *Ibid*.

There is wide scale under-reporting of domestic violence in India. Consequently, even if cases of manslaughter have been tried, the past history of abuse may not be of significant relevance because victims are often reluctant to report prior incidents of abuse.

Research shows that there is an increased focus on the *Domestic Violence Act 2005*; this Act considers prior history of violence in sentencing but these cases have not yet considered cases of the murder of a husband or male partner.

There is significant focus on murder caused by dowry pressure, acid burning and rape, as opposed to manslaughter due to domestic abuse.

#### QUESTION 6:

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

Whether the past history of abuse of a female offender will have any bearing on the sentence passed will depend on the facts of the case.

Based on the case law reviewed, the courts have at times taken into account a history of abuse while sentencing the female offender. The courts have considered sustained abuse as provocation to committing the offence and have reduced the charge of murder to culpable homicide not amounting to murder, thereby reducing the sentence.

In terms of reports in the media, an article in the *Bombay Mirror*<sup>142</sup> from October 2014 suggests that a sessions court acquitted a woman of murdering her live-in partner, and instead convicted her of culpable homicide not amounting to murder, due to the accused being a victim of domestic abuse.

### 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?**

There do not appear to be any direct data and/or statistics with respect to sentencing in lower courts as opposed to higher courts.

However, there is data identifying the number of violent crime-related cases that were disposed of by the courts in 2013<sup>143</sup> and the total number of cases under the IPC that were disposed of by the courts during 2013.<sup>144</sup> We also found an article describing gender bias carried by lower courts:<sup>145</sup> *“Female litigants regularly encounter poor treatment from their own counsel, opposing counsel, and courtroom staff, which can cause them to feel marginalized, unassisted and isolated”*.<sup>146</sup>

#### 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?**

In India battered woman syndrome is also known as the “Nallathangal Syndrome” which is based out of Tamil literature dealing with a similar concept. There is case law which discusses battered woman syndrome and Nallathangal Syndrome to explain the theory of sustained provocation as an exception and has been used *inter alia* to reduce the sentences of women who are charged with violent crimes. The three Indian judgments (among others) where battered woman syndrome and/or Nallathangal Syndrome have been discussed are: *Manju Lakra v State of Assam* (Gauhati HC) at paragraphs 91, 101-103, and 115<sup>147</sup>, *Suyambukkani v State of Tamil*<sup>148</sup> Nadu (Madras HC) at paragraphs 7, 16 and 22, and *Poovammal v State of Tamil Nadu*.<sup>149</sup>

<sup>142</sup>. <http://www.mumbaimirror.com/mumbai/crime/Court-says-murder-accused-was-domestic-abuse-victim-gives-her-lighter-sentence/articleshow/44842981.cms>.

<sup>143</sup>. <http://ncrb.gov.in/CD-CII2013/CII13-TABLES/Table%204.17.pdf>.

<sup>144</sup>. <http://ncrb.gov.in/CD-CII2013/CII13-TABLES/Table%204.9.pdf>.

<sup>145</sup>. “Grappling at the Grassroots: Access to Justice in India”, p172-173, Harvard Human Rights Journal, May 2014.

<sup>146</sup>. *Id.* page 173.

<sup>147</sup>. 2013 (4) GLT333.

<sup>148</sup>. 1989 L.W. (Cr.) 86.

<sup>149</sup>. MANU/TN/0189/2012.

## ANNEX 6:

## Japan

## Introduction

The primary source of Japanese criminal law is the Japanese Criminal Code (Act No. 45 of April 24, 1907) (the “**Japanese Criminal Code**”), which sets out the rules for establishing a criminal act and sentencing.

There is no specific defence available to victims of abuse who commit violent crimes in Japan. However, it is theoretically possible to make it easier to establish an imminent threat in the context of establishing self-defence when a past history of abuse is taken into account compared to a case where no such past history exists. There are a few cases based on “excessive” self-defence or diminished capacity where women who committed violent crimes against their long-term abusers were given statutory reduced sentences or exculpated because their guilt was assessed to be limited by a history of past abuse.

Although there are no official sentencing rules or guidelines in Japan, judges and juries generally have discretion to consider a variety of circumstances when sentencing an offender, including a past history of abuse, provided that the punishment is within the relevant range of statutory penalties set for each criminal charge. The past history of abuse has in a few cases resulted in the statutory reduction of liability within the relevant statutory range or the exculpation of an offender.

Generally, however, little weight is given to a past history of abuse in sentencing. Only in a very few cases have such past histories of abuse been considered to reduce sentences or exculpate the offender.

Some Japanese scholars (gender studies specialists) have discussed this topic. They insist 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 self-defence. However, this thesis has not yet been recognised in case law.

## 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)?**

## 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?**

The Criminal Code does not provide for any defence based solely on the history of past abuse. Furthermore, a past history of abuse cannot be pleaded as a defence. A past history of abuse may however be taken into account in establishing an imminent threat where the defendant commits a crime (for example, murder) in self-defence or establishing the insanity defence.

## Self-defence

Under Article 36(1) of the Criminal Code, there are two major requirements for claiming self-defence as follows:

- the existence of “imminent and unlawful infringement”; and
- “an act unavoidably performed to protect the rights” (i.e. appropriateness of the defence).

Self-defence is therefore found only when a person engages in an act that is unavoidable and is committed in order to defend himself or herself against an unlawful infringement that is either present or imminent. The requirement for a “present or imminent” threat usually means that this defence is not available for a past history of abuse. There have been no cases where a history of abuse was the sole factor for successfully establishing self-defence under Article 36(1) of the Japanese Criminal Code.



However, such past histories of abuse may be available as a defence when assessing whether an act exceeds the limits of self-defence as defined under Article 36(1) of the Japanese Criminal Code (Article 36(2)). Self-defence will be deemed excessive if the act performed by a person could be avoided, even where such an act was committed in order to protect the right of oneself or any other person.

Under Article 36(2), excessive self-defence may lead to an offender's punishment being reduced or may exculpate the offender in light of the circumstances of the case. Due to the general difference in body strength between a man and a woman, it is not usual for a battered woman to make an immediate counter-charge against the abuser. Typically, a woman will take advantage of a moment when the abuser is temporarily passive (typically while he is sleeping or intoxicated) to commit a violent crime.

As such, the court usually finds it difficult to deem a woman's violent action against an abuser as self-defence under Article 36(1). If an abuser was not attacking the accused at the moment when the violent crime committed by the abused woman, it is difficult to recognise the existence of "imminent and unlawful infringement"; accordingly, the court is very unlikely to find self-defence as justification under Article 36(1) or excessive self-defence under Article 36(2) (unless specific circumstances exist).

There are only a handful of precedent cases where the court addresses a history of abuse experienced by a defendant woman. Among these cases, the court only took the abuse history into account when sentencing a crime (as discussed below) and, for the above reasons, defendants are often not successful in relying on a past history of abuse to establish self-defence as a full defence.

In a relatively old case,<sup>150</sup> the Nagoya Local District Court granted a partial defence to an abused woman by recognising excessive self-defence under Article 36(2) of the Criminal Code. The Court considered the history of abuse in assessing the level of guilt and culpability of the defendant. In that case, the defendant had been abused for approximately seven years by her husband. On the day of the victim's murder, after being battered by the victim with a golf club for several hours, the defendant stabbed him to death in his neck with a paring knife. Even though the victim was intoxicated and lying on the floor with his eyes closed at the very moment of being stabbed, the Court recognised that an "imminent and unlawful infringement" against the defendant had still existed. However, as her stabbing him with a knife in his neck was excessive and not deemed to have been "unavoidably performed", the court did not accept the defence of self-defence under Article 36(1). The

Court, however, concluded that her act was excessive self-defence and the defendant was exculpated under Article 36(2) of the Japanese Criminal Code.

## Insanity

Pursuant to Article 39 of the Japanese Criminal Code, insanity is a full defence which is available in relation to criminal acts. Any criminal act committed while the offender is insane is not punishable,<sup>151</sup> while a criminal act committed while the offender has diminished capacity would generally lead to the offender's punishment being reduced.<sup>152</sup> Therefore, insanity or diminished capacity can be claimed by an abused woman to mitigate her crime, although these provisions do not explicitly address a prior history of abuse.

In 1973, the Grand Bench of the Supreme Court suggested that a defendant's past history of abuse was the reason for her state of diminished capacity, and this was taken into account in considering the defendant's culpability.<sup>153</sup> The defendant had been abused by her father for decades, which resulted in her being relegated to leading her life as the *de facto* wife of her father for more than 10 years and bearing his children. The defendant finally strangled him to death after being held and attacked by the victim. The Court stated that the defendant was in a state of diminished capacity with anxiety and from lack of sleep when she committed the crime, and Article 39(2) of the Japanese Criminal Code was applied.

### QUESTION 3:

**Does the 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?**

The Japanese Criminal Code does not contain any provisions which explicitly mention prior (domestic and/or sexual) violence as a mitigating factor relevant to guilt or innocence in case of a violent offence against an abuser.

### 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?**

Generally, Japanese courts do not take a past history of abuse into account when it establishes the crime. As mentioned above, where the facts and circumstances constitute other defences (for example, excessive self-defence and diminished capacity), courts have given consideration to a defendant's history of abuse.

<sup>150</sup>. Nagoya Local District Court Jul. 11, 1995, Heisei 7 (Wa) No.39 (Hanreijiho 1539-143).

<sup>151</sup>. Article 39(1) of the Japanese Criminal Code.

<sup>152</sup>. Article 39 (2) of the Japanese Criminal Code.

<sup>153</sup>. Grand Bench of Supreme Court Apr. 4, 1973, Showa 48 (A) No. 1310 (Hanreijiho 697-3).

## 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?**

There are no official sentencing rules or guidelines in Japan. However, a past history of abuse can be taken into account for the purpose of sentencing.

Japanese law only stipulates a range of statutory penalties for each criminal charge, and it generally allows judges and juries to determine the sentencing for each case (within the relevant statutory range) considering a variety of circumstances (including a past history of abuse) at their sole discretion. There is no limit on the number of factors that can be taken into account.

In a recent case<sup>154</sup> considered by the Sapporo High Court, the defendant, together with her son and daughter, had started living with her husband from 2002. The husband, who was a member of a gang (*yakuza*), had abused the defendant and her children (and had even raped the defendant's daughter a few times) for several years. The defendant added sleeping medicine into the victim's miso soup, and together with her son, killed the victim by stabbing him in the left-hand side of his chest with a hunting knife and then strangling him. The Court gave her a sentence of five years, considering her sincere attempt to release herself and her children from the continuous violence which was considered to be a mitigating factor. However, the court referred to her "well-planned" and "cruel" act against the sleeping victim as an aggravating factor.

In a 2009 case before the Fukushima District Court,<sup>155</sup> the defendant, who had suffered from abuse from her husband for decades, was indicted on charges of the attempted murder of her husband (together with her daughter) by strangling him while he was sleeping. Although the Court criticised her "strong criminal intent" and "dangerous attitude", it also referred to the history of abuse to recognise the responsibility of the victim, and gave the defendant a suspended sentence.

### QUESTION 6:

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

Only minimal weight is given to a past history of abuse in sentencing. In the context of sentencing violent crimes, Japanese courts traditionally put great value on the following factors: type of weapon; body part of a victim

attacked; manner of attack; whether the attack was well-planned or incidental; and whether the defendant has shown any sign of remorse.

A past history of abuse was, in some cases, referred to as a mitigating factor in Japanese case law (see the case above). However, in practice, it is quite often that an abused woman committed a crime, taking advantage of or even waiting for the moment when the abuser is temporarily passive (typically while he is sleeping or intoxicated), which is likely to be considered an aggravating factor. Therefore, as a whole, past histories of abuse have not had much impact in the sentencing of violent crimes committed by abused women.

A survey showed that there is no significant difference in the length of a sentence between the following cases: (a) cases of an abuser being prosecuted for his violence against women; and (b) cases of an abused woman being prosecuted for her violence against her abuser.<sup>156</sup> Also, other statistics show that, judging from precedents over the past 25 years, 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.<sup>157</sup>

## 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?**

There are no 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.

### 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?**

Some scholars (specialising in gender studies) insist that a continuous history of abuse should be deemed as an ongoing infringement against a woman's freedom, which will automatically fulfil "imminent and unlawful infringement", one of the requirements of self-defence. However, case law has not yet recognised this.

<sup>154</sup>. Sapporo High Court, Nov. 13, 2007.

<sup>155</sup>. Fukushima District Court Aizuwakamatsu Branch, Mar 26, 2009, Heisei 20 (Wa) No.5.

<sup>156</sup>. Matsumura (2013). *DV to ryoukei jou no kouryo [DVs and factors to be considered for sentencing]*, Hou Shikkou Kenkyuukai, *Hou Wa DV Higaisha Wo Sukueruka [Can the Law Save DV Victims]*, 270-291.

<sup>157</sup>. Iwai & Watanabe, Josei Ni Yoru Satsujinzai No Ryoukei No Henka [Changes in Sentences to Murder Cases Committed By Females], *Senshu Hogaku Ronshu*, 102, 1-27.

## ANNEX 7:

## Mexico

## Introduction

Mexico is a federal state formed of 31 independent states, which in turn have different municipalities. Each state and the federal district have their own legislative body and their own judicial authorities. Therefore, within Mexico there are different levels of jurisdiction: municipal, state and federal.

According to the Mexican Federal Constitution, criminal law is part of the local jurisdiction; therefore, each one of the independent states has its own criminal code. There is also a Federal Criminal Code applicable to certain federal crimes. However, crimes related to personal violence and homicide are generally not considered to be federal crimes.

As such, the analysis below relies on the general principles of criminal law in Mexico; however, some of the information may differ from one state to another.

Mexico has a civil law legal system, thus there is no form of binding judicial precedent, although jurisprudence can be persuasive where the statutory law is unclear. However, in general, past decisions are not considered to be relevant to legal practice. Further, there is no public access to, or a database available to access, cases that may provide insight on the subject of women who kill their abusers, nor any similar cases from which to draw analogies. Criminal law experts have been consulted, who concur about the lack of information available on the subject. This may be attributable to the lack of a need for past cases to be recorded and accessed, as well as the underdeveloped state of the law on this issue.

## 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)?<sup>158</sup>**

## 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?**

Under Mexican law, a past history of abuse (whether as a result of gender violence or more generally) has historically not been a reliable defence in criminal litigation. The explanation below considers whether a history of abuse could contribute to establishing a defence or mitigating factor on the basis of pleading self-defence or mental illness.

## Self-defence

Article 15, Section IV of the Federal Criminal Code sets forth the minimum grounds to claim self-defence. The offender must prove that (a) there was an imminent, real or current unjustified aggression; (b) reasonable measures were used in order to protect themselves or another person; and (c) there was no intentional provocation by the victim or the person being defended. As such, the concept of self-defence is very specific and does not apply to offences normally connected to battered woman syndrome and slow burn reaction.

The Mexico City Human Rights Commission (the “**Commission**”) has noted as *amicus curiae* in the case of Yakiri Rubí Rubio Aupart that, in general, public prosecutors do not take into consideration a gender perspective in the analysis of self-defence as a defence to culpability or as a mitigating factor. The Commission has recommended that in cases of sexual and domestic abuse of the offender, the accused should not be subject to the requirement of proving imminent danger to make out self-defence because the nature of the threat is constant and permanent.<sup>159</sup>

To our knowledge, the recommendation of the Commission that the requirement for imminent danger as a pre-requisite for self-defence should be dropped in the case of women with a history of abuse has not been taken into account by any court.

<sup>158</sup>. The issues surrounding whether a past history of abuse can be pleaded as a defence or as a mitigating factor have both been addressed in this section due to the structure of the information received from local counsel.

<sup>159</sup>. Comisión de los Derechos Humanos del Distrito Federal, Amicus Curiae, Caso: Yakiri Rubí Rubio Aupart, México, D.F., 11 February 2014, p. 33-36.

## Mental illness

Pursuant to Article 15, Section VII of the Federal Criminal Code, if, due to mental illness, an offender did not have the capacity at the time of the offence to understand that their behaviour was criminal or to conduct themselves accordingly, they will be exculpated from criminal responsibility. A limited understanding that one's behaviour was criminal or a limited capacity to behave accordingly will be considered as a mitigating factor.

In order to satisfy such exclusion of culpability or as a mitigating factor, an expert medical report stating that the offender was not able to understand or had limited understanding of her criminal behaviour due to a mental illness or pathology is required. As a general rule in Mexico, the mental pathology pleaded as a mitigating factor may be permanent or transitory.

However, in Mexico, battered woman syndrome and slow-burn reaction are generally not considered to be recognised mental pathologies for the purposes of establishing a mitigating factor or defence to a crime. There is little information and research on the subject and we are told that there are not many experts that could endorse or give scientific support to this defence.

Nevertheless, a non-binding decision of a federal court (a "Tesis") states that if a judge raises the fact that a woman accused of murder suffered gender violence from her victim due to a family relationship, the judge must immediately order a psychological analysis to determine whether the offender could claim a mitigating factor or defence due to a permanent or transitory mental pathology.

### QUESTION 3:

**Does the 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?**

Neither local nor federal criminal codes in Mexico explicitly or implicitly set forth a history of past abuse as a mitigating factor. However, depending on the jurisdiction and as set out above, a history of abuse could potentially be used as a defence or a mitigating factor.

### 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?**

No cases have been found in which a history of abuse has been taken into consideration in practice.

## 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?**

As a general rule, local criminal codes provide that in sentencing, the judge should consider the particular circumstances of the victim, such as the relationship between the victim and the offender, the time and place where the illegal action took place, the culpability of the offender and the general circumstances that may have motivated the action. As such, a woman's past history of abuse ought to be factored into sentencing (however, there are no public databases on which to find cases to this effect).

Constitutional reform in June 2008 shifted the penal system from inquisitorial to adversarial, which allowed for the entrenchment of the presumption of innocence, an active role of the accused in the procedure and an oral and more efficient trial.

Based on this constitutional reform, on 4 March 2014, the National Criminal Procedure Code (the "CNPP") was enacted. The CNPP provides judges with wider flexibility in sentencing, and it is foreseeable that in the near future a past history of abuse of a woman convicted of a violent crime against the offender will be taken into consideration in sentencing.

Article 410 of the CNPP provides that a court should consider the defendant's degree of culpability in sentencing, which will be determined by taking into consideration the circumstances and characteristics of the criminal conduct, the possibility of being able to act in a different way, the motivation behind the criminal act, the particular physical and psychological conditions of the accused, and individual characteristics of the defendant such as age, social and cultural conditions, family relationships with the victim and any other circumstances relevant to the individualisation of the sentence. It is foreseeable that judges may be able to use this broader discretion as a means to introduce a past history of abuse as a mitigating factor in sentencing. It is envisaged that the CNPP will come into force for the entire country on 18 June 2016.

### QUESTION 6:

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

It is unclear what weight would be given to a past history of abuse as a mitigating factor in sentencing, as judicial precedent is not utilised and there is no legislative indication of weight to be given.



### 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?**

No statistics have been found to this effect.

#### 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?**

There are many testimonials in which convicted women have expressed a history of past abuse; however, there are no indications that they used this history of abuse as a defence in their case.

Statistics indicate that a large majority of female prisoners and criminals in Mexico have an abuse-related background, whether it be from parents, spouses and even siblings or other non-immediate family members. Most literature on the subject notes a past history of abuse as a common factor for all types of female offenders, not just those convicted of a violent crime against her abuser.

#### **Possible avenues to establish the defence or mitigating factor**

As indicated above, there is little basis upon which to plead a past history of abuse as a defence or mitigating factor. However, local counsel have alerted us to the following measures which may, in future, allow for such pleading.

In the last decade, legislation concerning the protection of women from sexual and domestic abuse has been enacted, such as the General Law for the Access of Women to a Life Free of Violence and the General Victims Law. The government and lawmakers are progressively becoming more concerned about violence against women. Although they do not consider explicitly a history of domestic or sexual abuse as a mitigating factor, these laws point to the relevance and importance of the problem of domestic or sexual abuse, and may help support a defence on those bases. Human rights organisations, including the Mexico City Human Rights Commission, have noted that criminal legislation in Mexico is based upon masculine stereotypes which leave women in a vulnerable position before the law.<sup>160</sup>

Additionally, the human rights constitutional reform of 2011 allowed for international law as a major source of human rights law in Mexico. The human rights reform compels all Mexican courts to consider human rights treaties to which Mexico is a party as binding at a local and a national level (*control de convencionalidad*). As such, treaties including the Belém do Pará Convention and the Convention on the Elimination of All Forms of Discrimination against Women are directly applicable in domestic law.

Further, the Supreme Court of Justice ruled in 2013 that decisions of the Inter-American Court of Human Rights are binding in Mexico, regardless of whether Mexico is one of the parties to the decision.<sup>161</sup> This new source of jurisprudence may provide judicial precedents for cases in which a violent action is the result of a past history of domestic or sexual abuse. At the date of this report, although there have been some cases on gender related crimes (see, for example, *Campo Algodonero v Mexico*), there have not been rulings on the specific subject of this report.

The Protocol for the Procurement, Expert and Police Investigation with Gender Perspective for Sexual Violence (the “**Protocol**”) published by FEVIMTRA (the Special Prosecutor for Gender Violence Crimes against Women and Human Trafficking), states that to presume that a victim will be able to immediately denounce the abuse (including pleading it as a defence or mitigating factor in court) is a form of “re-victimisation” of the victim. The Protocol provides that under Mexican law, a defence of past history of abuse should be viewed through the lens of international human rights law. The Protocol urged judges to consider conditions of inequality, submission, gender discrimination and psychological violence that may influence the reaction of abused woman.<sup>162</sup>

From the experience of criminal lawyers consulted, it is open to conclude that the Protocol issued by FEVIMTRA has not been successfully implemented in cases where a woman accused of a violent crime has had a past history of abuse, and that the state authorities usually undermine the Protocol. The level of accountability for not complying with the Protocol is very low.

<sup>160</sup>. Comisión de los Derechos Humanos del Distrito Federal, Op. Cit., pp. 26-32.

<sup>161</sup>. Contradicción de Tesis 293/2011.

<sup>162</sup>. Protocolo de Investigación Ministerial, Pericial y policial con Perspectiva de Género para la Violencia Sexual, op. cit., p. 48.



## ANNEX 8:

## Poland

## Introduction

Poland is a civil law jurisdiction and the primary source of Polish criminal law is the Penal Code (the “**Code**”), which sets out the rules for establishing a criminal act and sentencing. Although case law in Poland has no binding force and there is no doctrine of precedent, it is persuasive and may therefore have an impact on the interpretation of legislation (including the Code).

In Poland, there is no specific defence based on a history of abuse. However, a history of past abuse may be relevant to establishing an offence of “privileged” murder. Polish criminal law identifies murder committed under the influence of strong mental agitation that is justified by the circumstances as a “privileged” type of murder which carries a lesser sentence than murder (equivalent to the English law concept of “voluntary manslaughter”). It is rather exceptional that the defences of self-defence, temporary insanity or partial insanity could be established by the existence of a history of abuse alone.

Although Polish law does not explicitly mention a history of abuse as a possible mitigating factor, there are several cases where women who committed violent crimes against their long-term abusers were given lesser sentences because their guilt was assessed to be limited by a history of past abuse. Furthermore, there are 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.

In addition, although Polish sentencing laws do not explicitly mention the history of past abuse as a factor to be considered in sentencing, courts have wide discretion to consider certain “general” factors, such as reasons behind the crime. On this basis, courts have taken a history of past abuse into consideration to impose a lesser sentence. Furthermore, courts have the power to suspend a sentence in certain circumstances and a history of past abuse has been found to be relevant in this context.

Both academics and organisations representing women’s rights in Poland have discussed the concepts of slow burn reaction and battered woman syndrome and its links with violent crime against the abuser.

Please note that this annex sets out a high level summary of Polish law with respect to the sentencing of victims of violence who have themselves committed violent crimes against their abusers. Whilst this annex covers the relevant law in this area, it does not purport to be a comprehensive review of all of the law and case law in this area.

## 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)?**

## 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?**

The Code does not provide for any full or partial defences based solely on a history of past abuse. Furthermore, a history of past abuse cannot on its own serve as a basis for the general defences of self-defence or temporary or partial insanity (without the other requisite conditions for the defences being met – see below). However, a history of past abuse could be relevant where (a) in the context of a murder allegation, the defendant committed an offence of “privileged murder” (equivalent to the English “voluntary manslaughter” offence) which carries a lesser sentence to murder, or (b) it is relied on as background to a claim of self-defence to show the constituent parts of the defence have been satisfied.

## “Privileged” murder

Where murder is committed under the influence of strong mental agitation, justified by the circumstances in which the crime took place, the criminal act may be qualified as a separate type of crime, known as “privileged” murder. Although prior domestic or sexual violence is not explicitly mentioned in the Code as a circumstance in which the crime may be qualified as “privileged”, the courts do, in practice, consider this as a relevant circumstance.

The consequence of the murder being deemed “privileged” is that a lesser sentence may be given by the court. The minimum penalty under Polish law for a “regular” murder conviction is eight years’ imprisonment and the maximum penalty is life imprisonment,<sup>163</sup> whereas a conviction of “privileged” murder carries a minimum sentence of one year of imprisonment and a maximum sentence of 10 years’ imprisonment.<sup>164</sup>

In a 2013 case before the Court of Appeal in Wrocław,<sup>165</sup> the defendant, who had been physically and mentally abused by her husband over a period of years, killed her husband who had arrived home intoxicated and threatened to “cut her with an axe” but had not physically made an attempt on her life. The Court determined that self-defence could not be established given that the defendant’s reaction was not a proportionate response to the threat from her husband. However, the Court found that the murder was “privileged”, given that the threat faced by the defendant would have caused strong mental agitation, including fear and anxiety, and deepened her general insecurity in light of the history of abuse that she had already suffered.

### Self-defence

Under the Code, self-defence is a full defence, which is available with respect to any act which would otherwise be a criminal act (including murder and other violent crimes). In order to establish self-defence, the reaction by the defendant must have been a justified and proportionate response to an immediate danger caused by an attack. Accordingly, this defence will only succeed where the defendant faced a direct attack from her abuser, and not in the case of a slow burn reaction following a history of abuse over a period of time.

However, a history of abuse has been provided to courts in previous cases as relevant background to a self-defence claim. In a 2013 murder case before the District Court in Częstochowa,<sup>166</sup> the defendant successfully pleaded self-defence where she fatally stabbed her husband with a knife that he had been using to attack her. The defendant had suffered a history of abuse from her husband over many years. The Court explained that the woman was “*acting under pressure, killing her husband in self-defence. She did it because she was afraid for her life*”. This case can be seen as an example of where a history of abuse was used as relevant background to show that the use of self-defence was justified and proportionate. However, if the defendant’s reaction had not also been a direct response to an immediate threat from her abuser, self-defence would not have been established.

### Temporary (full) insanity and partial insanity

Under Article 31 § 1 of the Code, temporary insanity is a full defence to murder, which is available where, 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 other mental disturbance.<sup>167</sup>

However, the Code also provides for a defence of partial insanity, which is available where at the time of the offence the defendant’s ability to recognise the meaning of her conduct or to manage her behaviour was significantly diminished. This is not a full defence but courts may apply extraordinary mitigation of punishment, which may result in a lesser or no penalty for the relevant crime (Article 31 § 2 of the Code) (discussed further below).

A history of abuse would not suffice on its own, independently from other factors, to establish the defences of either temporary or partial insanity. In a 2013 judgment of the District Court in Białystok,<sup>168</sup> a history of abuse was taken into consideration when assessing the level of culpability of the defendant. Immediately prior to the murder, the husband hit the defendant in the face with his fist. The husband (who was an alcoholic) had abused his wife physically and mentally for over 10 years. The fact that the wife was hit by her husband in her face was the last link in a chain of the victim’s aggressive behaviour towards his wife, which led to her strong agitation and, in consequence, to her aggressive reaction. The defendant’s strong agitation was considered to be, from a medical point of view, a strong reaction to stress which resulted in a mental disturbance. Accordingly, at the time of the offence, the defendant’s ability to recognise the meaning of her conduct and to manage her behaviour was significantly diminished. The Court qualified the offence as a “privileged” murder and (independently) applied an extraordinary mitigation of punishment under Article 31 § 2 of the Code due to partial insanity.

#### QUESTION 3:

**Does the 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?**

The Code does not contain any specific provisions which explicitly mention prior (domestic and/or sexual) violence as a mitigating factor relevant to guilt or innocence in a case of a violent offence against an abuser. However, the Code allows for “extraordinary mitigation” of a punishment to be applied in certain circumstances where the constituent parts of a claim of self-defence or temporary insanity are not fully satisfied. Furthermore, a history of abuse may have an impact on the overall assessment of the level of culpability of the defendant.

<sup>163</sup>. Article 148 § 1 of the Code.

<sup>164</sup>. Article 148 § 4 of the Code.

<sup>165</sup>. The Court of Appeal in Wrocław, 8 May 2013, II AKa 125/13.

<sup>166</sup>. The District Court in Częstochowa, 5 October 2013, II K 164/14.

<sup>167</sup>. Article 31 § 1 of the Code.

<sup>168</sup>. The District Court in Białystok, 7 October 2013, III K 24/12.

## Extraordinary mitigation

Extraordinary mitigation is not a defence, rather it is a concept that mitigates the severity of the crime committed by a person who is otherwise guilty. The consequence of the court applying extraordinary mitigation to a crime is that either no penalty will be imposed or a lesser sentence than the statutory minimum will be handed down by the court.<sup>169</sup> Extraordinary mitigation of a crime may result in no penalty at all (in the case of less serious offences), which are punishable by imprisonment, restriction of liberty or a fine.

Extraordinary mitigation can apply in cases where a defence of self-defence is unavailable because the defendant's reaction was not a direct and proportionate response to the threat from her abuser. In such cases, the court may either apply extraordinary mitigation of punishment or refrain from imposing a punishment at all.<sup>170</sup> For example, in a 2007 case before the Court of Appeal in Katowice,<sup>171</sup> where the defendant killed her husband following multiple attacks against her, the Court noted that, on the day of the crime, where the defendant had a right to defend herself but her response was excessive and the defence of self-defence was not available. The defendant was found guilty of murder but the Court applied extraordinary mitigation of punishment and the defendant received a lesser sentence of one year and nine months' imprisonment.

Extraordinary mitigation can also apply in cases where a full defence of temporary insanity is unavailable because the defendant was to some extent capable of recognising the significance of her crime (partial insanity) (discussed further above).<sup>172</sup>

By way of example, in a 2013 case before the District Court in Legnica,<sup>173</sup> the Court applied extraordinary mitigation to a situation where the defendant, who had suffered a history of abuse from her husband, killed her abuser. The Court noted that the defendant's sanity was significantly limited and her ability to adequately perceive the reality of her crime was reduced. Although the defendant was found guilty of murder, she was sentenced to three years' imprisonment instead of the statutory minimum for murder of eight years.

Extraordinary mitigation can also apply in the case of an attempted crime. According to the Code, the punishment for an attempted murder is the same as for a committed murder, although the court may extraordinarily mitigate the punishment if the offender took (unsuccessful) voluntary actions to reverse the effect of the offence.<sup>174</sup>

In these circumstances, the court may either apply extraordinary mitigation of punishment or abstain from imposing a penalty.

Please note that, in relation to murder specifically, prior to the amendment of the Code in 2010, the court was allowed to impose a prison sentence of a minimum of one-third of the statutory minimum (i.e. one third of eight years) as part of the extraordinary mitigation of punishment. However, since 2010, the extraordinary mitigation of punishment for a crime which carries 25 years' imprisonment (for example, murder) cannot result in a penalty of less than eight years of imprisonment.

## Assessment of guilt

Once the court has established that a criminal act has been committed, the court will also assess the level of "guilt" (i.e. the overall negative aspects of an act which are attributable to the accused). This assessment may lead the court to hand down a less (or more) stringent punishment (within the statutory limits of punishment for a given crime).

The assessment of guilt is two-fold. Firstly, the principle of guilt legitimises criminal liability. Secondly, it limits the scope of punishment, which may not exceed the degree of guilt. When determining the degree of guilt, the court takes into account both the conditions of culpability (the capacity to commit an offence, the ability to recognise the unlawfulness of an act and the motivational circumstances surrounding the act) and the offender's attitude to the offence. The court therefore evaluates the defendant's intention and the motive which drove her, as well as her method of carrying out the offence.

### 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?**

Please see above for references to the relevant court cases. Please note that, as mentioned above, previous case law and precedent is not binding on the courts. However, courts may refer to earlier case law to justify their judgments. For example, in a 2013 case before the Appeal Court in Warsaw,<sup>175</sup> the Court, when assessing whether the offence had been committed by the defendant in a state of strong mental agitation, referred to an earlier 1978 judgment<sup>176</sup> in which the Supreme Court gave examples of when a crime may be considered to have been committed in a state of strong mental agitation justified by circumstances.

<sup>169</sup>. Article 60 § 6 of the Code.

<sup>170</sup>. Article 25 § 2 of the Code.

<sup>171</sup>. The Court of Appeal in Katowice, 16 October 2007, II AKa 307/07.

<sup>172</sup>. Article 31 § 2 of the Code.

<sup>173</sup>. The District Court in Legnica 28 January 2013, III K 76/12.

<sup>174</sup>. Article 15 § 2 of the Code.

<sup>175</sup>. The Appeal Court in Warsaw, 28 October 2013, II AKa 351/13.

<sup>176</sup>. The Supreme Court, 19 December 1978, KR 226/78.

## 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?**

The Code does not specifically mention a past history of abuse as a factor to be considered in sentencing a woman convicted of a violent crime against her abuser. The courts must rely on the general rules on sentencing contained in the Code,<sup>177</sup> which provide that the court must impose penalties according to its own discretion, within the limits prescribed by law and bearing in mind that the harshness of the penalty should not exceed the degree of guilt.

### “General” factors

There are several “general” factors that the court must take into account in every case when deciding the sentence, such as (a) the degree of guilt of the accused, (b) the reasons behind the crime (the motivation of the accused person) and (c) the personal conditions of the accused. These factors are very broad and provide courts with a degree of flexibility to consider a wide array of more specific circumstances. In practice, the courts tend to consider a number of specific circumstances such as (a) acting under strong agitation, (b) the emotional state of a defendant and the psychological or/and physical bullying of the defendant, (c) the previous behaviour of the defendant, (d) the relationship between the defendant and the victim, (e) provocation by the victim including the use of offensive words, (f) the fact that the victim presented a threat not only to the defendant but also to her children and, (g) actual or anticipated violence. A history of abuse can therefore be relevant as a factor to consider in sentencing and may lead to a lesser penalty up to the statutory minimum.

However, in some cases the court has refused to consider a history of abuse as a mitigating factor. For example, in a 2005 case, the Court of Appeal in Katowice<sup>178</sup> reversed the judgment of the District Court, and determined the offence to be “regular” murder instead of “privileged” murder, despite a history of abuse. The District Court in Katowice had initially sentenced the defendant to five years’ imprisonment, qualifying the offence as “privileged” murder. The Court of Appeal reversed the judgment, underlining that, although in the past the husband used violence against the defendant, which was the cause of his conviction for abuse, this was not of predominant importance in the circumstances of the case at hand.

The Court based its findings on the testimony of the defendant’s son, who testified that his mother had behaved impulsively under the influence of alcohol, which had led to quarrels with her husband, and that in the last two or three years before the event, he had not witnessed his mother being abused by his father. The Court of Appeal determined the offence to be “regular” murder instead of “privileged” murder and independently applied an extraordinary mitigation of punishment under Article 31 § 2 of the Code due to partial insanity. In consequence, the Court of Appeal judged the penalty to be the same as the court of the first instance and sentenced the defendant to five years’ imprisonment.<sup>179</sup>

### Conditional suspension

The courts also have power to conditionally suspend the execution of the sentence. In relation to custodial sentences of up to two years, the court may conditionally suspend the execution of such a sentence for up to five years, if it is regarded as sufficient to attain the objectives of the penalty with respect to the defendant and prevent her from reoffending.<sup>180</sup> In deciding whether to suspend the execution of punishment, the court must primarily take into consideration (a) the attitude of the defendant, (b) her personal characteristics and conditions, (c) her way of life to date and (d) her conduct after the commission of the offence. A history of past abuse of the defendant by the victim may be relevant in this context.

By way of illustration, in the 2013 case before the District Court of Legnica<sup>181</sup> which involved a defendant who attempted to kill her husband who had abused her over many years, the defendant’s sentence was conditionally suspended for a probation period of two years. The Court took the view that there was a positive forecast for the defendant, considering that the defendant would obey the law and would not reoffend. The execution of the sentence was therefore not necessary to meet the objectives of the punishment.

### QUESTION 6:

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

The Code does not contain any specific provisions which explicitly state how much weight should be given to a history of abuse in sentencing. As such, the court has wide discretion to give such weight to history of abuse as it thinks is justified. As discussed above, this discretion can be exercised at various stages of the sentencing process, including when (a) the court determines whether and how to apply extraordinary mitigation; and (b) the

<sup>177</sup>. Article 53 § et. seq. of the Code.

<sup>178</sup>. The Court of Appeal in Katowice, 14 January 2005, II AKa 109/05.

<sup>179</sup>. Prior to the amendment of the Code in 2010, the court could apply an extraordinary mitigation of punishment for murder by handing down a sentence of imprisonment for the period of not less than one-third of the statutory minimum (i.e. one-third of eight years). Since 2010, the extraordinary mitigation of punishment for crime threatened by 25 years’ imprisonment (i.e. murder) may not result in handing down a penalty of less than 8 years of imprisonment.

<sup>180</sup>. Article 69 § 1 of the Code.

<sup>181</sup>. The District Court in Legnica, 17 October 2013, 3 Ds. 168/13.

court considers sentencing guidelines to determine the appropriate length of sentence and whether a suspension is justified. The level of any reduction of a sentence or suspension will nevertheless depend on the specific facts of the crime and the weight given to a history of abuse will vary on a case-by-case basis.

### 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?**

There are general statistics collected by the Polish Ministry of Justice which set out the number and type of committed crimes and sentences. These can be provided upon request if necessary.

#### 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?**

The concepts of a slow burn reaction or battered woman syndrome have been discussed both by academics and non-governmental organisations representing women's rights. For example, in 2013 the Centre for Women's Rights (Centrum Praw Kobiet) published a series of mini-guides for public prosecutors, policemen and psychologists regarding domestic violence, in which the concepts of battered woman syndrome and a slow burn reaction are described.<sup>182</sup>

In the above-mentioned mini-guides, authors describe psychological and behavioural disorders suffered by abused women, such as post-traumatic stress disorder, self-destructive inclinations, low self-esteem, feelings of shame, Stockholm syndrome and battered woman syndrome, resulting from living in a toxic relationship with a violent partner for many years. The studies discuss the consequences of battered woman syndrome, noting that such women have cognitive and emotional deficits, undervalue their own capabilities and as a result they are unable to leave abusive partners.

M. Łosińska, in a research study entitled, "Woman as a perpetrator of murder – criminological and forensic analysis"<sup>183</sup> ("Kobieta jako sprawczyni zabójstwa – analiza kryminologiczna i kryminalistyczna"), analysing the reasons why women decide to murder their husbands or partners, attributes considerable importance to a history of abuse and the so-called "cycle of violence". A sense of grievance is indicated as one of the main motives for murdering an abusive partner, next to revenge and a sense of insecurity and anxiety. According to the author, the sense of grievance may grow in tension over the years of regular abuse until it finds its uncontrolled outcome in an act of violence.

<sup>182</sup>. <http://rownosc.info/bibliography/publication/przemoc-wobec-kobiet-w-rodzynie-niezbednik-psychol;> [http://issuu.com/centrum\\_praw\\_kobiet/docs/niezbednik\\_policjanta\\_22\\_01](http://issuu.com/centrum_praw_kobiet/docs/niezbednik_policjanta_22_01), [http://issuu.com/centrum\\_praw\\_kobiet/docs/niezbednik\\_prokuratora\\_22\\_01\\_1](http://issuu.com/centrum_praw_kobiet/docs/niezbednik_prokuratora_22_01_1).

<sup>183</sup>. Marta Łosińska, *Kobieta jako sprawczyni zabójstwa – analiza kryminologiczna i kryminalistyczna*, Przegląd Prawniczy Ekonomiczny i Społeczny 1/2013.



## ANNEX 9:

## Spain

Spanish legislation does not make any special provision for dealing with women accused of violent crimes who have suffered a history of abuse at the hands of their victim. It is open to women accused of violent crimes to raise evidence of a history of abuse in attempting to establish one of the existing defences in the Spanish Criminal Code: temporary mental disorder, self-defence or insurmountable fear. The most frequently used defence is that of insurmountable fear, and there are examples of women successfully using this as a defence. However, the requirement that the threat which gives rise to the fear is “imminent” means that in most cases women who have suffered a history of abuse have difficulty establishing this defence. While Spanish law does not contain “sentencing guidelines”, it does provide for factors which go towards proof of a defence to be treated as mitigating factors in sentencing where all the elements of the defence cannot be established.

## 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)?**

The Spanish Criminal Code provides the complete legislative framework in Spain for defences to violent crimes. Section 20 of the Spanish Criminal Code sets out three possible grounds for full exemption from criminal liability that could be argued in cases where a woman is charged with a violent crime against her abuser.

### Temporary mental disorder

The defence of temporary mental disorder is available in cases where the accused can show that their actions were caused by a psychological disturbance arising from external events (which could include abuse). In order to establish this defence, the accused must prove that:

- (a) the outbreak of violence occurred suddenly;
- (b) the mental disorder was of a temporary nature, meaning that the accused must only have suffered from the disorder at the time of the violent crime;

- (c) they recovered from the incident without any further outbreaks of mental disorder;
- (d) the intensity of the psychological disturbance was such that it completely clouded their mind and judgement; and
- (e) the violent reactions arising from external events were extraordinary and would not be considered normal.

It is not strictly necessary for the accused to be diagnosed as suffering from a recognised mental illness although, in practice, successful use of this defence is usually limited to cases where the temporary mental disorder has been established on a pathological basis to differentiate it from a “passionate state”.

In order to rely on this defence, the accused must be examined immediately by a doctor to diagnose the degree of mental alteration suffered.

If successfully established, this defence can provide a full defence for a woman charged with a violent crime against her abuser.

### Self-defence

Self-defence is the action necessary to repel unjust aggression against her or against another and such action “is not merely a fear of future aggression”.<sup>184</sup>

In order to establish this defence, the accused must prove that:

- (a) the degree of aggression by their victim towards them was unlawful;
- (b) their actions were rational in order to prevent or repel the aggression; and
- (c) the aggression of the attacker was not provoked by the accused.

By its very nature, this defence will only be available where the violent crime committed by the woman was an immediate reaction to a specific occasion of aggression by her abuser and was done in self-defence or defence of another (for example, a child). This defence therefore cannot be relied upon by women solely on the basis of historic abuse.

<sup>184</sup>. Spanish Supreme Court, Second Chamber, judgment of 4 February 1983.

If successfully established, this defence can provide a full defence for a woman charged with a violent crime against her abuser.

### Insurmountable fear

Insurmountable fear is fear resulting from a situation capable of generating in the defendant an emotional state of such intensity that their normal faculties are impaired, leading to a loss of will or ability to control themselves. In order to establish this defence, it must be shown that:

- (a) the violent crime arose in circumstances considered to be real, true, serious, recognised, imminent and unjustified which caused the accused to suffer a degree of fear that could be considered to be “insurmountable”, meaning that it could not be controlled or overcome by ordinary persons; and
- (b) fear was the sole motive for the action taken.

Notwithstanding the above criteria, it is sufficient to show that the circumstances were such that insurmountable fear can be *presumed* to result from the imminent threat, and that the accused was in a position where they were forced to choose between being the victim or being the perpetrator of violence.

If the defence of insurmountable fear is established, it can provide a full defence to violent crimes.

In light of the criteria for this defence, it appears that insurmountable fear could provide a defence for women who have suffered from historic abuse and have committed a violent crime against their abusers, provided that the above requirements are satisfied.

In circumstances where the defences of temporary mental disorder, self-defence or insurmountable fear cannot be fully established but exist in part, Section 21 of the Spanish Criminal Code provides that the relevant circumstances may constitute mitigating factors which can be reflected in any sentencing.

The Spanish Criminal Code also provides that situations “similar” to those established in Section 21 which may give rise to the defences of, among others, temporary mental disorder, self-defence or insurmountable fear, might also constitute mitigating factors, allowing more lenient sentencing.

### Other factors

In addition to the defences set out above which allow full exemption from criminal liability, the Spanish Criminal Code also provides for certain conditions which may aggravate or mitigate any criminal liability.

Criminal liability may be mitigated in circumstances where the accused suffered from a serious addiction to drugs or alcohol. It may also be mitigated where it can be established that the accused’s actions were caused by stimuli so overpowering that they produced fury, obstinacy or another similar state of mind (“*estado pasional*”). This is referred to below as a “passionate state”.

On the other hand, evidence which suggests that the crime was premeditated, or that the accused used a disguise to commit the crime, could aggravate criminal liability. Any abuse of superiority or evidence that the accused took advantage of a place or time or abused a position of confidence could also aggravate any criminal liability.

Finally, Section 23 of the Spanish Criminal Code allows the Court to consider any relationship of kinship between the accused and the victim which, depending on the circumstances, may be considered to be an aggravating or extenuating factor. In this instance, “kinship” refers to the accused’s spouse or a person with whom they share a stable emotional relationship, or any ascendant, descendant or biological or adoptive sibling of the offender, or spouse or cohabitating partner thereof, and where such a relationship exists between the accused and the victim, this provision allows the Court to take this relationship into account in its judgment and sentencing.

Although there is no established rule, the courts usually treat kinship as an aggravating factor in crimes against persons and sexual freedom. In contrast, the courts usually treat it as a mitigating factor in crimes against property and honour.

### 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?**

In general, the Spanish courts very rarely find there to be grounds for exemption from liability. In half of the cases of domestic violence that we have reviewed, the accused women failed to establish any of the defences described above despite their history of abuse or experience of very recent violence by a male family member.

### Rulings upholding the exemption from liability

#### Supreme Court Judgment of 13 December 2002

The accused locked her husband out on the roof for two days without food or drink, for which she was convicted of the crime of unlawful detention. The accused asked to be exempted from liability on the grounds of self-defence, temporary mental disorder and insurmountable fear. The first two defences were dismissed on the basis that they did not meet the requisite tests but, in respect of insurmountable fear, the Supreme Court held that the psychological and physical violence to which the accused had been regularly subjected “naturally engenders an intense rational fear, based on real and proven events, which reaches a level sufficient to considerably reduce the ability to choose. Accordingly this justifies, in cases like this of reactions to that situation of domestic violence, for this situation to be considered at least as a partial defence”.

### **Catalan High Court of Justice Judgment of 29 November 1999**

The accused, as a result of abuse inflicted by her husband, arranged for him to be killed by another person. The Court accepted evidence that she suffered from battered woman syndrome and that this affected her ability to make choices, reducing her faculties of cognition and volition. In the end, the Court applied the partial defence of insurmountable fear.

### **Malaga High Court Judgment of 17 April 2012**

The accused stabbed her husband to death during an argument whilst both were drunk. During the trial, evidence emerged that the woman had suffered multiple injuries at the hands of her husband over the years. The Court concluded that “based on the situation that the accused has had to live with over the years of her marriage, she could expect another attack from her husband, which means it can be considered logical for her to become fearful of being assaulted again by her husband in view of the argument that was taking place between them, but to an extent that although partially overriding her intellectual and volitional faculties, did not override them completely”. Accordingly, apart from the partial defence due to alcohol poisoning (2.090g/l of blood alcohol), the Court applied the partial defence of insurmountable fear.

### **Alicante High Court Judgment of 12 April 2010**

The accused stabbed her husband to death during an argument when he was drunk. Although the accused did not plead insurmountable fear, the Court applied that defence on the basis that the accused had suffered serious abuse from the victim. In this case, the Court clarified that the accused was not wholly exempt because she had had the opportunity to behave differently by ending her relationship with the victim, thereby avoiding the danger of suffering further abuse (a number of people offered for her to stay elsewhere).

## **Judgments dismissing the exemption from liability**

### **Judgment of the Supreme Court of 4 March 2011**

The charged woman in this case had suffered continuous abuse by her partner and he had attempted to strangle her the night before she attacked him. During an argument the following day, the woman stabbed him with a knife causing his death.

The lower Court partially accepted the woman's defence of insurmountable fear and this was taken into account as a mitigating factor in the sentencing of the accused. She was found guilty of homicide and sentenced to six years in prison. The basis for the Court's finding of insurmountable fear was proof that the accused had been the subject of abuse by the murder victim.

However, the decision of the lower Court was appealed to the Supreme Court by the charged woman. The Supreme Court did not agree that the defence of insurmountable fear had been established on the grounds that the lower Court had failed to consider whether the accused could have acted differently and whether she could have responded differently to the pressure of fear. The Supreme Court determined that this test must always be applied where a defence of insurmountable fear is pleaded. In this case, the Supreme Court found that there were objective factors that allowed for the possibility of different conduct or behaviour. The accused had had the chance to act differently because she had been given the opportunity to escape her abuser by staying with friends who had offered her an alternative place to live.

### **Judgment of the Supreme Court of 11 October 2011**

The accused woman had suffered a history of abuse by her husband whom she hit with a dumbbell while he was in bed, causing his death. In reaching its guilty verdict, the lower Court considered kinship to be an aggravating factor and took into account the accused's confession as a mitigating factor. The accused woman was sentenced to fifteen years in prison.

She attempted to establish the defences of self-defence, insurmountable fear and passionate state. However, the Supreme Court found that the nature of the violent act against her husband removed the possibility of establishing any defence as the attack caught the husband off guard and the insurmountable fear of the woman was not proven to be the trigger event which caused the violent crime.

### **A Coruña High Court Judgment of 16 May 2014**

After separating from her husband, the accused threatened her husband on a number of occasions regarding the divorce process and their son. The Court acknowledged that the woman suffered from battered woman syndrome but concluded that “this cannot mean, in itself, that in domestic violence cases where both partners are charged with different and combined or directly related criminal conduct, that the woman is given a direct and automatic defence outside the usual standards of its consideration”. The Court's view was that the situation of abuse is not of sufficient substance to define an alteration or restriction of the ability of the person concerned to comprehend, act or make decisions.

The judgment did not make clear whether this reasoning is of general application. As discussed above, case law makes it clear that a history of abuse is not in itself a mitigating factor and will only have an impact on sentencing where the Court finds it to form part of one of the defences and/or mitigating factors described above.

### High Court of Pontevedra Judgment of 1 July 2002

The charged woman ordered the murder of her husband. It was proven that the woman and her daughter suffered a history of abuse by the victim.

Although the Court found that a mitigating factor “similar” to passionate state was established, its impact was negated by the aggravating circumstance of kinship as the victim was the accused’s spouse. This meant that the effect of the occurrence of both circumstances, mitigating and aggravating, was neutralised in terms of criminal liability.

### Impact of mitigating factors on sentencing

In the cases reviewed above, the Court applied several aggravating and extenuating factors jointly, making it impossible to identify the impact of each specific factor on sentencing. The law establishes that (a) when only one mitigating circumstance exists, the lower half of the sentencing scale shall be applied; and (b) when two or more extenuating circumstances exist and the Court finds that no aggravating circumstances existed, sentencing shall be reduced by one or two degrees in accordance with Article 66 of the Criminal Code.

For example, for manslaughter cases, the law provides for a prison sentence of between 10 and 15 years. If a single mitigating circumstance exists, the punishment shall be between 10 and 12.5 years. If two or more mitigating circumstances exist, the Court will reduce the sentence by one or two degrees, i.e. from 5 to 10 years or from 2.5 to 5 years.

#### QUESTION 3:

**Does the 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?**

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

#### 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?**

Please see the cases discussed above.

## 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?**

The criminal justice system in Spain does not use sentencing guidelines. Case law does not provide any special sentencing criteria for women convicted of a violent crime against their abusers.

#### QUESTION 6:

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

A history of abuse is not in itself a mitigating factor and will only have an impact on sentencing where the court finds it to form part of one of the defences described above. The impact of any defence or mitigating factors on sentencing is established by the Spanish Criminal Code. Section 66 of the Spanish Criminal Code sets out the rules on sentencing which the judges or courts will apply when determining an appropriate criminal sentence.

For example, when one mitigating circumstance exists, the court will award a sentence in line with the lower half of the punishment scale applicable to the crime. On the contrary, in circumstances where one or two aggravating factors are established, the court will award a sentence which falls within the top half of the appropriate punishment scale.

Please also see our comments above in respect of the impact of mitigating factors on sentencing.

## 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?**

There are no public statistics on these issues.

#### 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?**

There is some consideration of battered woman syndrome in Spanish publications.<sup>185</sup> However, these publications often are an assessment of Western (mostly common law) jurisdictions. There is a lack of academic or judicial commentary concerning Spanish law.

<sup>185</sup>. This is an example of the consideration in publications from Spain: <http://www.poder-judicial.go.cr/violenciaintrafamiliar/index.php/de-su-interes?download=29:compendio-de-definiciones-s-ndromes>.

**ANNEX 10:**

# The United States

## Introduction

The United States Constitution gives specific powers to the national (federal) government, with the remainder being the responsibility of the individual states. Each of the United States' 50 states has its own state constitution, governmental structure, legislation and judiciary.

For the purposes of this study and due to the legal variations that exist from one state to another, a sample of states has been considered. The following states have been included in this study: California, Florida, Illinois, New Jersey, New York and Texas. This annex will set out a general overview of the law relating to female abuse victims in the United States by summarising the laws of these various states in the executive summary, before individually addressing each state in detail.

Below, we have set out the relevant questions and executive summaries of the responses:

**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)?**

**Summary response:**

No, there is no express legislative provision to allow this. However, case law indicates that a history of past abuse or evidence of battered woman syndrome can be taken into account when establishing the defence of self-defence or, in some states, duress. Such evidence is delivered by expert testimony to aid the jury in understanding the behaviour of abused women and how it can lead to the commission of the crime.

**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?**

**Summary response:**

The response to question 2 is dealt with in the cases cited in the footnotes in each section.

**QUESTION 3:**

**Does the 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?**

**Summary response:**

No. It is, however, a defendant's constitutional right to present exculpatory evidence, including the right to give evidence of prior domestic or sexual violence. Evidence of a history of abuse can therefore have an impact on the evaluation of the level of the defendant's culpability and can also be used as a mitigating factor in sentencing.

**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?**

**Summary response:**

Yes, there have been a number of cases across the states that we reviewed where violent crimes have been committed by women against their long-term abusers and evidence of past abuse has led to a lesser sentence being delivered. It should be noted, however, that the application of a past history of abuse as a mitigating factor varies depending on the facts of the case.

**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?**

**Summary response:**

Sentencing guidelines in the United States demand that the trial judge consider certain aggravating or mitigating factors and some discretion is afforded to judges as to what evidence can be presented in their regard. Although a history of past abuse is not explicitly mentioned as one of these factors, case law has shown that it can be used as mitigation in sentencing.



**QUESTION 6:**

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

**Summary response:**

There is no concrete indication as to how much weight was afforded to evidence of a past history of abuse when a court has downgraded the severity of a sentence. It can only be said that the weight of such evidence is subject to the court's discretion.

**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?**

**Summary response:**

No. There are a number of statistical databases concerning the sentencing of men compared with the sentencing of women, or regarding the offences behind the incarceration of women, but none that specifically address the question of gender in terms of sentencing for violent crime in higher and lower courts.

**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?**

**Summary response:**

There are numerous academic articles throughout the states that we reviewed that discuss the concept of battered woman syndrome and its propensity to cause the sufferer to commit a violent crime against her abuser. Further, battered woman syndrome has been the subject of judicial scrutiny in a number of cases, although no United States-wide consensus has been reached.

This annex sets out a high level summary of the law of the aforementioned United States states with respect to the sentencing of female victims of abuse but does not purport to be a comprehensive review of all of the law and case law in this area.

## JURISDICTION:

# The federal courts of the United States

## 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)?**

**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?**

Generally speaking, most violent crimes fall within the jurisdiction of individual states, but certain violent crimes may be charged as federal offences.<sup>186</sup> Individuals prosecuted in federal courts may be charged with a federal offence or a state law crime. Where a person is charged with a state law crime in federal court, the specific state law crime and defences to that crime will apply.<sup>187</sup> Regardless of whether such person is charged with a state law crime or a federal offence in a federal court, however, the federal rules of evidence and the federal sentencing guidelines will apply.<sup>188</sup>

In general, federal courts have held that a past history of abuse may be relied upon by a defendant to support certain defences, such as a defence of self-defence.<sup>189</sup>

<sup>186</sup>. See 18 U.S.C. § 16 (defining "Crime of Violence"); see, for example, 18 U.S.C. § 1111 (defining "murder" under federal law).

<sup>187</sup>. See for example, *Dando v Yukins*, 461 F.3d 791, 801 (6th Cir. 2006) (applying Michigan state law with regard to defense of "duress" and finding that battered woman syndrome is relevant to a duress defense under Michigan law); *Lannert v Jones*, 321 F.3d 747, 753-754 (8th Cir. 2003) (upholding district court's decision which applied Missouri state law that expert testimony regarding battered woman syndrome was properly excluded where self-defence is not at issue in the case).

<sup>188</sup>. It should be noted that the federal rules of evidence and the federal sentencing guidelines will apply in federal court except in cases of *habeas corpus*, in which federal courts must defer to the state court's interpretation of its own rules of evidence and procedure. See *Tourlakis v Morris*, 738 F. Supp. 1128, 1132 (S.D. Ohio 1990). A writ of *habeas corpus* is mainly used as a post-conviction remedy for state or federal prisoners who challenge the legality of the application of federal laws that were used in the judicial proceedings that resulted in their detention.

<sup>189</sup>. See *United States v Weis*, 891 F. Supp. 2d 1007, 1012 (N.D. Ill. 2012) (battered woman syndrome "has been commonly used in self-defence cases to explain the behaviour of women who injure or kill their batterers"); *United States v Marengi*, 893 F. Supp. 85, 95 (D. Maine 1995) (upholding the use of battered woman syndrome expert evidence to support a defence of self-defence).

Federal courts are split on whether a past history of abuse may be relied upon by a defendant to support a defence of duress:<sup>190</sup> some courts approve of the use of battered woman syndrome to support a defence of duress,<sup>191</sup> while others do not.<sup>192</sup>

Where federal courts permit evidence of a past history of abuse, or the presence of battered woman syndrome, they will generally permit the admission of expert testimony on the subject.<sup>193</sup> Federal courts define battered woman syndrome as generally referring to “common characteristics appearing in women who are physically and psychologically abused by their mates.”<sup>194</sup>

Admissibility of expert testimony on the subject of battered woman syndrome is governed by Federal Rule of Evidence 401, (which provides that the battered woman syndrome evidence must be relevant by relating “to a fact that is of consequence to the determination of the action”),<sup>195</sup> and Federal Rule of Evidence 403 (which provides that such evidence may be excluded if its value is “substantially outweighed” by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence).<sup>196</sup> In addition, the expert must meet the requirements of Federal Rule of Evidence 702, which requires that the expert must be qualified to testify on the subject matter and that the subject about which the expert is testifying must be reliable and assist the trier of fact in making a determination.<sup>197</sup>

#### QUESTION 3:

**Does the 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?**

#### 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?**

No, 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.<sup>198</sup> And as discussed above, prior domestic/sexual abuse may be relevant in the context of certain defences, but is not a defence in its own right.

## 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?**

No, the Federal Sentencing Guidelines (the “Guidelines”) do not explicitly allow a past history of abuse to be considered if a woman is convicted of a violent crime against her abuser.<sup>199</sup> However, the Guidelines are “advisory,” rather than “mandatory,” although the Supreme Court of the United States has instructed that the Guidelines “should be the starting point and the initial benchmark” for sentencing.<sup>200</sup>

While the Guidelines do not allow a past history of abuse to be considered, it is well-established that federal sentencing judges are permitted to “exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law... particularly the fullest information possible concerning the defendant's life and characteristics.”<sup>201</sup> That principle is codified at section 3661 of title 18 of the United States Code, which provides that “[n]o limitation shall be placed on the information” a sentencing court may

190. The defence of duress is a common law concept that federal criminal law has incorporated. See *United States v Bailey*, 444 U.S. 394, 409-10 (1980). In order to succeed on a defence of duress, the Model Penal Code (“MPC”) provides that the defendant must show that she “engaged in the conduct charged to constitute an offense because [s]he was coerced to do so by the use of, or a threat to use, unlawful force against [her] person or the person of another, that a person of reasonable firmness in [her] situation would have been unable to resist.” MPC § 2.09.

191. See for example, *Dando v Yukins*, 461 F.3d 791, 801 (6th Cir. 2006) (stating that battered woman syndrome “can potentially bolster an argument that a defendant's actions were in fact reasonable”); *United States v Nwoye*, 2014 WL 4179119, at \*9 (D.C. Cir. Aug. 25, 2014) (holding that “expert evidence on battered woman syndrome may be admitted in support of a duress defence in appropriate circumstances for the benefit of a jury”); *Marengi*, 893 F. Supp. at 95 (upholding the use of battered woman syndrome evidence to support a defence of duress for the same reasons that such evidence is used to support a defence of self-defence).

192. See *United States v Willis*, 38 F.3d 170, 175 (5th Cir. 1994) (upholding the lower court's decision to exclude evidence of battered woman syndrome because the elements of a defence of duress are stated in objective terms, while evidence that a defendant is suffering from battered woman syndrome is subjective and fails to address how a “reasonable” person would have acted under the circumstances).

193. *United States v Taylor*, 820 F. Supp. 2d 124, 127 (S.D.N.Y. 1993); *Arcore v United States*, 929 F.2d 1235, 1241 (8th Cir. 1991); *Fennell v Goolsby*, 630 F. Supp. 451, 456-59 (E.D. Pa. 1985); *State v Hennum*, 441 N.W.2d 794 (Minn. 1989); *Smith v State*, 277 S.E.2d 678 (1981).

194. *United States v Weis*, 891 F. Supp. 2d 1007, 1012 (N.D. Ill. 2012); *Fennell v Goolsby*, 630 F. Supp. 451, 456 (E.D. Pa. 1985).

195. Fed. R. Evid. 401.

196. Fed. R. Evid. 403.

197. Fed. R. Evid. 702 (“A Witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialised knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case”).

198. *Chambers v Mississippi*, 410 U.S. 284, 302 (1973); *Crane v Kentucky*, 476 U.S. 683, 690 (1986) (“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, . . . the Constitution guarantees criminal defendants “a meaningful opportunity to present a complete defense”) (quoting *California v Trombetta*, 467 U.S. 479, 485 (1984)), see also *Washington v Texas*, 388 U.S. 14, 19 (1967) (indicating that “the right to present a defense” is a “fundamental element of due process of law.”).

199. See 18 U.S.C. § 3553 (providing a list of factors to be considered in imposing a sentence, and an explanation of the application of the Guidelines in imposing a sentence).

200. *Pepper v United States*, 131 S. Ct. 1229, 1233 (2011) (citing *Gall v United States*, 552 U.S. 38, 49-51 (2007)).

201. *Pepper v United States*, 131 S. Ct. 1229, 1333 (2011) (citing *Williams v New York*, 337 U.S. 241, 247 (1949) (quotations omitted); see also 18 U.S.C. § 3661, which provides that “no limitation shall be placed on the information a sentencing court may consider”).

consider “concerning the [defendant’s] background, character and conduct”<sup>202</sup> and section 3553(a) of the United States Code specifies that sentencing courts must consider, among other things, a defendant’s “history and characteristics.”<sup>203</sup> Nevertheless, sentencing judges are required to give “serious consideration to the extent of any departure from the Guidelines” and are required to explain their conclusions that an unusually lenient sentence is appropriate in a particular case with sufficient justifications.”<sup>204</sup>

#### QUESTION 6:

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

Although sentencing judges may consider all mitigating factors stemming from a defendant’s background, history, characteristics, and conduct, we have been unable to find a case in which a woman’s sentence was reduced based on a past history of abuse or domestic and/or sexual abuse.

### 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?**

The University of Pennsylvania Law Review article, “Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals,” posits:

*“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 decedent, and (4) of those, the percentage who claim to have acted in self-defence.*

*Also missing from the existing data are statistics on outcomes of arrests in cases in which battered women killed partners and claimed self-defence: of the arrests, how many are prosecuted and in how many are prosecutions withdrawn; of the prosecutions, how many result in guilty pleas and how many in trials; and, of the trials, how many end in convictions.*

*One thing is clear, but not explained by the current state of statistical literature: only a small minority of arrests are reflected in the appellate decisions.”*<sup>205</sup>

A study in 2012 by Sonja Starr, an assistant law professor at the University of Michigan, found that men are given much higher sentences than women convicted of the same crimes in federal courts.<sup>206</sup> Professor Starr assessed the gender disparities in federal criminal cases and found that the gender gap in sentencing does exist and the system reacts more favourably for women.

Another publication regarding gender disparity in sentencing supports Starr’s research and presented the following statistics:

*“Of all offenders convicted in U.S. district courts in 2003, 82.8 percent of the males were sentenced to prison but only 57.5 percent of the females. Among offenders convicted of violent crimes, 95.0 percent of the males and 76.4 percent of the females were incarcerated. For these offenses, the average sentence was 90.7 months for men and 42.5 months for women (Sourcebook of Criminal Justice Statistics Online 2003 N.d., tables 5.20.2003 and 5.21.2000).*

*Forty-two percent of the male offenders sentenced by state court judges in 2004 were sentenced to prison, compared with 27 percent of the female offenders. The average maximum prison sentence was 61 months for males and 42 months for females (U.S. Department of Justice, Bureau of Justice Statistics 2007g, tables 2.4 and 2.6). ”*<sup>207</sup>

The research found that women are substantially less likely than men to be sentenced to prison in federal and state courts.<sup>208</sup>

#### 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?**

None found.

<sup>202</sup>. 18 U.S.C. § 3661.

<sup>203</sup>. 18 U.S.C. § 3553(a)(1).

<sup>204</sup>. *Gall v United States*, 552 U.S. 38, 46 (2007). A sentencing judge’s decision will be reviewed by appellate courts for reasonableness of a sentence outside the range suggested by the Guidelines. *Id.*

<sup>205</sup>. [http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3681&context=penn\\_law\\_review](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3681&context=penn_law_review).

<sup>206</sup>. Estimating Gender Disparities in Federal Criminal Cases, [http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1164&context=law\\_econ\\_current](http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1164&context=law_econ_current).

<sup>207</sup>. Sentencing Disparity And Discrimination: A Focus on Gender, [http://www.sagepub.com/sites/default/files/upm-binaries/27008\\_4.pdf](http://www.sagepub.com/sites/default/files/upm-binaries/27008_4.pdf).

<sup>208</sup>. *Id.*, p. 143.

## JURISDICTION:

## State of California

## 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)?**

## 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?**

Under California State law, a past history of abuse is not a defence to a criminal act. However, evidence of domestic abuse, or “intimate partner battering,” as it is termed under state law, is relevant in the context of a claim to self-defence<sup>209</sup> (either perfect<sup>210</sup> – meaning a full justification to a charge of murder – or imperfect,<sup>211</sup> which can result in a conviction of voluntary manslaughter). “Intimate partner battering” replaced the previous formulation, “battered woman syndrome,” which was described by California courts as a “series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives.”<sup>212</sup>

Under California State law, “[h]omicide is also justifiable when committed by any person in any of the following cases:

- (a) when resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or
- (b) when committed in defence of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or

- (c) when committed in the lawful defence of such person, or of a wife or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person on whose behalf the defence was made, if he was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed.”<sup>213</sup>

Under California State law, to claim perfect self-defence, an individual must actually and reasonably believe in the necessity of defending oneself from imminent danger of death or great bodily injury.<sup>214</sup> Likewise, “imperfect self-defense,” as would support voluntary manslaughter under California State law, is the killing of another human being under the actual but unreasonable belief that the killer was in imminent danger of death or great bodily injury.<sup>215</sup>

Evidence of intimate partner battering is relevant to the claim of self-defence for three purposes: (a) to assess a defendant’s credibility by dispelling commonly held myths about victims of abuse; (b) to prove that a defendant had an honest belief that she was in imminent danger of death or great bodily injury from the victim; and (c) to assess the objective reasonableness of the defendant’s belief.<sup>216</sup> California State courts have held such evidence admissible in proceedings where abused women are prosecuted for killing their abusers.<sup>217</sup> For example, in *People v Humphrey*, a woman who killed her abuser was convicted of the lesser crime of voluntary manslaughter rather than murder, based on testimony regarding battered woman syndrome.<sup>218</sup> In *re Walker*, a woman’s conviction for second-degree murder was vacated based on the omission of battered woman syndrome testimony from the original trial, given that “a reasonable probability existed that, if present with the expert testimony...the jury would have found [her] guilty of the lesser included offence of voluntary manslaughter.”<sup>219</sup>

209. See *People v Humphrey*, 921 P.2d 1 (1996). Under California State law, “self-defence” is not a defence to a crime (which would shift the burden to the prosecution to disprove beyond a reasonable doubt once the defendant has made out a *prima facie* case) but rather a justification (which could support a lower charge or sentence).

210. *People v Lopez*, 132 Cal. Rptr. 3d 248 (Cal. Ct. App. 2011), *review denied*.

211. *People v Booker* 119 Cal. Rptr. 3d 722 (2011), *cert. denied*, 132 S. Ct. 455 (2011).

212. *People v Humphrey*, 921 P.2d 1, 7 (1996) (citing *State v Kelly*, 478 A.2d 364, 371 (1984); *People v Aris*, 215 Cal. App. 3d 1178, 1194 (1989); *People v Romero*, 883 P.2d 388, n.1 (1994)).

213. Cal. Penal Code § 197 (West 2014)).

214. *People v Lopez*, 132 Cal. Rptr. 3d 248 (Cal. Ct. App. 2011), *review denied*.

215. *People v Booker* 119 Cal. Rptr. 3d 722 (2011), *cert. denied*, 132 S. Ct. 455 (2011).

216. *People v Jaspar*, 98 Cal. App. 4th 99, 105 Cal. Rptr. 2d 470 (2002).

217. See for example, *People v Jaspar*, 119 Cal. Rptr. 2d 470 (Cal. Ct. App. 2002); *People v Humphrey*, 13 Cal. 4th 1073 (1996); In *re Walker*, 54 Cal. Rptr. 3d 411, 421 (2007).

218. *People v Humphrey*, 13 Cal. 4th 1073, 1089 (1996). (“the testimony [on battered woman syndrome] the court told the jury not to consider was directly responsive to this argument [of the reasonableness of the woman’s belief of the need for self-defence]).”

219. In *re Walker*, 147 Cal. App. 4th 533, 553 (2007), as modified on denial of reh’g (Mar. 6, 2007).



Under Section 1107 of the California Evidence Code, “[i]n a criminal action, expert testimony is admissible by either the prosecution or the defence regarding intimate partner battering and its effects, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behaviour of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.”<sup>220</sup> By statute, such evidence is not to be considered a new scientific technique whose reliability is unproven.<sup>221</sup> Expert testimony on this subject will be permitted where there is independent evidence of domestic violence.<sup>222</sup> However, expert testimony on intimate partner battering, is not admissible to prove a particular defendant’s state of mind or perceptions.<sup>223</sup>

### QUESTION 3:

**Does the 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?**

### 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?**

Not explicitly, 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. As discussed above, it may also be relevant in the context of certain justifications, though it is not a defence in its own right. As discussed below, prior violence may also serve as a mitigating factor in sentencing.

## 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?**

Not explicitly, however a defendant has the right, under the federal constitution, to present mitigating evidence at all phases of the trial.<sup>224</sup> This evidence may be admitted by the trial court, which has broad discretion under California

State law to consider relevant evidence at sentencing.<sup>225</sup> Additionally, section 1107 of California’s Evidence Code specifically permits the introduction of this type of evidence.<sup>226</sup>

Under section 4801 of the California Penal Code, the Board of Parole Hearings is authorised to recommend a commutation of sentence or pardon for evidence of intimate partner battering and its effects, if it appears that the criminal behaviour of the convicted was the result of that victimisation.<sup>227</sup> For persons convicted of an offence prior to 29 August 1996, the Board or Parole Hearings shall give “great weight” when reviewing the prisoner’s suitability for parole to information or evidence that, at the time of the crime, the prisoner had experienced intimate partner battering.<sup>228</sup>

Lastly, California State law provides that, for violent felonies committed before 29 August 1996, a prisoner may bring a writ of *habeas corpus* on the basis that expert testimony related to intimate partner battering and its effects was not received in evidence at the trial court proceedings.<sup>229</sup> The prisoner must prove that this evidence is of such substance that, had it been received, there is a reasonable probability, sufficient to undermine confidence in the judgment of conviction, that the result of the proceedings would have been different.<sup>230</sup> This remedy is subject to the discretion of the courts to consider the merits of the petition.<sup>231</sup>

### QUESTION 6:

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

The trial court has broad discretion to impose sentences within statutory guidelines on determinate sentencing,<sup>232</sup> taking into account mitigating factors, as described above. While California State law provides that evidence of intimate partner battering *may* be considered and used by the court to sentence the defendant, the court has the discretion to set the appropriate sentence.

<sup>220</sup> Cal. Evid. Code § 1107 (West 2014).

<sup>221</sup> Cal. Evid. Code § 1107(b) (West 2014).

<sup>222</sup> *People v Brown*, 94 P.3d 574 (2004).

<sup>223</sup> *People v Erickson*, 67 Cal. Rptr. 2d 740 (1997).

<sup>224</sup> *Lockett v Ohio*, 98 S. Ct. 2954, 2965 (1978); *Eddings v Oklahoma*, 102 S. Ct. 869, 875 (1982).

<sup>225</sup> *People v Coffman*, 96 P.3d 30, 116 (2004); *People v Towne*, 186 P.3d 10 (2008). See also Cal. Rules of Court § 4.420 (West 2015) (“the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision”).

<sup>226</sup> Cal. Evid. Code § 1107(b) (West 2014).

<sup>227</sup> Cal. Penal Code § 4801(a) (West 2014).

<sup>228</sup> Cal. Penal Code § 4801(b) (West 2014).

<sup>229</sup> Cal. Penal Code § 1473.5 (West 2014).

<sup>230</sup> *Id.*

<sup>231</sup> See *In re Walker*, 54 Cal. Rptr. 3d 411, 426 (2007) (vacating a prisoner’s conviction and her remanding for retrial based on the reasonable probability that, if presented with expert testimony on intimate partner battering and its effects, the jury would have found the prisoner guilty of a lesser included offence, voluntary manslaughter).

<sup>232</sup> Cal. Penal Code § 1170 (West 2014).



### 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?**

The California Department of Corrections and Rehabilitation has statistics but, upon researching, we could not locate any gender specific statistics related to sentencing and violent crime.<sup>233</sup>

The Sentencing Project is a non-profit organisation promoting sentencing policy reforms. The group put together an academic paper in 1999 on “gender and justice”, which was related to women and sentencing policies. The report cites many statistics on a national scale and also focuses on three states — New York, California and Minnesota — covering the women’s prison population and includes statistics disaggregated by gender and violent/nonviolent crimes.<sup>234</sup> Statistics highlighted include:

- drug offences accounted for almost half (49%) of the rise in the number of women incarcerated in state prisons from 1986 to 1996, compared to almost one-third (32%) of the increase for men;
- the number of women incarcerated in state prisons for a drug offence rose by 888% from 1986 to 1996, in contrast of a rise of 129% for non-drug offences; and
- drug offences account for a dramatic proportion of the rise in the number of women sentenced to imprisonment from 1986 to 1995, notably:
  - 55% of the increase in California; and
  - women drug offenders in 1995 were more likely to be sentenced to prison than in 1986.

In a book entitled, “*How Do Judges Decide?*” there is a chapter called “Sentencing Disparity and Discrimination—A Focus on Gender”. The authors provide some statistics from 2004 broken down at the local versus federal court levels, crime type and sentencing length. The results of these empirical studies of sentences imposed in state and federal courts confirm that gender discrimination in sentencing is not a thing of the past. Even after controlling for crime seriousness, the offender’s criminal history, and other legally relevant variables, these studies reveal that female offenders are treated more leniently than male offenders. Some of the statistics are pulled from the following sources:

- 2004 Sourcebook of Federal Sentencing Statistics (table 12 and table 13) by the U.S. Sentencing Commission, 2005, Washington, DC; and
- compiled from data presented in State Court Sentencing of Convicted Felons, 2004: Statistical Tables (tables 1.2 and 1.3), by the Bureau of Justice Statistics.<sup>235</sup>

#### Specific to the death penalty:

A study by Professor Steven Shatz of the University of San Francisco Law School and Naomi Shatz of the New York Civil Liberties Union suggests that gender bias continues to exist in the application of the death penalty. In a review of 1,300 murder cases in California between 2003 and 2005, the authors found gender disparities with respect to both defendants and victims in the underlying crime. The study revealed that the influence of gender-based values was particularly pronounced in certain crimes: gang murders (few death sentences), rape murders (many death sentences), and domestic violence murders (few death sentences). The authors concluded: “The present study confirms what earlier studies have shown: that the death penalty is imposed on women relatively infrequently and that it is disproportionately imposed for the killing of women. Thus, the death penalty in California appears to be applied in accordance with stereotypes about women’s innate abilities, their roles in society, and their capacity for violence. Far from being gender neutral, the California death penalty seems to allow prejudices and stereotypes about violence and gender, chivalric values, to determine who lives and who dies.”<sup>236</sup>

#### 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?**

There is existing academic discourse around battered woman syndrome. A commentary entitled “*Double Victims: Ending the Incarceration of California’s Battered Women*”<sup>237</sup> that was published in the Berkeley Journal of Gender, Law & Justice in 2013 is particularly relevant.

The commentary focuses on the plight of incarcerated women survivors of domestic violence – who are eligible for *habeas corpus* relief under section 1473.5 of the California Penal Code. The author examines the range of relief potentially available to these women, exploring the benefits and shortcomings of these options. Furthermore, the author discusses how the technicalities of the *habeas corpus* statute have limited survivors’ access to relief.

One particularly salient point pertains to the continuation of abuse and victimisation of these incarcerated women within the justice system:

233. See <http://www.cdcr.ca.gov/Reports/index.html>.

234. See <http://www.prisonpolicy.org/scans/sp/genderandjustice.pdf>.

235. See <http://www.bjs.gov/content/pub/pdf/fssc04.pdf>; see also [http://www.sagepub.com/upm-data/27008\\_4.pdf](http://www.sagepub.com/upm-data/27008_4.pdf).

236. See <http://www.deathpenaltyinfo.org/studies-gender-bias-death-sentencing>.

237. See <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1292&context=bglij>.

*"Injustice and sex-based discrimination plague the experiences of these women as they navigate the justice system. Women who kill their abusers receive harsher sentences on average for their crimes than either men who kill their female partners or men who kill in self-defence. Elizabeth Dermody Leonard, a sociology professor who conducted an in-depth study of forty-two women imprisoned in California for killing their abusive partners, determined that the legal system's injustices converge to re-victimise battered criminal defendants.... Sexism in the criminal justice system dictates that women stay within their gender role expectations or face severe consequences, the same message communicated to women by their abusive mates. Following a battered woman's conviction, she enters another world of total control . . . A Department of Justice-funded report finding that "[p]rior histories of intimate partner violence seem to be repeated in the prison environment" supports this conclusion. The report's authors cite to numerous studies and their own findings documenting physical, sexual, and psychological abuse in prisons across the country..."*

The article goes onto the note that the then-Valley State Prison for Women (which housed roughly 37% of female prisoners in California) has one of the highest rates of sexual victimisation and that California State law still allows for male guards to oversee female prisoners at all times.<sup>238</sup>

The commentary also discusses the limitation of the federal *habeas corpus* process (generally unavailable for state prisoners). The author notes that "while the *habeas corpus* law inevitably excludes others, some abuse survivors fall just outside the letter of the law because of the remaining difficulty with the section 1473.5 cut-off date. Other women cannot pursue the *habeas corpus* option because they received some expert testimony at their trials, even if that testimony was inadequate or otherwise not truly."<sup>239</sup>

Another Commentary published in the University of San Francisco Law Review in 2009, entitled "*California's Broken Parole System: Flawed Standards and Insufficient Oversight Threaten the Rights of Prisoners*" by Steve Disharoon<sup>240</sup> examines the parole suitability considerations

of California State prisoners with indeterminate sentences. The author theorises that on an administrative and judicial level, the system is flawed. Particularly relevant is the comment noted below:

*"Therefore, this factor [battered woman syndrome] allows for the different treatment of inmates—both male and female—who have suffered abuse, based only on the happenstance of the source of the abuse. To fix this unfairness, the factor should be revised, and the Board should take into consideration any type of abuse that may have spurred the inmate to commit violent acts."*<sup>241</sup>

A thesis entitled "Gender Inequality in the Law: Deficiencies of Battered Woman Syndrome and a New Solution to Closing the Gender Gap in Self-Defense Law" published in 2011 at Claremont McKenna College, posits that battered woman syndrome testimony has increased gender stereotypes in the law and has blurred the line between a justification and excuse defence. The author suggests that courts should allow expert testimony on patterns of abuse and social patterns of abuse and social agency framework to contextualise gender differences in physical stature and other characteristics to confront the realities of domestic abuse. This framework will show how a battered woman's observations about her environment, her circumstances, and her social limitations to explain behaviours that are difficult for a non-battered person to understand.<sup>242</sup>

A commentary entitled "Reforms to Criminal Defense Instructions: New Patterned Jury Instructions Which Account for the Experience of the Battered Woman Who Kills Her Battering Mate" was published in the Golden Gate University Law Review in 2010 by Deborah Ann Klis. This commentary focuses on battered woman syndrome and how the syndrome interplays with the viability of the current criminal defences that are available. It proposes reform to criminal defence instruction and how these changes will enable a battered woman to assert an effective defence.<sup>243</sup>

238. See <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1292&context=bglij> [pg 258].

239. See <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1292&context=bglij> [pg 289].

240. See <http://lawblog.usfca.edu/lawreview/wp-content/uploads/2014/09/7-SAN-44-1-Disharoon.pdf>.

241. See <http://lawblog.usfca.edu/lawreview/wp-content/uploads/2014/09/7-SAN-44-1-Disharoon.pdf> [pg. 199].

242. See [http://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1155&context=cmc\\_theses](http://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1155&context=cmc_theses).

243. See <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1612&context=ggulrev>.

## JURISDICTION:

## State of Florida

## 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)?**

## 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?**

The statutes, cases and secondary sources we reviewed suggest that under Florida State law, battered-spouse or battered woman syndrome<sup>244</sup> is admissible into evidence when dealing with the issue of self-defence<sup>245</sup> in criminal cases. Battered woman syndrome is considered a special defence requiring notice but is not considered proof of diminished mental capacity to form intent.<sup>246</sup> A Florida court recently defined battered woman syndrome as “a set of psychological and behavioural reactions exhibited by victims of severe, long-term, domestic physical and emotional abuse.”<sup>247</sup>

Relevant case law suggests that defendants seeking to present evidence of battered woman syndrome can introduce expert witness testimony, so long as the expert is qualified to give opinion on the subject matter.<sup>248</sup> Additionally, the cases we reviewed suggest that expert witness testimony can be presented in at least two ways. First, an expert witness can generally describe battered woman syndrome and characteristics of a woman suffering from it, expressing opinions in response to hypothetical questions, but not giving an opinion with respect to the defendant. Alternatively, a witness can discuss whether the defendant might suffer from battered woman syndrome, but in this latter scenario,

the prosecution would have the opportunity to examine the defendant (notwithstanding any Fifth Amendment right against self-incrimination).<sup>249</sup>

## QUESTION 3:

**Does the 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?**

## 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?**

As noted above, Rule 3.201 of the Florida Rules of Criminal Procedure codifies battered woman syndrome as a defence to criminal charges. Defendants seeking to rely on this defence are required to give advance notice to the prosecution prior to trial.

There are a number of cases where battered-spouse syndrome testimony (or the exclusion thereof) altered a conviction (and/or resulted in a successful appeal). Some of those cases are listed, and briefly described, in the footnotes of this of this annex.

## 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?**

Rule 3.701 of the Florida Rules of Criminal Procedure (Sentencing Guidelines) (“**Rule 3.701**”) does not expressly provide that a past history of abuse would be considered as part of the sentencing guidelines for a woman convicted of a violent crime against her abuser. However, it does provide that:

<sup>244</sup>. See Fla. R. Crim. P. 3.201. In *Bartlett v State*, the Court of Appeal held that allowing a detective to testify that he had ruled out the possibility that the killing of a man by his live-in girlfriend who had filed a notice of intent to rely on self-defence under Rule 3.201 was a reversible error. See *Bartlett v State*, 993 So.2d 157 (Fla. Dist. Ct. App. 2008). One commentator has suggested that battered woman syndrome has over time become “entrenched as a scientific theory in self-defence cases” under Florida law. See Jay B. Rosman, Circuit Judge, *The Battered Women Syndrome in Florida: Junk Science or Admissible Evidence?* 15 St. Thomas L. Rev. 807 (2003).

<sup>245</sup>. Under Florida State law, a person is justified in using or threatening to use force against another “when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other’s imminent use of unlawful force.” Fla. Stat. Ann. § 776.012 (West). Regarding deadly force, a person is justified in using or threatening to use deadly force “if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.” *Id.*

<sup>246</sup>. See, for example, *Caren v Crist*, 2008 WL 2397592, at \*4 (N.D. Fla. June 10, 2008).

<sup>247</sup>. *United States v Barnes*, 2010 WL 2044913, at \*12 (N.D. Fla. Apr. 22, 2010).

<sup>248</sup>. See, for example, *State v Hickson*, 630 So. 2d 172, 173 (Fla. 1993) (holding that “an expert can generally describe battered woman syndrome and the characteristics of a person suffering from the syndrome and can express an opinion in response to hypothetical questions predicated on facts in evidence, but cannot give an opinion based on an interview of the defendant as to the applicability of battered woman syndrome to that defendant unless notice of reliance on such testimony is given and the state has the opportunity to have its expert examine the defendant.”); *Weiland v State*, 732 So. 2d 1044 (Fla. 1999) (“battered woman syndrome evidence is admissible to rebut the common myths concerning battered women and to explain the very real dangers faced by women in such relationships”); see also *Terry v State*, 467 So. 2d 761 (Fla. Dist. Ct. App. 1985) (expert opinion evidence regarding battered woman syndrome admissible for self-defence purposes but only if the expert is sufficiently qualified).

<sup>249</sup>. See, for example, *id.*

"A range is provided to permit some discretion. The permitted ranges allow the sentencing judge additional discretion when the particular circumstances of a crime or defendant make it appropriate to increase or decrease the recommended sentence without the requirement of finding reasonable justification to do so and without the requirement of a written explanation." See Rule 3.701(d)(8).

These guidelines also contemplate a departure from a recommended or permitted guideline sentence if there are "circumstances or factors that reasonably justify aggravating or mitigating the sentence." See Rule 3.701(d)(11).

We have not identified any case law addressing departures from sentencing guidelines with respect to abused women or battered woman syndrome. However, we did identify a case that may be instructive as to the limits a trial court may have in departing from sentencing guidelines. In *State v Smith*, a defendant was convicted of committing a lewd act upon a child. The trial court implemented a downward departure from the sentencing guidelines because it found that the victim had performed consensual sexual acts with other minors. The appellate court overturned the departure, finding a lack of "clear and convincing reasons" to justify the downward departure from the guidelines.<sup>250</sup>

If nothing else, this case serves as evidence that, while judges have discretion to depart from sentencing guidelines, the appellate courts will not consider that discretion to be unfettered.

#### QUESTION 6:

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

Rule 3.701 does not contain any express weight metrics relating to a history of abuse. Instead, it appears that while trial courts have the authority to exercise some discretion in departing from the sentencing guidelines, that discretion must be substantiated with clear and convincing reasons for such departure, and may be subject to appellate review (as discussed in our prior answer, above).

### 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?**

There do not appear to be any statistics related to individuals sentenced in lower courts versus higher courts readily available for Florida. In fact, this question may not be relevant as criminal sentencing in Florida appears to be conducted entirely at the circuit court level.

Searches of Florida State law court systems and the State Attorney-General records did not locate any data on criminal appeals disaggregated by gender.

Florida does publish detailed specifics on the demographics of newly admitted prisoners and its existing inmate population through its Department of Corrections ("DC") on an annual basis. Statistics available through the DC Annual Report include information on prisoners' gender, race, age range, nature of primary offence, number of prior offences, and approximate sentence length. No specific information on appeals is published on the DC website.

Of note, per the DC's reporting, as of June 2014, 7% (7,150) of Florida's inmate population was female; 67% of which were white and 33% were black or "other." Of the male population, 46% were white. Of the then current female inmate population, approximately 13% were incarcerated for murder or manslaughter and 13% for "violent personal offences." The rates for men were 14% and 12%, respectively. In general, commitment length was shorter for women than men and the average sentence length for white females was 7.8 years, compared to 15.6 for white males, and 10.3 years for black females, compared to 18.0 for black males.

#### 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?**

Yes, there is other academic and judicial discourse around battered woman syndrome or a slow burn reaction and its links with violent crime. The criminal justice system becomes responsible to respond to domestic violence given the direct correlation the above and the woman's offence when a battered woman commits a violent crime. Battering can be compared to the cycle of violence theory: "The cycle of violence theory ... provides an understanding to why the person affected by domestic and family violence continues to face a violent situation." Battered woman syndrome or a slow burn reaction are an issue when making convictions because they contradict the "Single Subject Rules and the Legislative Process."

Typically the criminal justice system is expected to detach one crime from past committed crimes, which prevents bias. Criminal acts are intended to be viewed as a single vacuum; however, this should not be the case with domestic abuse victims. Florida has encountered cases that allowed ignoring the "Single Subject Rules" because of the circumstances of the crime. Florida State courts have gone both ways in terms of sentencing battered women, based on the totality of the circumstances and any mitigating factors (past abuse that would give an objectively reasonable conclusion that the defendant, the abused, was in reasonable fear of abuse).

<sup>250</sup>. See *State v Smith*, App. 5 Dist., 668 So.2d 639 (1996).



## JURISDICTION:

## State of Illinois

## 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)?**

## 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?**

While Illinois statutes do not explicitly specify a history of domestic abuse as a defence,<sup>251</sup> State case law establishes that domestic violence victims may introduce evidence thereof to affirmatively defend or mitigate criminal charges.<sup>252</sup> Defendants may introduce evidence of prior domestic abuse, including, but not limited to, expert testimony on battered woman syndrome, if such evidence is “necessary to proving a crucial issue in the case”, typically, the defendant’s *mens rea* at the time of the criminal *actus reus*.<sup>253</sup>

For example, a first-degree murder defendant may introduce such evidence to (a) raise the affirmative defence of defence of self or others, or (b) argue for lesser charges to be brought instead, such as voluntary manslaughter based on provocation or an unreasonable belief in justification.<sup>254</sup>

## QUESTION 3:

**Does the 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?**

## 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?**

While Illinois statute does not recognise that prior domestic violence may be a mitigating factor when adjudicating crime alleged perpetrated by a victim against her abuser, binding case law, as discussed above does.

## 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?**

In sentencing a defendant who has been convicted of a violent crime against her abuser, Illinois State courts may consider the defendant’s past history of abuse. To determine a sentence, Illinois courts are not bound by a trial’s sentencing rules, but instead may search anywhere within reasonable bounds for facts that may mitigate or aggravate the offence.<sup>255</sup>

Therefore, while Illinois State courts must consider the 13 mitigating<sup>256</sup> and 22 aggravating statutory<sup>257</sup> sentencing factors, these considerations are not exclusive.<sup>258</sup>

This is a liberal standard: courts have held that a trial court may consider “impressions” about the person being sentenced, as well as “reflecting upon the defendant’s personality, propensities, purposes, tendencies, and indeed every aspect of [her] life relevant to sentencing.”<sup>259</sup>

Given that, as discussed above, courts may consider a history of domestic violence to prove relevant trial issues, they often may find such personal history relevant to sentencing, as well.

251. See, for example, 720 ILCS § 5/6 (2012) (Responsibility); 720 ILCS 5/7 (2012) (Justifiable Use of Force; Exoneration).

252. *People v Evans*, 271 Ill.App.3d 495, 208 Ill. Dec. 42, 648 N.E.2d 964 (Ill.App.Ct.1995). Courts in many other US states agree that expert testimony about battered woman syndrome can be admissible under a self-defence theory. See, for example, *State v Hickson*, 630 So.2d 172 (Fla.1993); *Pickle v State*, 280 Ga. App. 821, 635 S.E.2d 197 (Ga.Ct.App.2006); *State v Price*, 760 N.W.2d 210 (Iowa Ct. App. 2008); *State v Hundley*, 236 Kan. 461, 693 P.2d 475 (Kan.1985); *Commonwealth v Rose*, 725 S.W.2d 588 (Ky.1987), overruled on other grounds by *Commonwealth v Craig*, 783 S.W.2d 387 (Ky.1990); *State v Anaya*, 438 A.2d 892 (Me.1981); *People v Wilson*, 194 Mich. App. 599, 487 N.W.2d 822 (Mich.Ct.App.1992); *State v Edwards*, 60 S.W.3d 602 (Mo.Ct.App.2001); *Boykins v State*, 116 Nev. 171, 995 P.2d 474 (Nev.2000); *State v Kelly*, 97 N.J. 178, 478 A.2d 364 (N.J.1984); *People v Seeley*, 186 Misc.2d 715, 720 N.Y.S.2d 315 (N.Y.Sup.Ct.2000); *State v Koss*, 49 Ohio St.3d 213, 551 N.E.2d 970 (Ohio 1990); *Bechtel v State*, 840 P.2d 1 (Okla.Crim.App.1992); *Commonwealth v Miller*, 430 Pa. Super. 297, 634 A.2d 614 (Pa.Super.Ct.1993); *State v Urena*, 899 A.2d 1281 (R.I.2006); *Felder v State*, 756 S.W.2d 309 (Tex.Crim.App.1988).

253. *People v Lawson*, 644 N.E.2d 1172, 1188 (Ill. 1994); see also *People v Sawyer*, 503 N.E.2d 331, 335 (Ill. 1986) (“In the context of self-defense, it is the defendant’s perception of the danger, and not the actual danger, which is dispositive”).

254. *People v Evans*, 648 N.E.2d 964, 969 (Ill. App. 1st 1995).

255. *People v Dominique*, 408 N.E.2d 280 (Ill. App. 1st 1980).

256. 730 ILCS § 5-5-3.1 (2013).

257. 730 ILCS § 5-5-3.2 (2014).

258. *People v Brunner*, 976 N.E.2d 27 (Ill. App. 4th 2012), reh’g denied, appeal denied, 979 N.E.2d 880.

259. *People v Traina*, 172 Ill.Dec. 274, 280 (5th Dist. 1992).



**QUESTION 6:**

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

Illinois State law does not specify what weight should be given to any abuse history in sentencing. Instead, a trial court has “broad discretion” to weigh and balance the relevant factors as it sees fit.<sup>260</sup> While it must consider any mitigating evidence the defendant puts forth, the appellate court will not disturb its finding unless there is a clear abuse of discretion.<sup>261</sup>

**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?**

None found.

**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?**

None found.

## JURISDICTION:

# State of New Jersey

## 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)?**

**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?**

Under New Jersey State law, a past history 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.<sup>262</sup>

New Jersey State courts have described battered woman syndrome as “a collection of common behavioural and psychological characteristics exhibited in women who repeatedly are physically and emotionally abused over

a prolonged length of time by the dominant male figure in their lives.”<sup>263</sup> A woman seeking to use evidence of battered woman syndrome is permitted to introduce expert testimony to explain “conduct exhibited by battered women toward their abusers”<sup>264</sup> and to provide an understanding of the battered woman’s state of mind.<sup>265</sup>

A victim does not need to be diagnosed as suffering from battered woman syndrome for expert testimony on battered woman syndrome to be admitted.<sup>266</sup> However, a woman intending to introduce expert testimony on battered woman syndrome must submit to psychiatric examinations by appropriate experts selected by the state, which may be used to rebut the defence.<sup>267</sup>

Under the New Jersey Code of Criminal Justice (“NJ Penal Law”) section 2C:3, the use of force against another in self-defence is justifiable “when the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.”<sup>268</sup> The actor must have an “actual, honest, reasonable belief” in the necessity of using force.<sup>269</sup> Further, the use of deadly force is not justifiable unless the actor reasonably believes that such force is necessary to protect himself against death or serious bodily harm.<sup>270</sup> In the context of self-defence, New Jersey

<sup>260.</sup> *People v Weiser*, 993 N.E.2d 614, 621 (Ill. App. 5th 2013), rehearing denied (Sept. 5, 2013), appeal denied, No. 116664, 2013 WL 7157254 (Nov. 27, 2013); see also *People v Madura*, 257 Ill. App. 3d 735, 740 (1994).

<sup>261.</sup> See *Weiser*, 993 N.E.2d at 621 (“We will not find an abuse of this discretion merely because we might have balanced the factors differently.”).

<sup>262.</sup> *State v B.H.*, 183 N.J. 171, 185, 199 (N.J. 2005).

<sup>263.</sup> *B.H.*, 183 N.J. at 183 (citation omitted).

<sup>264.</sup> *Id.* at 183.

<sup>265.</sup> *State v Townsend*, 374 N.J. Super. 25, 52-3 (N.J. App. Div. 2005) (citation omitted), overturned on other grounds by *State v Townsend*, 186 N.J. 473, 897 A.2d 316 (N.J. May 15, 2006). Under New Jersey State law, three requirements for the admission of expert testimony must be satisfied: (a) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (b) the field testified to must be at a state of the art that an expert’s testimony could be sufficiently reliable; and (c) the witness must have sufficient expertise to offer the intended testimony. *State v Torres*, 183 N.J. 554, 567-68 (N.J. 2005).

<sup>266.</sup> *State v Townsend*, 186 N.J. at 495.

<sup>267.</sup> *State v Myers*, 239 N.J. Super. 158, 170 (N.J. App. Div. 1990).

<sup>268.</sup> N.J.S.A. 2C:3-4(a).

<sup>269.</sup> *State v Garcia*, 210 N.J. 364, 389 (N.J. 2012) (internal quotations omitted).

<sup>270.</sup> N.J.S.A. 2C:3-4(b)(2).

courts have held that evidence of battered woman syndrome is relevant to the jury's determination of both the subjective honesty and the objective reasonableness of a defendant's belief that deadly force was necessary to protect herself against death or serious bodily harm.<sup>271</sup>

Under New Jersey State law, self-defence is an affirmative defence, and exonerates a defendant from criminal liability.<sup>272</sup> Although the defendant must demonstrate that the use of force was justifiable, when self-defence is raised the burden of proof is on the prosecution to disprove it beyond reasonable doubt.<sup>273</sup>

The NJ Penal Law provides that, "it is an affirmative defence that the actor engaged in the conduct charged to constitute an offence because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist."<sup>274</sup> The statute further provides that the defence of duress: (a) is "unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subject to duress" or if he was criminally negligent in placing himself in such a situation, whenever criminal negligence suffices to establish culpability for the offence charged; and (b) in a prosecution for murder, is only available to reduce the degree of the crime to manslaughter.<sup>275</sup> Finally, "it is not a defence that a woman acted on the command of her husband, unless she acted under such coercion as would establish a defense under this crime."<sup>276</sup> In the context of a duress defence, evidence of battered woman syndrome is admissible "to assess the sincerity of a defendant's perception of a threat from her alleged abuser," but it cannot be "used to assist the jury in assessing the objective reasonableness of defendant's conduct in response to the purported threat[.]"<sup>277</sup>

Further, New Jersey State law previously imposed a duty of retreat on a woman attacked by her cohabitant spouse;<sup>278</sup> however, in 1999 the New Jersey Legislature amended the relevant provision of the NJ Penal Code statute to remove this language.<sup>279</sup>

#### QUESTION 3:

**Does the 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?**

#### 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?**

No, 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.<sup>280</sup> As discussed above, this may be relevant in the context of certain defences, though is not a defence in its own right. As further discussed below, prior violence may also serve as a mitigating factor in sentencing.

## 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?**

In general, the NJ Penal Code provides a general framework to guide judicial discretion in imposing sentences to ensure that similarly situated defendants do not receive dissimilar sentences.<sup>281</sup> The New Jersey State law provides a statutory range for each degree of offence, and the sentencing court must consider both aggravating and mitigating factors.<sup>282</sup>

Under New Jersey State law, evidence of battered woman syndrome is admissible at sentencing.<sup>283</sup> While the NJ Penal Code does not explicitly provide that evidence of battered woman syndrome is a mitigating factor at sentencing, courts have considered battered woman syndrome in relation to the following mitigating factors: (a) the defendant acted under strong provocation; (b) there were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defence; (c) the victim of the defendant's conduct induced or facilitated its commission; and (d) the defendant's conduct was the result of circumstances unlikely to recur.<sup>284</sup>

<sup>271</sup> *State v Kelly*, 97 N.J. 178, 202-04 (N.J. 1984); see *State v Gartland*, 149 N.J. 456, 694 A.2d 564 (1997) (battered woman syndrome evidence is relevant to objective and subjective elements of self-defence).

<sup>272</sup> *State v Handy*, 215 N.J. 334, 356 (N.J. 2013); see N.J.S.A. 2C:3-1.

<sup>273</sup> *Id.*

<sup>274</sup> N.J.S.A. 2C:2-9.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *State v B.H.*, 183 N.J. at 199-200.

<sup>278</sup> See *State v Gartland*, 149 N.J. 456, 466-67 (1997) (noting that New Jersey is among the minority of jurisdictions that impose a duty of retreat on a woman attacked by her cohabitant spouse and invited the legislature to reconsider application of the retreat doctrine in cases of domestic violence because the imposition of a duty to retreat on a battered woman who finds herself the target of attack by a cohabitant in her own home is inherently unfair).

<sup>279</sup> See S. 271, 208th Leg., Reg. Sess. (N.J. 1998), revising N.J. Stat. Ann. § 2C:3-4 (1987).

<sup>280</sup> *Chambers v Mississippi*, 410 U.S. 284, 302 (1973).

<sup>281</sup> *State v Fuentes*, 217 N.J. 57, 72 (N.J. 2014).

<sup>282</sup> *Id.*; See N.J. S.A. 2C:44-1.

<sup>283</sup> *State v Hess*, 207 N.J. 123, 149 (N.J. 2011).

<sup>284</sup> *Id.*; N.J.S.A. 2C:44-1(b)(3)-(5); see *State v Briggs*, 349 N.J. Super. 496, 504 (N.J. App. Div. 2002) (the trial court was required to consider the continuous physical, sexual and psychological abuse of the defendant by the victim in determining whether to apply certain mitigating factors); *State v Hess*, 207 N.J. at 149.

The NJ Penal Code provides that courts may impose a “downgraded sentence,” i.e., a sentence appropriate for a crime one degree lower than the crime for which the defendant was convicted, if the court finds that the mitigating factors substantially outweigh the aggravating factors and where the downgrade is in the interests of justice.<sup>285</sup>

#### QUESTION 6:

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

As discussed above, the court must balance any relevant aggravating and mitigating factors; these factors are “qualitatively assessed and assigned appropriate weight in a case-specific balancing process.”<sup>286</sup>

### 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?**

We were unable to find any statistics disaggregated by gender on how defendants charged with violent offences are sentenced in lower courts as opposed to at higher courts following appeal.

However, we were able to obtain some relevant information on the lack of statistical information associated with battered woman syndrome. The University of Pennsylvania Law Review article, “Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals,” posits:

*“There are no statistical studies that address all of the following factors: (a) the number of women in the United States who kill, (b) of those, the percentage who kill spouses or lovers, (c) of those, the percentage who claim to have been battered by the decedent, and (d) of those, the percentage who claim to have acted in self-defence.*

*Also missing from the existing data are statistics on outcomes of arrests in cases in which battered women killed partners and claimed self-defence: of the arrests, how many are prosecuted and in how many are prosecutions withdrawn; of the prosecutions, how many result in guilty pleas and how many in trials; and, of the trials, how many end in convictions.*

*One thing is clear, but not explained by the current state of statistical literature: only a small minority of arrests are reflected in the appellate decisions.”*<sup>287</sup>

#### 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?**

In addition to New Jersey State law allowing evidence of battered woman syndrome, not as a strict defence to a crime, but as a justification for a crime used to mitigate sentencing, New Jersey State courts have recognised that battered woman syndrome is a cognisable cause of action under the laws of New Jersey. The Court in *Cusseaux v Pickett*<sup>288</sup> reasoned that the Prevention of Domestic Violence Act recognised the inadequacies of the law with regard to battered women, noting that, as established in *State v Kelly*, where the “existing criminal statutes” were insufficient to address the problem of battered women, “so too are the civil laws of assault and battery insufficient to redress the harms suffered as a result of domestic violence.”<sup>289</sup>

The court articulated four elements which the plaintiff must prove to succeed in sustaining an action for battered woman syndrome. These elements are not limited to spouses but can include any “domestic intimate partnership” whether it be heterosexual or homosexual, married or unmarried. A person may plead battered-person syndrome as long as the following elements are met. The plaintiff must prove:

*“(a) involvement in a marital or marital-like intimate relationship; and (b) physical or psychological abuse perpetrated by the dominant partner to the relationship over an extended period of time; and (c) the abuse has caused recurring physical or psychological injury over the course of the relationship; and (d) a past or present inability to take any action to improve or alter the situation unilaterally.”*

Further, the statute of limitations would begin with the last incident of abuse.

Additionally, over the past decade, California has passed a series of laws to assist survivors of domestic violence that have incarcerated for committing crimes against their abusers. According to a January 1, 2015 *Al Jazeera America* article, it appears that New York and New Jersey are following suit. New York introduced the Domestic Violence Survivors Justice Act in 2011 to address these issues, and as of this article, is in front of the NY Codes Committee to approve the bill.<sup>290</sup>

<sup>285</sup>. N.J.S.A. 2C:44-1f(2).

<sup>286</sup>. Fuentes, 217 N.J. at 72-73,

<sup>287</sup>. See [http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3681&context=penn\\_law\\_review](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3681&context=penn_law_review).

<sup>288</sup>. *Cusseaux v Pickett*, 279 N.J. Super. 335 (N.J. Super. Ct. Law Div. 1994), disagreed with by *Giovine v Giovine*, 284 N.J. Super. 3 (N.J. Super. A.D. 1995) (battered woman syndrome itself is not a continuing tort, but instead the tortious conduct giving rise to the medical condition must be a continuous tort).

<sup>289</sup>. See Battered Women Syndrome as a Tort Cause of Action, 12 J.L. & Health 407 (1997-1998), p. 442, available at: <http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1230&context=jlh>.

<sup>290</sup>. See Domestic violence victims in NY prisons may get some relief, *Al Jazeera America*, available at: <http://america.aljazeera.com/articles/2015/1/1/domestic-violencevictimsinnypisonsmaygetsomerelief.html>.

In the fall of 2014, the New Jersey General Assembly passed a package of bills aimed at protecting victims of domestic violence, one of which is a bill that aims to help domestic violence victims “get out of jail” for certain crimes

and enter into a reintegration program.<sup>291</sup> In October 2014, this particular bill was passed by the state Senate and appears to be awaiting the signature of the New Jersey State Governor to be passed into law.<sup>292</sup>

## JURISDICTION:

# State of New York

## 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)?**

### 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?**

Under New York State law, a past history of abuse is not expressly a defence to a criminal act.<sup>293</sup> While past abuse is not defence in its own right,<sup>294</sup> evidence of battered woman syndrome has been held to be relevant in the context of certain defences, including self-defence<sup>295</sup> and duress.<sup>296</sup>

Battered woman syndrome has been described by New York State courts as “a series of common characteristics found in women who are abused both physically and emotionally by the dominant male figures in their lives over a prolonged period of time.”<sup>297</sup> Characteristics of battered woman syndrome include, according to New York State

courts, “fear, hyper-suggestibility, isolation, guilt, and emotional dependency, which culminate in a person’s belief that escape from the abuser is impossible.”<sup>298</sup>

Battered woman syndrome is relevant in the context of certain defences as it can provide evidence of the woman’s state of mind when the crime was committed. For example, evidence of battered woman syndrome can be used to support a defence of self-defence by showing the reasonableness of a woman’s belief that she was in imminent danger of physical force when she perpetrated the crime, or to support an argument that the woman was suffering from an extreme emotional disturbance when she committed the crime.<sup>299</sup> Under New York State law, the justification of “self-defence” is a defence for a crime,<sup>300</sup> and the prosecution has the burden of disproving such defence beyond a reasonable doubt.<sup>301</sup> New York Penal Law, section 35.15, entitled “Justification; use of physical force in defence of a person,” provides that a person may, subject to applicable limitations set forth in the Penal Law, “use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use of imminent use of unlawful physical force by such other person.”<sup>302</sup>

Women seeking to use evidence of battered woman syndrome are permitted to introduce expert testimony on the syndrome at trial to assist juries to understand

<sup>291</sup>. See N.J. Assembly passes domestic violence bills amid Ray Rice scandal, *NJ.com*, available at: [http://www.nj.com/politics/index.ssf/2014/09/nj\\_assembly\\_passes\\_domestic\\_violence\\_bills\\_amid\\_ray\\_rice\\_scandal.html](http://www.nj.com/politics/index.ssf/2014/09/nj_assembly_passes_domestic_violence_bills_amid_ray_rice_scandal.html).

<sup>292</sup>. See bill before the State Senate: [http://www.njleg.state.nj.us/2014/Bills/S1000/995\\_11.PDF](http://www.njleg.state.nj.us/2014/Bills/S1000/995_11.PDF); see also link for status of bill passage: <http://www.njleg.state.nj.us/bills/BillView.asp?BillNumber=S995>.

<sup>293</sup>. *People v Seeley*, 720 N.Y.S.2d 315, 318 (N.Y. Sup. Ct. 2000).

<sup>294</sup>. See *People v Hartman*, 833 N.Y.S.2d 361, 365 (Third Dep’t 2009) (citing *People v Wilcox*, 788 N.Y.S.2d 503 (Third Dep’t 2005), lv. denied, 796 N.Y.S.2d 592 (2005) (under New York law, it is well established that “battered person syndrome, while not a defence in its own right, is “relevant in the context of self-defence”) (citation omitted).

<sup>295</sup>. N.Y. Penal Law § 35.15 (McKinney 2004).

<sup>296</sup>. Under New York law, “duress” is considered a defence against a crime. Under New York Penal Law section 40.00, entitled “Duress,” “[i]n any prosecution for an offence, it is an affirmative defence that the defendant engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would have been unable to resist.” N.Y. Penal Law § 40.00 (McKinney 2004). New York Penal Law section 40.00 further provides that the defence of duress “is not available when a person intentionally or recklessly places himself in a situation in which it is probable that he will be subjected to duress.” *Id.*

<sup>297</sup>. *People v Ellis*, 650 N.Y.S.2d 503, 506 (N.Y. Sup. Ct. 1996).

<sup>298</sup>. *People v Seeley*, 720 N.Y.S.2d 315, 318 (N.Y. Sup. Ct. 2000) (citations omitted).

<sup>299</sup>. See *People v Ciervo*, 506 N.Y.S.2d 462, 463 (Second Dep’t 1986).

<sup>300</sup>. N.Y. Penal Law § 35.00 (McKinney 2004) (“In any prosecution for an offence, justification, as defined in sections 35.05 through 35.30, is a defense.”)

<sup>301</sup>. N.Y. Penal Law § 25.00 (McKinney 2004) (“When a “defence,” other than an “affirmative defence,” defined by statute is raised at a trial, the people have the burden of disproving such defense beyond a reasonable doubt.) See also N.Y. Penal Law § 35.00 (defining justifications as “defences”); N.Y. Penal Law § 40.00 (McKinney 2004) (defining duress, by contrast, as an “affirmative defence,” which, per N.Y. Penal Law § 35.00, places the burden on the defendant of establishing the defence by a preponderance of the evidence.)

<sup>302</sup>. N.Y. Penal Law § 35.15 (McKinney 2004).



the behavioural pattern of abused women and how the abuse affects their conduct before, during, and after the commission of a crime.<sup>303</sup> Under New York State law, a woman who intends to present evidence that she suffers from battered woman syndrome must meet certain procedural requirements (such as serving a notice of intent to present such evidence within a specified time frame) and must submit to an examination by a state-selected psychiatrist, if the state so demands and the court agrees.<sup>304</sup>

Battered woman syndrome is considered a subcategory of post-traumatic stress syndrome, and is not considered a “mental defect or disease” tending to support a claim of insanity.<sup>305</sup>

For example, in the case of *People v Torres*,<sup>306</sup> the defendant, Lydia Torres, was arrested in connection with the fatal shooting of her common law husband, Ruperto Rosado, who died as a result of three gunshot wounds that he suffered while sitting in a chair in the living room of the apartment he shared with the defendant. The defendant offered proof of her prolonged physical and psychological maltreatment by the deceased to show that a result of her intimate and long-term familiarity with the deceased’s history of violence, she was convinced at the time of the shooting that she was in serious danger. She testified that at various times, the deceased menaced her with a knife and a pistol and that once, with the defendant as a bystander, he stabbed a young man in a street fight and shot another in an attempted robbery of the liquor store he owned. She also testified that on the night of the shooting, he had been violent with her and she was convinced that the savageness of this behaviour was different in degree from anything that she had previously experienced before, and that this time, the deceased really meant to kill her, so she shot him while he was sitting in the chair. The Court permitted the use of expert testimony about the defendant’s battered woman syndrome to help substantiate her claim of self-defence. There is no information as to whether her claim of self-defence was successful.

#### QUESTION 3:

**Does the 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?**

#### 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?**

No, however, it is a defendant’s constitutional right to present evidence that is exculpatory, which includes the right to offer evidence of prior domestic/sexual violence.<sup>307</sup> As discussed above, this may be relevant in the context of certain defences, though is not a defence in its own right. As further discussed below, prior violence may also serve as a mitigating factor in sentencing.

## 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?**

Yes; under New York Penal Law, Section 60.12, where a court is imposing a sentence for a violent felony offence,<sup>308</sup> upon a determination by the court following a hearing that “(a) the defendant was the victim of physical, sexual or psychological abuse by the victim or intended victim of such offence, (b) such abuse was a factor in causing the defendant to commit such an offence and (c) the victim or intended victim of such offence was a member of the same family or household as the defendant,” the court may impose an “indeterminate sentence of imprisonment” rather than a determinate sentence.<sup>309</sup>

Normally, when a violent felony offence is committed, the court is required to impose a determinate sentence of imprisonment for a specified period of years.<sup>310</sup> A determinate sentence is a sentence that has a defined length and cannot be changed by a state parole board or other agency. An indeterminate sentence of imprisonment is one that consists of a range of years, in which a minimum term is provided by the court, but the release date from prison, if any, is uncertain and will be determined by the state parole board reviewing the case in the future. Therefore, a history of past abuse may give the court greater discretion over the sentence and may serve to provide a means for a convicted person to be released early from incarceration.

<sup>303</sup>. *People v Ellis*, 650 N.Y.S.2d 503, 506 (N.Y. Sup. Ct. 1996) (citing *People v Hryckewicz*, 634 N.Y.S.2d 297 (4th Dep’t 1995)). In deciding whether the expert evidence is admissible, the following tests are applied by the court “(1) whether the evidence presented by the expert witness has the required scientific basis for admission, (2) whether the jurors are not able to evaluate and draw conclusions from the evidence based on their day-to-day experiences, their common observation and their knowledge, and would benefit from the specialised knowledge on an expert witness, and (3) whether the probative worth of the expert’s testimony outweighs the possibility of undue prejudice to the defendant or interferes with the jury’s province to determine credibility.” *People v White*, 650 N.Y.S.2d 503, 504 (N.Y. Sup. Ct. 1996).

<sup>304</sup>. *People v Seeley*, 720 N.Y.S.2d 315, 321-22 (N.Y. Sup. Ct. 2000).

<sup>305</sup>. *Id.*

<sup>306</sup>. 488 N.Y.S.2d 358 (Sup. Ct. 1985).

<sup>307</sup>. *Chambers v Mississippi*, 410 U.S. 284, 302 (1973).

<sup>308</sup>. See N.Y. Penal Law § 70.02 (McKinney 2013) (defining “violent felony offence”).

<sup>309</sup>. N.Y. Penal Law § 60.12 (McKinney 2015); see also N.Y. Penal Law § 851 (McKinney 2011).

<sup>310</sup>. See N.Y. Penal Law § 70.02 (McKinney 2013) (defining “violent felony offence”).



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

The court has the discretion to impose sentences within the statutory guidelines taking into account the circumstances of the case, including a history of abuse. While the New York Penal Law provides that a past history of abuse *may* be considered and used by the court to sentence the defendant, the court has the discretion to set the appropriate sentence.<sup>311</sup>

**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?**

We were unable to find any statistics disaggregated by gender on how defendants charged with violent offences are sentenced in lower courts as opposed to at higher courts following appeal.

Please see above the information that we were able to obtain from the University of Pennsylvania Law Review and the 2012 study of Sonya Starr.

**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?**

The Sheehan case, where Sheehan was acquitted of second-degree murder in 2011, is of significance for the purposes of this report. This case, explained in the New York Times article, “An Abused Wife? Or an Executioner?” highlights an interesting viewpoint of the Queens prosecutor, Debra Pomodore.

*“But the Queens prosecutor, Debra Pomodore, attacked the syndrome as little more than “pseudoscience” embraced by the defendant out of desperation to stay out of prison. Moreover, Ms. Pomodore, an assistant district*

*attorney, argued, being abused was not an excuse for an open season on killing men; of the nearly four million women abused each year by their husbands in the United States, only 500 to 600 killed them, she said.”*<sup>312</sup>

The article also raises a challenge that has been put to other women in other cases reviewed by this report: *“Here the defence faces several daunting challenges, including explaining why Ms. Sheehan did not just leave her husband or call the police.”*<sup>313</sup>

Furthermore, the New York Times article, “Battered Women, Battered Justice” provides an interesting viewpoint: many women now in prison might not be there if they had been able to claim battered woman syndrome. One study suggests that as many as a quarter of the 326 New York women currently imprisoned for homicide or attempted homicide might have killed because of abusive relationships.<sup>314</sup>

Some additional relevant facts include:

- according to federal data from The Sentencing Project in May 2007, “One in three female offenders in state prisons is incarcerated for a violent offence, but female violent offenders are twice as likely as men to have victimised someone they knew”<sup>315</sup>; and
- one paper in particular published on the American Bar website entitled, “Defending Victims of Domestic Violence Who Kill Their Batterers: Using the Trial Expert to Change Social Norms,” explores various ways to change societal perceptions of domestic violence and battered women who kill their batterers.<sup>316</sup>

311. See, for example, *People v Sheehan*, 965 N.Y.S.2d 633, 624 (Second Dep’t 2013) (holding that while New York Penal Law Section 60.12 was applicable and could have been utilised by the court to sentence the defendant (who was a victim of domestic abuse) to an indeterminate term of imprisonment, under the particular circumstances of this case, it was not an improvident exercise of discretion for the court to decline to sentence the defendant to a determinate imprisonment sentence).

312. “An Abused Wife? Or an Executioner?” New York Times. 25 September 2011, available at: [http://www.nytimes.com/2011/09/26/nyregion/an-abused-wife-or-an-executioner.html?\\_r=1](http://www.nytimes.com/2011/09/26/nyregion/an-abused-wife-or-an-executioner.html?_r=1).

313. *Id.*

314. Battered Women, Battered Justice. New York Times. 13 March 1991; available at: <http://www.nytimes.com/1991/03/13/opinion/battered-women-battered-justice.html>.

315. Federal data: The Sentencing Project, Women in the Criminal Justice System, May 2007, available at: [http://www.sentencingproject.org/doc/publications/womenincj\\_total.pdf](http://www.sentencingproject.org/doc/publications/womenincj_total.pdf).

316. Defending Victims of Domestic Violence Who Kill Their Batterers: Using the Trial Expert to Change Social Norms, available at: <http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Wimberly.authcheckdam.pdf>.

## JURISDICTION:

## State of Texas

## 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)?**

## 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?**

Under Texas State law, a past history of abuse is not expressly a defence to a criminal act. However, a woman charged with murdering her abuser is explicitly permitted to offer evidence pertaining to the “family violence” she suffered at the hands of the deceased<sup>317</sup> in connection with the justifications of: self-defence; deadly force in defence<sup>318</sup> of person;<sup>319</sup> and defence of a third person.<sup>320</sup>

Texas state law defines “family violence” as:

- “an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself;”<sup>321</sup>
- abuse<sup>322</sup> by a member of a family or household towards a child of the family or household; or
- “dating violence,” defined as “an act intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the victim in fear of imminent physical harm, bodily injury, assault, or sexual assault” directed at a victim with whom the actor has or has had a dating relationship.<sup>323</sup>

Under Texas State law, “self-defence” is a “justification” excluding criminal responsibility and as such, is a defence.<sup>324</sup> Under section 9.31 of the Texas Penal Code, entitled, “Self-Defense,” a person may be justified, subject to applicable limitations set forth in the Texas Penal Code, in “using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other’s use or attempted use of unlawful force.”<sup>325</sup>

Under Texas State law, “deadly force in defence of [one’s] person” is not considered a defence to a crime, but rather a “justification” excluding criminal responsibility. Under section 9.32 of the Texas Penal Code, entitled, “Deadly Force in Defense of Person,” “a person is justified in using deadly force against another: (1) if the actor would be justified in using force against the other under Section 9.31 [the self-defence provision]; and (2) when and to the degree the actor reasonably believes the deadly force is immediately necessary: (A) to protect the actor against the other’s use or attempted use of unlawful deadly force; or (B) to prevent the other’s imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.”<sup>326</sup> Similarly, “defence of a third person” is not considered a defence to a crime, but rather a “justification” excluding criminal responsibility. Under section 9.33 of the Texas Penal Code, entitled, “Defense of Third Person,” “[a] person is justified in using force or deadly force against another to protect a third person if: (1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 [self-defence] or 9.32 [deadly force in defence of person] in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and (2) the actor reasonably believes that his intervention is immediately necessary to protect the third person.”<sup>327</sup>

317. Tex. Code Crim. Proc. Ann. art. § 38.36(b) (West 2013) (titled “Evidence in Prosecutions for Murder”).

318. Tex. Penal Code § 9.31 (West 2013).

319. Tex. Penal Code § 9.32 (West 2013).

320. Tex. Penal Code § 9.33 (West 2013).

321. Tex. Fam. Code § 71.004 (West 2013) (defining “family violence”).

322. Tex. Fam. Code § 261.001(1)(C), (E), and (G) (West 2013) (defining “abuse”); see also Tex. Fam. Code § 71.004 (West 2013) (defining “family violence”).

323. Tex. Fam. Code § 71.0021 (West 2013) (defining “dating violence”); see also Tex. Fam. Code § 71.004 (West 2013) (defining “family violence”).

324. *Todd v State*, No. 05-95-00994-CR, 1998 WL 196187, at \*4 (Tex. App. Apr. 24, 1998) (citing *Kizart v State*, 811 S.W.2d 137, 139 (Tex.App.-Dallas 1991, no pet.)).

325. Tex. Penal Code § 9.31 (West 2013).

326. Tex. Penal Code § 9.32 (West 2013).

327. Tex. Penal Code § 9.33 (West 2013).

Under the provisions of the Texas Code of Criminal Procedure, a woman charged with murdering her abuser can offer relevant evidence of having been the victim of acts of family violence committed by the deceased, “in order to establish her reasonable belief that the use of force or deadly force was immediately necessary.”<sup>328</sup> She may also offer, for the same purposes, “relevant expert testimony regarding the condition of her mind at the time of the offence, including those relevant facts and circumstances relating to family violence that are the basis of the expert’s opinion.”<sup>329</sup> Although Texas courts have agreed that evidence of abuse and expert testimony regarding battered woman syndrome is relevant in cases where abused women kill their abusers,<sup>330</sup> a number of Texas cases involve abused women who killed their husbands but who were not granted the defence; for example, in the case of *Lane v Texas*, an abused woman was held not to have acted in self-defence when she drove eight miles to her abusive husband’s residence and shot him while he was sleeping.<sup>331</sup>

#### QUESTION 3:

**Does the 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?**

#### 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?**

Not explicitly, 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.<sup>332</sup> And as discussed above, it may be relevant in the context of certain justifications, though it is not a defence in its own right. As discussed below, prior violence may also serve as a mitigating factor in sentencing.

## 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?**

Not explicitly, however, Texas law permits defendants to present evidence (including expert evidence) of mitigating circumstances, which are “circumstances that will support a belief that defendants who commit criminal acts that are attributable to such circumstances are less culpable than others who have no such excuse.”<sup>333</sup> Texas courts have indicated that information on battered woman syndrome is admissible “for whatever mitigating impact it may have as a circumstance of the offender.”<sup>334</sup>

#### QUESTION 6:

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

The court has the discretion to impose sentences taking into account the unique circumstances of the case and any mitigating factors going to the moral culpability of the offender (including relevant evidence of abuse) (see above).

## 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?**

While there do not appear to be readily available or accessible statistics which directly address this point, we have located the following data sources which deal with certain aspects of the legal and social environment surrounding the issue in question. Statistics linked to Texas State courts specifically are especially difficult to locate, so much of our research centred on statistics at a federal level.

<sup>328</sup> Tex. Code Crim. Proc. Ann. art. § 38.36(b)(1) (West 2013).

<sup>329</sup> Tex. Code Crim. Proc. Ann. art. § 38.36(b)(2) (West 2013). See for example, *Fielder v State*, 756 S.W.2d 309 (Tex. Crim. App. 1988) (reversing the lower court’s exclusion of expert evidence on battered woman syndrome and remanding for new proceedings, stating that “to the extent that the expert could explain the endurance of the hypothetical woman in a way that the jury could infer it is consistent with a claim of fear of the abuser, that testimony was of appreciable aid to the trier of fact” *Id.* at 321); *Pierini v State*, 804 S.W.2d 258, 261 (Tex. App. 1991) (finding that an abused woman’s testimony was sufficient to raise the issue of whether her actions were justified because of fear of imminent death or serious bodily injury, when she killed the victim during a scuffle). However, a defendant is not entitled to a specific instruction patterned on the evidentiary rule in a murder or voluntary manslaughter proceeding, so long as the instruction informs the jury that it may consider facts and circumstances surrounding the killing and previous relationship between the defendant and victim, in addition to requiring the jury to consider the reasonableness of self-defence from the defendant’s viewpoint at the time of the offence. *Richardson v State*, 906 S.W.2d 646, 649 (Tex. App. 1995).

<sup>330</sup> *Id.*

<sup>331</sup> *Lane v State*, 957 S.W.2d 584, 587 (Tex. App. 1997). See also *Todd v State*, No. 05-95-00994-CR, 1998 WL 196187, at \*7 (Tex. App. Apr. 24, 1998) (upholding a conviction for voluntary manslaughter in part because the jury had sufficient evidence that the woman was not immobilised by fear to support a claim of self-defence in the killing of her abusive husband); *Vann v State*, 853 S.W.2d 243, 251 (Tex. App. 1993) (finding sufficient evidence to support a conviction of voluntary manslaughter despite the introduction of battered woman syndrome evidence and other evidence of abuse, but remanding for a new trial to correct the harmful error of admitting hearsay evidence).

<sup>332</sup> *Chambers v Mississippi*, 410 U.S. 284, 302 (1973).

<sup>333</sup> *Robison v State*, 888 S.W.2d 473, 487 (Tex. Crim. App. 1994) (citing *California v Brown*, 107 S. Ct. 837, 841, (1987).

<sup>334</sup> *Ortiz v State*, 834 S.W.2d 343, 346 (Tex. Crim. App. 1992).

In December 1999, the Bureau of Justice published a special report on women offenders<sup>335</sup> that indicates that “nearly 6 in 10 women in State prisons had experienced physical or sexual abuse in the past.” Further, over a third of women in prisons had “been abused by an intimate in the past.” There has been a substantial increase in the number of female defendants convicted of felonies, specifically between 1990 and 1996 for this report. “For women defendants convicted in State courts, nearly 90% of the increase in the number of violent felons was accounted for by aggravated assault, perhaps reflecting increased prosecution of women for domestic violence.” At the end of 1998, 75,241 women under jurisdiction of correctional authorities were held by the states, while 9,186 were held at the federal level. Texas specifically held 10,343 female inmates, which is the second highest ratio of all states (Oklahoma is first). Texas held 102 women per 100,000 residents.

In 2012, the Federal Bureau of Investigation (FBI) released a report entitled “Crime in the United States 2012.” Table 10,<sup>336</sup> which expands on murder circumstances by relationship, is especially relevant, although not specific to Texas. In the same report, Table 3<sup>337</sup> expands on murder offenders disaggregated by gender, although also not specific to Texas.

On 29 July 2013, Hannah Wallen, a men’s rights activist, published an article with interesting statistics pertaining to the issue of gender disparity in the United States’ justice system,<sup>338</sup> For example, “men receive 63% longer sentences on average than women do.” The article includes several relevant sources. A Texas-specific study<sup>339</sup> that was conducted at the University of Texas at El Paso and published in 2006 examines gender differences in criminal sentencing. “Females are no less likely than males to receive prison time” for violent offences. However, for those who do, “females receive substantially shorter sentences than males.” The authors of the study greatly attribute this difference to “features of Texas’ legal code that channel the level of discretion available to judges depending on crime type and whether incarceration likelihood or sentence length is examined.”

#### 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?**

There is a wide range of scholarship on the psychology of battered woman syndrome and battered women. The below is an outline on literature specific to battered women who commit violent acts against their abusers and the response by the Texas criminal justice system.

Some scholars are concerned with judicial system bias against women who have survived domestic violence and taken action against their abuser(s). For example, Sarah M. Buel, a law professor at the Arizona State University – Sandra Day O’Connor College of Law, writes on the effective denial of Gideon rights to women who have committed acts of violence against their abusers. The article highlights several instances of attorney malfeasance and criminal justice system bias in Texas towards women who may have otherwise mounted effective defences based on battered woman syndrome.<sup>340</sup>

Further, Christine Emerson of Baylor University School of Law writes on the Fifth Circuit’s decision that “the battered woman syndrome is irrelevant to a female defendant’s duress defence.”<sup>341</sup> This is despite the fact that, as Lamis Ali Safa argues in the *Thurgood Marshall Law Review*, “expert testimony on the battered woman syndrome can help abused women explain how prolonged abuse caused them to act in ways they would not normally act.”<sup>342</sup> Safa’s note in particular highlights the unique pressures that women who have suffered domestic violence are under and how this can fuel a “slow burn” effect. Lauren Zykorie in the *Texas Journal of Women & the Law* contends that advocates of domestic violence victims who take action against their abusers should also have their testimony taken seriously and should not be “regarded as inferior to the traditional expert.”<sup>343</sup>

335. See <http://bjs.gov/content/pub/pdf/wo.pdf>.

336. [https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded\\_homicide\\_data\\_table\\_10\\_murder\\_circumstances\\_by\\_relationship\\_2012.xls](https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_10_murder_circumstances_by_relationship_2012.xls).

337. [https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded\\_homicide\\_data\\_table\\_3\\_murder\\_offenders\\_by\\_age\\_sex\\_and\\_race\\_2012.xls](https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_3_murder_offenders_by_age_sex_and_race_2012.xls).

338. <http://www.avoiceformen.com/misandry/gender-disparity-in-criminal-court/>.

339. [http://digitalcommons.utep.edu/cgi/viewcontent.cgi?article=1001&context=gang\\_lee&sei-redir=1&referer=http%3A%2F%2Fwww.bing.com%2Fsearch%3Fq%3Dviolent%2Bcrimes%2Bby%2Bgender%2Bsentencing%2Bcourt%26qs%3Dn%26form%3DQBR%26pq%3D-violent%2Bcrimes%2Bby%2Bgender%2Bsentencing%2Bcourt%26sc%3D0-25%26sp%3D-1%26sk%3D%26cvid%3D0c4fdf-f92eb9490da3c770e63ec16ec2#search=%22violent%20crimes%20by%20gender%20sentencing%20court%22](http://digitalcommons.utep.edu/cgi/viewcontent.cgi?article=1001&context=gang_lee&sei-redir=1&referer=http%3A%2F%2Fwww.bing.com%2Fsearch%3Fq%3Dviolent%2Bcrimes%2Bby%2Bgender%2Bsentencing%2Bcourt%26qs%3Dn%26form%3DQBR%26pq%3D-violent%2Bcrimes%2Bby%2Bgender%2Bsentencing%2Bcourt%26sc%3D0-25%26sp%3D-1%26sk%3D%26cvid%3D0c4fdf-f92eb9490da3c770e63ec16ec2#search=%22violent%20crimes%20by%20gender%20sentencing%20court%22).

340. Buel, Sarah M., *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct* (2003). *Harvard Women’s Law Journal*, Vol. 26, No. 217, 2003. Available at SSRN: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1647011](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1647011).

341. “*United States v Willis*: No Room for the Battered Woman Syndrome in the Fifth Circuit,” 48 *Baylor L. Rev.* 317.

342. “The Abuse Behind Closed Doors and the Screams That Are Never Heard,” 22 *T. Marshall L. Rev.* 281.

343. “Can a Domestic Violence Advocate Testify as an Expert Witness? Follow the ABC’s of Expert Testimony Standards in Texas Courts Assist the Trier of Fact, Be Relevant, and Reliable Credentials Must be Established,” 11 *Tex. J. Women & L.* 275.

# Acknowledgements

This research report was produced on a pro bono basis. The team was led by Linklaters London lawyers, Verity Doyle and Jennifer Khanna, and sponsored by partner Toby Grimstone.

We are very grateful to the many people from Linklaters and other firms who contributed to this project, including the following:

## Australia

Gabrielle Holly, Larissa Chu, Duncan Campbell, Alexander Fawke, with special thanks to our colleagues at Allens-Linklaters in Australia.

## Brazil

Dorothea Antzoulatos, Karen Clarke, Maria Matos, Talita de Moraes.

## Hong Kong

Gavin Lewis, Jelita Pandjaitan, Magnus Mason, Amina Malik, Deborah Papworth, Jesslyn Leung, Sarah Martin, Tani Burge, En-Li Lim, Longman Hu, Anthony Lo.

## India

Allison Hosking, Keya Advani and from TT&A, Priyanka Kumar, Feroz Dubash, Shrishti Goyal.

## Japan

Oyebola Ajayi, Daniel Tan, Kozo Sasaki, Sohei Nishimura.

## Mexico

Mandip Englund, Jessie Ingle and from Nader, Hayaux & Goebel, Vanessa Franyutti, Juan Pablo Sainz.

## Poland

Martyna Budzynska, Lisa Bruce, Malgorzata Szwaj, Olga Gorska, Piotr Kosinski.

## Spain

Elsie Blackshaw, Charisa Yeung, Paloma Fierro, Pilar Pueyo.

## USA

Jaime McKenzie, Scarlett Lionis, Adriana Maestas, Elizabeth Dowd, Jessica Djlani, Karen Carbonell, Kari Parks.



**Penal Reform International**

[www.penalreform.org](http://www.penalreform.org)  
Twitter: @PenalReformInt

**Linklaters LLP**

One Silk Street  
London EC2Y 8HQ  
United Kingdom

Telephone: +44 (0) 20 7456 2000  
Twitter: @LinklatersLLP  
[www.linklaters.com](http://www.linklaters.com)