

# South African Criminal Law and Battered Women Who Kill: Discussion Document 2

by

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## Executive Summary

Battered women who kill their abusers in South Africa often face barriers to accessing criminal law defences to murder. The Centre for Applied Legal Studies of the University of the Witwatersrand (CALS) has produced this document on behalf of the Centre for the Study of the Violence and Reconciliation (CSVr) to explore the reforms necessary for women to gain access to the defences. It continues the discussion that began in *Legal Defences For Battered Women Who Kill Their Abusers: Discussion Document 1*. While the previous research focused on comparative law and foreign experiences with legal defences for these women, this research looks specifically at South African law and experiences.

It examines the defences to murder under South African criminal law and explores the obstacles in the path of women's access to the traditional defences to murder when they kill their abusers, particularly in non-confrontational situations. This determination will aid CALS and the CSVr in developing reform recommendations to overcome the obstacles.

Chapter 1 introduces the research, the research methodology and the list of assumptions the document makes. These are identical to those in Document 1.

Chapter 2 examines the different justification defences abused women could potentially argue against a charge of murder. Section 2.1 explains the law of self-defence in South Africa and its theoretical underpinnings. The document establishes the basis for the defence, and the interpretation of those self-defence elements to identify possible obstacles abused women who kill might encounter. The chapter gives examples of women who have attempted to access the defence and their experiences.

As part of the methodology described in the first chapter, the research engaged the help of

criminal law experts. Section 2.1 describes the recommendations and comments of the experts, including whether to reform self-defence through the common law or through legislation. Section 2.1 concludes with a description of recommendations from other sources of information. Section 2.2 discusses the necessity defence as an option for abused women who kill their batterers. It describes the elements of the defence, including obstacles the women face in accessing it and any recommendations made for the reform of necessity to allow abused women to access it.

Chapter 3 considers six different excuse defences an abused woman may argue against a murder charge for killing her abuser. These include putative private defence, necessity as an excuse, non-pathological criminal incapacity and insanity. The document engages in a discussion of provocation and diminished capacity as defences, although neither defence seems to exist independently of non-pathological criminal incapacity or sentencing mitigation. The chapter raises the possibility of a new defence, putative necessity defence.

The document describes the elements of each possible defence and barriers women face when trying it. It also gives recommendations for the reform of putative private defence, provocation and non-pathological criminal incapacity.

Chapter 4 focuses on the sentencing of people convicted of murder. It discusses the definition of "substantial and compelling" in South Africa's sentencing statute, which is the standard courts consider when determining whether to mitigate a sentence. The document considers diminished capacity and provocation as mitigating factors before discussing reform recommendations for the consideration of abuse at sentencing. Finally, it discusses the treatment at the sentencing stage of the trial of abused persons who kill.

The admission of expert testimony on the effects of abuse and the social context of abuse, as well as testimony on the history of abuse between the accused and the deceased and the deceased's history of violence are the focus of Chapter 5. The chapter discusses the types of evidence abused women seek to have admitted at trial and whether there are any impediments to its admission.

Chapter 6 of the document details the general trends facing abused women who have been tried for killing their abusers. It looks at how these women and their experiences are treated by the courts and whether women are treated differently from men who kill their intimate partners.

Chapter 7 concludes with a description of recommendations for the reform of each type of defence. It includes the experiences of abused women who kill.

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## **Chapter 1: Introduction**

### **1.1 Introduction**

The CSVR commissioned this report from CALS as part of an ongoing project looking at issues involving battered women who have killed their abusers. It should be viewed as a continuation of the research that developed into Discussion Document 1: *Legal Defences For Battered Women Who Kill Their Abusers*. This report should be read in conjunction with Document 1 in order to gain a full understanding of the issues and reform recommendations for criminal defences for battered women who kill.

The report's purpose is to generate recommendations for gaining access to South African criminal law defences for women who kill their abusers. The report takes an in-depth look at criminal defences to murder to ascertain how much access, if any, these women have to the defences now, particularly women who have killed in non-confrontational situations (when the women were not facing immediate abuse). A non-confrontational situation includes one in which there has been a temporal break between the physical abuse and the woman's actions.

The second objective is to consider why these women have not been able to access the defences. This entails identifying the obstacles abused women encounter when arguing a defence to murder for the killing of her abuser. The report considers any problems battered women have admitting as evidence the history of abuse and social context evidence of battering during the course of their criminal trials. The document considers whether men and women charged with the murder of their intimate partners are treated differently in terms of access to the defences and, in some instances, the results of conviction.

While this research specifically highlights problems women who kill their abusers

encounter within the criminal law system, it has a much broader application. It identifies the gendered viewpoint of criminal law and the difficulty women generally encounter having their experiences understood as a result. It helps identify the stereotypes and biases that apply to abused women generally.

## **1.2 Methodology**

CALS initiated its research through a review of the criminal defences to murder as described in both South African academic literature and case law. This provided the basis for understanding the purposes of the defences, their elements as well as whether any battered women have been able to access the defences and/or argue successfully any of these defences to the charges of murder for the killing of their abusers. This review also helped determine any impediments or obstacles that confront women trying to argue these defences.

CALS researched reported case law, unreported cases located on electronic databases and battered women cases brought to the attention of the CSVR. This report does not purport to have been an exhaustive analysis of South African case law.

The second method CALS employed for this research was to interview highly regarded criminal law practitioners, including academics, criminal defence advocates and judicial officers. The purpose of interviewing them was to ensure that the research considered more than just the black letter law of criminal defences. It allowed for the research to engage with the law and to gain insight into attitudes towards these women.

CALS used the interviews to ask the criminal law experts:

- (1) about the boundaries of each of the criminal defences to murder;
- (2) whether battered women who have killed their abusers in non-confrontational situations could or should be able to use these defences;
- (3) why they often have trouble accessing the defences (a research finding); and
- (4) what the practitioner thought of the recommendations formulated in Discussion Document 1.

CALS sent letters to the High Court Judges in Cape Town and the Witwatersrand Local Division and interviewed those who responded or those who had been identified by colleagues as specialists in criminal law.<sup>1</sup> Based on these same recommendations, CALS contacted a few Supreme Court of Appeal and Constitutional Court judges. Ultimately, CALS interviewed six High Court judges, two Supreme Court of Appeal judges and one Constitutional Court judge.

Through this process, one of the High Court judges contacted four advocates with the Legal Aid Board to participate in the research. Judges, attorneys and academics recommended other criminal law advocates. Three participated.

Two academics interviewed for the research are leading academics in the field of criminal law and were identified on that basis. Their treatises are well regarded and often cited in court judgment. Three more academics were interviewed at the recommendation of their colleagues.

CALS also contacted the Presiding Regional President of the magistrates' courts in Gauteng and the Western Cape. The Presiding Regional President of the Western Cape felt that the magistrates who report to her would not be of much assistance on the issue of battered women who kill. Although initially the Gauteng Presiding Regional President suggested he would facilitate interviews with the magistrates who report to him, he failed to return the numerous phone calls CALS initiated to set up the meetings.<sup>2</sup>

Prior to each interview, CALS distributed a background paper that explained the purpose of the research, the social context of domestic violence in South Africa, three case studies of battered women who killed their abusers and the recommendations contained in Discussion Document 1. Each interview began with a discussion of self-defence and whether this defence was appropriate for battered women who killed their abusers, whether the law could accommodate the argument and what the expert thought of CSVR's initial recommendations. Typically, the discussions turned towards the defence of non-pathological criminal incapacity, whether it still exists and whether it is appropriate for battered women who kill their abusers in non-confrontational situations.

Because of time constraints, the interviews did not always continue beyond the first two topics. For those with more time, the interviews delved into putative self-defence, sentence mitigation and any foreseeable problems of having evidence of the past history of abuse between the woman and her abuser, the social context of battering and evidence of the effects of battering admitted before the court.

Because the questions were open-ended, the criminal law experts did not uniformly answer the same questions or discuss the same issues, as they were given the opportunity to comment on what they felt were the most important issues for the research. As a result, inferences should not be drawn from the absence of contrary opinions or criticisms in the sections of the report based on interviews with experts unless indicated in the document.

### **1.3 Assumptions**

Through the course of this report, the document makes several assumptions that need to be addressed directly.

1. Battered women are those women who face a pattern of physical and/or psychological abuse at the hands of their intimate partner.
2. The State inadequately protects battered women. Researchers report that South African women face enormous hurdles in accessing domestic violence legislation, beginning first with unsympathetic, and often hostile, police when reporting an incident of violence.<sup>3</sup> State prosecutors treat domestic violence allegations less seriously than other criminal complaints.<sup>4</sup> Further, the State fails to provide adequate shelter and aid to battered women seeking to leave their abusive partners.
3. Women do not leave their batterers for a variety of reasons. These include economic and emotional dependence. Many feel compelled to stay for the sake of their children. Some are too afraid of how their abusive partners will react. Others lack self-esteem or suffer from the battered woman's syndrome, which makes it difficult

for them to leave.

4. Separation from a batterer is full of risks. Research shows that often batterers respond violently to - and often kill - partners who try to leave them. Many batterers who kill their partners do so when their partners try to leave.<sup>5</sup>
5. Where there is a pattern of violence, the threat does not stop merely because the abuser is unable to abuse his partner at that moment. The threat of violence will continue as long as any relationship between the abuser and his victim continues.
6. As a result of the inadequacy of state protection for abused women and the many dangers women face in separating from their abusers, many of the women who kill their abusers have no reasonably safe alternative to that course of action.
7. Women's experiences are inadequately represented in the development and application of criminal law and defences. Once battered women react violently against their abusers, criminal law fails to provide these women with appropriate defences that recognise or appreciate their experiences with domestic violence.<sup>6</sup>
8. Male homicide typically involves one man killing another, where both parties are strangers.<sup>7</sup> The current legal defences to murder reflect this kind of relationship. For example, self-defence developed according to the "barroom brawl" scenario – when two strangers of roughly equal size get into a fight. As will be argued below, the legal elements of a defence for self-defence reflect that scenario.<sup>8</sup> By comparison, women are much more likely to kill their intimate partners, often after being abused by the deceased.<sup>9</sup> The parties to the killing are not strangers, but have had a relationship for some length of time, and are typically not of equal size. The responses of women to a threat to their lives will be based on both of these characteristics, neither of which is reflected in the legal elements for self-defence. As a result, battered women who kill their abusers face large hurdles to using this defence.<sup>10</sup>
9. The goal of this research and discussion is to locate the most appropriate protection for battered women who kill abusive partners out of fear for their lives. These legal defences are vital until state responses to domestic violence make them unnecessary. This document assumes that at least some of these women deserve an acquittal for their actions, while others deserve mitigation of charges and/or sentences.
10. Admission of expert testimony on the social context and effects of domestic violence and of testimony on the history of the abusive relationship are necessary to provide battered women with a fair trial.<sup>11</sup> A woman's actions can be fairly judged only if understood in light of her experiences with the deceased and how those experiences shaped her perceptions.<sup>12</sup> Without this testimony, battered women have difficulty fitting their experiences into the narrow elements of traditional defences.
11. The best choice of defences will be ones that do not stereotype battered women, hold women to a lower standard of accountability than other criminal defendants or

provide the batterer with new defences for killing his partner.

## **Chapter 2: Justification defences for battered women who kill**

Before beginning a discussion of each of the criminal defences to murder that may be available to battered women who kill their abusers in non-confrontational situations, the report first considers the elements of a crime. For a court to convict an accused for the commission of a crime, the prosecution must prove that there was (1) an act or omission (2) that was unlawful, (3) that the accused voluntarily committed, and (4) for which the accused is culpable.<sup>13</sup> Each of the criminal defences adopted by the South African common law negates an element of the crime. If the prosecution cannot counter an accused's defence claim, the prosecution will not have proved the element of the crime the defence targeted and the accused must be acquitted.

Keeping in mind the explanation of justification and excuse defences described in Document 1, self-defence and necessity negate a finding that the accused's conduct was unlawful. Only these defences are considered justification defences. Under South African law, an act is unlawful if it is "contrary to the community's perception of justice or equity or the legal convictions of the community."<sup>14</sup> It is not enough to simply meet the elements of a crime as defined by statute or common law. The act is only unlawful if it is contrary to what is needed to keep "legal order" and "to the community's perception of justice or equity".<sup>15</sup> Since the advent of South Africa's Constitution,<sup>16</sup> individual rights, including those of bodily integrity, dignity and equality, reflect community values and "perceptions of justice and equity".<sup>17</sup>

Excuse defences target each of the other elements. If an accused suffered from non-pathological criminal incapacity or insanity, the prosecution could not prove she voluntarily committed the act. Defences to culpability, meaning whether the person had the requisite intention or acted in negligence are not specifically defined or framed as independent defences.

### **2.1 Self-Defence<sup>18</sup>**

Self-defence developed as a tool to negate the unlawfulness of an assault or a killing in circumstances in which the accused had no choice but to ward off an unlawful attack by another person. The legal system expects a person to seek other alternatives, such as going to the police or the courts, rather than taking the law into his/her own hands. Where these alternatives are not reasonably available, such as when a person is confronted with a firearm or knife, the law permits a person to act on his/her own behalf.<sup>19</sup>

Since the development of law and order structures, such as the police, the circumstances under which a person can resort to self-help are more limited.<sup>20</sup> In his treatise, Snyman initially suggests the principles of self-defence "can be applied only in certain defined circumstances."<sup>21</sup> He later states, however, that there is no reason why the defence should not be broadened to accommodate circumstances other than the ones already defined that stand on the same footing as self-defence.<sup>22</sup> The latter approach is consistent with the Appellate Division's conclusion in *S v Ntuli*, 1975 (1) SA 429. Here the court declared: "In



applying these formulations to the flesh-and-blood facts, the Court adopts a robust approach, not seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence."<sup>23</sup>

### **2.1.1. Elements**

As follows: (1) An accused used force to repel an unlawful attack (2) upon his life, bodily integrity or other protected interests. (3) The attack must have commenced, or must be imminently threatened; and (4) the defender must have reasonably believed (5) the act was necessary to protect against the attack. (6) The defensive action must be taken against the attacker (7) and must be no more harmful than necessary (proportionality).<sup>24</sup> It remains in question under South African law whether the defender is under a duty to retreat if s/he can do so safely, rather than resort to self-help. Finally, it is irrelevant whether the defendant caused or began altercation leading to the killing.

Anyone claiming self-defence must set out a foundation of facts and evidence for meeting each of these elements. Once that is successfully completed, the burden falls on the prosecution to prove beyond a reasonable doubt that the accused did not act in self-defence.<sup>25</sup> South African courts caution that anyone considering a self-defence claim "must beware of being an armchair critic".<sup>26</sup> A court must consider that "men faced in moments of crisis with a choice of alternatives are not to be judged as if they had had both time and opportunity to weigh the pros and cons. Allowance must be made for the circumstances of their position."<sup>27</sup> As will be discussed below, this relates to the reasonableness standard applied by the courts. The accused will be acquitted "if there is a reasonable possibility that he acted in self-defence, considered in the light of all the foregoing principles (elements)."<sup>28</sup>

Following the format provided in Document 1, the remaining subsections describe each of the elements of self-defence as discussed in South African case law.

#### **Unlawful act/attack**

A person may use force to repel an unlawful act.<sup>29</sup> If the attack is against a lawful act, the accused cannot claim self-defence.<sup>30</sup> The unlawful act may be an omission and may not have been intentionally committed,<sup>31</sup> the act may be aimed towards another person other than the defender.<sup>32</sup> In each of these circumstances, the defender may lawfully defend him/herself against the unlawful attack.

Importantly, South African courts are willing to recognise attacks against dignity as types of acts against which a person may defend, as became evident in *R v Van Vuuren*, 1961 (3) SA 305 (EC). The court concluded: "... provided that force is strictly commensurate with the requirements of restraint in the prevailing circumstances, defence against injury should include both injury to the person and dignity, for injury to the latter may be even more serious than the former and less easily remedied."<sup>33</sup> This may prove important to battered women who kill their abusers in non-confrontational situations as it may add weight to their claim to be defending against an act by the abuser.

From discussions with criminal law experts, it appears that battered women who kill their

abusers in non-confrontational situations may have difficulty proving they were defending against an unlawful act in the absence of an immediate threat. According to several judges, a threat by itself, without evidence of the abuser's capacity to follow through, is insufficient to meet the unlawful act requirement because people threaten each other all the time and do not mean it.

To test the boundaries of this conclusion, several of the experts were asked to consider a situation in which a woman killed her husband after he physically abused her, walked away briefly and then threatened to kill her. Of the experts who responded, all stated the woman could not claim self-defence because the threat of violence had ended. They were able to avoid dealing with the husband's threat of killing the wife by reiterating that people threaten each other all the time without meaning it.

These experts then considered whether a woman could claim self-defence when the physical violence had stopped but the husband continued the psychological abuse, with no interruption. They concluded that because the violence had stopped, the woman's life was no longer in danger.

This approach to locating an unlawful attack ignores that abused women typically have sufficient experience with their abusers to know when they intend to follow through on their threats. As described by the Court of Appeals of New Mexico:

Remarks or gestures which are merely offensive or perhaps even meaningless to the general public may be understood by the abused individual as an affirmation of impending physical abuse. To require the battered person to await a blatant, deadly assault before she can act in defence of herself would not only ignore unpleasant reality, but would amount to sentencing her to 'murder by installment.'<sup>34</sup>

In practice, South African criminal law provides little information about how it would treat a claim by a woman that she killed her abuser in response to an unlawful act that was not immediately apparent. From the case law, as described in section 2.1.2 below, it appears that only one accused attempted the argument. His claim failed, although the decision does not explain why.

The attitudes and responses of some of the criminal law experts, however, suggest that the law will have great difficulty finding self-defence in the absence of an overt threat or attack. The first response of approximately two-thirds of the experts interviewed was that a battered woman who killed her abuser in a non-confrontational situation could never show she was acting in self-defence, in part because she was not facing an attack or imminent threat. After some advocacy, however, nearly all the experts believed the unlawful act element could be met using evidence of a past pattern of abuse to show that the next period of abuse was inevitable. The typical example discussed during the interviews was of the man who drank to excess and then beat his wife every Friday. A consistent pattern such as this could evidence why a woman on Thursday could expect an attack on Friday.

A few of the experts said showing a pattern of abuse to meet the unlawful act element would not be enough under current law. The woman would need to show escalating

violence or a threat as well. This is consistent with the approach of several of the foreign law jurisdictions examined in Document 1, which suggests this element will be a hurdle for abused women who kill their abusers to overcome.

This discussion illuminates that instinctually, practitioners do not see the threat of abuse as ongoing, but instead assume that once the physical violence has stopped, even for a moment, the threat of abuse is over. This shows a very narrow understanding of the experiences of battered women who kill and the dynamics of abusive relationships.

### **Death or Serious Bodily Harm**

In order to justify self-defence, the defender must have been protecting "an interest which (sic) legally deserves to be protected."<sup>35</sup> Typically, self-defence involves someone protecting against physical harm. South African courts have allowed defenders to protect "property, dignity, (against an) unlawful arrest, unlawful entry into a house, attempted sodomy, trespassing and defamation."<sup>36</sup> At least one authority thinks a defender may lawfully protect her honour and reputation, in addition to dignity.<sup>37</sup>

The scope of interests that may be protected under self-defence law appears much broader than the scope in other common law countries.<sup>38</sup> As Burchell described in his treatise: "our courts treat private defence casuistically and the tendency seems to be to expand rather than to limit the legal interests which (sic) a person is permitted to protect by force."<sup>39</sup>

A person who uses lethal self-defence, however, needs to lay the foundation for a conclusion that s/he was protecting against death or serious injury.<sup>40</sup> There has been at least one case, however, in which a person successfully argued self-defence when he used lethal force to stop a thief from stealing from his store while no one was there. In the case of *S v Van Wyk*, the accused set up a shotgun that would fire at a person's leg if s/he broke into accused's store. He did this after going to the police for help and hiring a night watchman to guard his store. All of these efforts failed. The accused had warned the police and placed warnings about the shotgun on the store's door in English and Afrikaans. When protecting property, the court concluded, "If the use of necessary force is justified – as is the case – then it is not clear to me why deadly force must be excluded from that principle."<sup>41</sup> Whether a person could take the life of another in defence of property under South Africa's Constitution is doubtful.<sup>42</sup>

One judge explained it might be possible, although difficult, for a woman to argue she was defending her dignity when she killed her husband in a non-confrontational situation. This judge argued that under the Domestic Violence Act, the legislature widened the definition of domestic violence to include psychological harm. The courts should follow suit and recognise that a person may protect herself against psychological abuse. The judge concluded that psychological abuse limits a woman's quality of life beyond the effects of physical abuse alone. An abused woman should be entitled to protect herself against the loss of quality of life. The judge expressed concern that a proportionality requirement, which would measure whether the defensive action was proportionate with the threat of harm, may place an insurmountable obstacle to this argument.

Consistent with the analysis in Document 1, this element may prove to be a stumbling

block to these women even if they are able to prove an unlawful attack. When CALS provided case studies and sample fact patterns to the criminal law experts to consider, many asked how bad the abuse had been in the past.

A few practitioners suggested that unless the woman faced grievous bodily harm or death at the hands of the abuser in the past, she could not prove she faced a threat. If the woman uses the past pattern of abuse to prove the unlawful act, this very pattern may be under scrutiny to determine whether she was likely to suffer serious bodily harm or death during the anticipated attack. This highlights an important inequity in the law. Unlike a person confronted with violence from a stranger, an abused woman is not allowed to guess right the first time whether she faces death or serious bodily harm. She could encounter death at the hands of her abuser without being allowed to defend herself under the law.

South African courts seem to apply a broader approach to when a person may use lethal self-defence to protect him/herself than the rest of the common law world. This approach, however, does not seem likely to be applied to battered women who kill their abusers.

### **Imminence**

South Africa permits an acquittal for self-defence if the attack against which the accused was defending has commenced or was imminently threatened.<sup>43</sup> Presently, the treatises explain that a person cannot defend against an attack that will happen some time in the future,<sup>44</sup> seemingly because the attack might never happen.<sup>45</sup> Instead, the defender can take protective measures only.<sup>46</sup> Nor can a person defend against an attack that is already over, as that is revenge.<sup>47</sup> A person can defend herself against an attack that has been immediately threatened, although it has not yet begun.<sup>48</sup>

South African courts seem to construe the imminence requirement narrowly. For example, in *S v Ngomane*, 1979 (3) SA 859 (A), the Appellate Division refused a claim of self-defence in part because imminence seemed to be lacking. In this case, the deceased had knocked on the accused's door to ask for cigarettes. When the accused replied that he did not have any, the deceased threatened that if the accused did not open the door, he would set the hut on fire. The deceased tied the hut door shut so the accused could not leave. The accused begged the deceased to untie the door and agreed to open it. He opened the door holding a weapon, which he used to stab the deceased as he came through the open door.

The court concluded that despite the threat immediately prior to opening the door, the accused could not prove the deceased was a threat to him after he untied the door. The court wrote:

When appellant opened the door from the inside and the deceased opened it from the outside, it should have occurred to appellant that the deceased might have changed his mind about killing him. After all, the deceased's threat stemmed from appellant's original refusal to open the door; this reason for it had now fallen away; moreover, in compliance with appellant's plea, the deceased had desisted from setting the hut alight. Besides, he also did not manifest any intention of attacking appellant; e.g., he did not repeat this previous threat of killing the appellant, nor did he rush into the hut.<sup>49</sup>

Although the court accepted that the deceased had threatened to kill the accused just prior to the door's being opened, and despite the evidence of the deceased's willingness to carry out the threat, the court could not find an immediate threat of violence to the accused. Instead, the court expected the appellant to establish whether the deceased would have maintained an intention of violence once he walked into the hut. The court concluded, "I think the reasonable man in appellant's situation, before stabbing the deceased, would first have waited to ascertain what the deceased wanted or was going to do, either by a further enquiry of him or from his ensuing conduct."<sup>50</sup>

This fits in with the view of the experts who could not find an unlawful act when the physical violence stopped but the psychological abuse continued without interruption. The moment the physical abuse ended, the imminent attack ended and the woman was precluded from acting in self-defence.

There has been one notable case in which a pattern of unlawful behaviour justified a finding of imminence. In *S v Van Wyk*, the case in which the accused rigged a shotgun to shoot at the leg of intruder, two members of the bench who heard the case wrote:

The stated case differs from ordinary cases only in that in the defence, that is the placing of the firearm, there was no immediately threatening danger that could be resisted by a defender who was present ... there was however actually threatening harm by intruders which Van Wyk could expect with reasonable certainty and which he could not reasonably prevent except in absentia.

Another of the judges agreed that the setting of the firearm was reasonable, after carefully considering that the accused had tried numerous other measures to stop the theft that had failed; and that the accused had warned possible thieves of the firearm.<sup>51</sup> Because the accused exhausted all other options and because it appeared the thief would continue to steal from the accused, the court accepted the imminence of the attack.

This case is helpful in that it shows courts are willing to consider a pattern of behaviour to determine imminence. It is distinguishable from the battered women cases, however, because the shotgun would fire only if an intruder attempted to illegally enter the premises of the accused. If the unlawful act did not occur, no one could get hurt.

Each of the criminal law practitioners identified imminence as a major obstacle for battered women who kill abusers in non-confrontational situations. Most, however, felt that if the woman could lay the foundation for the past pattern of abuse to show the inevitability of the attack, she could meet this element of the defence. They explained that this would be difficult to prove without strong advocacy and that the argument would only apply rarely to these cases.

Further, most of the experts agreed that the woman also must show the inescapability of the abuse. A woman must show she had gone to the police and they refused to help; that she tried to leave, only to be forced to return to the abuser, before she could succeed in laying a proper foundation for imminence. It is not enough to believe she could not go to the police based on other people's experiences or to believe her partner's threat to follow her wherever she went. She must try these options herself. If the woman could show an absence of

reasonable alternatives in addition to the inevitability of the attack, she could meet the requirements of imminence.

Despite what appears to be some method of proving that one cannot escape abuse, the attitude of the experts suggested that in most of the non-confrontational killings cases, the woman could have left her abuser to avoid the harm. As long as flight remains an option, the experts believe the woman cannot argue self-defence.

What this approach ignores is that often women feel they cannot leave because of the threats of their abusers to follow them; or when they do leave, the abusers beat them more severely. In *Kgafela*, the woman's husband was a magistrate who told her again and again not to bother going to the police because no one would take action against a magistrate. Was it unreasonable for the woman to believe her husband? The experts' approach says yes. At what point do the courts force abusers to take responsibility for their own actions?

A few of the experts opined that the closer in time between the threatened violence and the defensive action, the easier it would be for a battered woman to lay the foundation for imminence. For example, if a woman feared abuse at the sight of her husband holding a squash racquet, a weapon he had used in the past to beat her, the court would be more likely to find imminence. As one advocate put it, the correct approach for the court was to consider the previous assaults in context with the present position. It would then decide whether the state had proved beyond a reasonable doubt that the present action (of the husband) was not about to become a repetition of his past actions.

This same advocate argued that if one considered the reasonableness of the woman's actions in the light of principles of fairness and community views, imminence should not be a stumbling block to a claim for self-defence for a battered woman who killed her abuser in a non-confrontational situation. He argued that if the court first considered whether the woman's action was wrong, it might better understand the question of imminence. The question becomes, based on fairness, public policy and the legal convictions of the community, if the battered woman was unreasonable in believing she was defending herself against an imminent attack? If not, then her action would not be illegal.

One academic and one advocate argued that it would be impossible for a battered woman who kills her abuser in a non-confrontational situation to prove she faced an imminent attack, and that at present this was appropriate because without an imminent attack, the unlawful act is merely speculative. Both reached this conclusion even when met with a factual situation in which a battered woman hired a killer after the police refused to help her stop the abuse. The woman had made repeated attempts to flee to her mother's home, where the abuser always found her and threatened her until she returned home. The two experts did not find the absence of alternatives a persuasive argument for proving imminence, in part because the woman could seek an urgent interdict to keep the abuser away from her.

The approach of the academic and the advocate assumes the woman lives near enough to a court to be able to seek an urgent interdict and that she has the resources to approach a court for an interdict. It also ignores that interdicts require enforcement by the police, which, as the example shows, may not happen, as police are often unwilling to help abused women.<sup>52</sup> Further, the belief that an attack is merely speculative until it is imminently

threatened ignores the experiences of abused women. A woman who is beaten every day or every Friday knows the attack is more than mere speculation.

Consistent with the findings in other jurisdictions, battered women who kill in non-confrontational situations will have great difficulty meeting the imminence element of self-defence unless the understanding of what is imminent changes (as it has in many foreign jurisdictions). The experts generally agree that if the woman can show the inevitability and inescapability of the abuse, she could jump this hurdle. They require her to try every other option first, however, rather than take on faith that the police will not help or that her partner means it when he says he will find her if she leaves.

### **Reasonableness**

An accused claiming self-defence must have had a reasonable belief that self-help was necessary.<sup>53</sup> South Africa has chosen to use the first variety of a mixed subjective-objective reasonable test as described in Document 1.<sup>54</sup> Under this test, an accused must lay the foundation and the prosecution must disprove her actions were reasonable in her circumstances. The court must consider reasonableness based on what the accused knows and sees.<sup>55</sup> For self-defence the court must establish that the accused believed she was acting lawfully, a subjective element, and that the circumstances justify that belief, an objective element. In determining the reasonableness of the accused's behaviour:<sup>56</sup>

Our courts have always insisted ... that they must be careful to avoid the role of armchair critic wise after the event, weighing the matter in the secluded security of the courtroom, by putting themselves in the position of the accused at the time of the attack.<sup>57</sup>

For example, in *R v Patel* 1959 (3) SA 121,123 (A), the Appellate Division considered a case in which the accused and the deceased had argued over whether the accused should return the deceased's jacket, which he was holding as collateral on a loan. The accused forced the deceased out of the store. The deceased later returned and started beating the accused's brother with a hammer. The accused shot the deceased. Quoting Gardiner and Lansdown,<sup>58</sup> the court concluded:

The danger may in truth not have been great, but the jury must consider whether a reasonable man, in the circumstances in which the accused was placed could have thought that he was in great danger. A weapon less dangerous than the one used may have been at hand (sic) which would have sufficed to ward off the threatened assault but the jury must not expect too nice a discrimination or too careful a choice of weapons from a man called upon in a sudden emergency to act promptly and without opportunity for reflection.<sup>59</sup>

Particularly helpful to battered women who kill their abusers is that the decision gives courts wide latitude to determine the reasonableness of their responses.

One advocate argued that one must keep in mind that reasonableness includes the concepts of fairness and justice and is based on policy considerations, as well as the legal convictions of the community. Accordingly, if battered women who kill in non-confrontational

situations keep these notions at the forefront of their argument, they will have a better chance at proving that the fear necessitating the killing was reasonable.

Despite this, few experts suggested that women's experiences would be included in the determination of reasonableness. Because of the belief that women can always leave their abusers, several experts felt it was unreasonable for the women to believe they needed to defend themselves with lethal force in non-confrontational situations. As described in Document 1, a belief that a woman is able to leave is a misconception. There is evidence that several of the experts interviewed for this research do not understand the experiences of battered women.

Further, the standard of reasonableness applied by these practitioners is gendered in application. The approach ignores that reasonableness must include the circumstances of the abused woman. As the Supreme Court of Canada wrote, referring to an earlier precedent from the court,

... The majority of the Court in *Lavallee* also implicitly accepted that women's experiences and perspectives may be different from the experiences and perspectives of men. It accepted that a woman's perception of what is reasonable is influenced by her gender, as well as by her individual experience, and both are relevant to the legal inquiry ... . More importantly, a majority of the Court accepted that the perspectives of women, which have historically been ignored, must now equally inform the 'objective' standard of the reasonable person in relation to self-defence.<sup>60</sup>

In Document 1, the CSVN recommends this mixed subjective-objective reasonableness test for reasons described therein.

### **Defensive Act Necessary to Protect Interest**

The element that the defensive act must be necessary to protect the threatened interest is not explicitly required in self-defence statutes or the common law in the countries considered in Document 1. Typically, courts in other jurisdictions use the element of imminence to prove the necessity of the act in protecting against bodily harm or death. But South Africa chooses to state explicitly what imminence implicitly does.

What this element requires is evidence that the accused had no other alternatives to stop the unlawful attack but to take defensive action.<sup>61</sup> Burchell explains that this requirement "does not mean that a person cannot act in defence if he could later obtain adequate relief by the legal process because the latter could not achieve the same result as defence, namely the warding off of an attack."<sup>62</sup>

It is possible that adding the explicit requirement of proving it was necessary to act may make self-defence more burdensome. It may require the accused to attempt to exhaust all other alternatives to self-help, including options that may be dangerous or pointless.

For identical reasons to those contained in the imminence section, proving necessity may be difficult for women who kill their abusers in non-confrontational situations. In terms of reform, inclusion of this specific necessity requirement may prove beneficial. Any



codification could strike imminence as a requirement and leave this element to serve as the basis for self-defence. Document 1 contains a similar recommendation.

### **Proportionality**

South African case law requires that a person use no more force than is necessary to stop an unlawful attack.<sup>63</sup> However, Snyman argues: "only if there is an extreme discrepancy between the threatened and protected interest, does the right to act in private defence fall away."<sup>64</sup> This position seems to stem from the discussion by courts that they cannot be armchair critics deciding from the security of a courtroom the reasonableness of the defensive action or, in turn, the proportionality of the defence to the threatened attack. As the Appellate Division wrote, "... men faced in moments of crisis with a choice of alternatives are not to be judged as if they had both time and opportunity to weigh the pros and cons. Allowance must be made for the circumstance of their position."<sup>65</sup>

This proportionality test may open doors for battered women to more easily access this defence. Battered women who kill their abusers may be in a better position to use this defence than their counterparts in foreign jurisdictions, where the fact that the woman used a firearm to defend against her abuser's fists has justified finding no proportionality.<sup>66</sup>

In his treatise, Burchell discusses the *Van Wyk* decision, which clarified that courts cannot determine proportionality "based on equality of the weapons of the two parties and seems to imply disapproval of the sole test being whether the means used were commensurate with the danger apprehended."<sup>67</sup> The court in *Van Wyk* wrote:

Proportionality will not do as a general basis for private defence. One who invades another's rights, who defiantly ignores the prohibition, warning and resistance of the right-holder so that he can only be prevented by the most extreme measures, can with good reason be seen as the author of his own misfortune. It is he who is the outlaw, and if he is prepared to risk death in violating another's rights, why should the defender, who is unquestionably entitled to protect his rights, be viewed as ... acting unlawfully if he uses deadly force rather than sacrifice his rights?<sup>68</sup>

If this case serves as the basis for concluding that there is a less than strict proportionality test, what happens if the case is called into question because the right to life under the Constitution must outweigh property rights? Fortunately, the proposition that the "weapons used by the attacker and the defendant need not be commensurate" has been upheld in other cases.<sup>69</sup>

Despite what appears to be less than a strict standard of proportionality, many experts expressed concern about whether battered women who kill in non-confrontational situations could successfully meet this requirement, particularly since the woman is responding with force against a passive attacker. In reaching their conclusion, practitioners seem to ignore the ongoing threat of abuse that exists in abusive relationships. Some women may be capable of defending themselves only when the attacker is passive. The experts also overlook the physical strength difference that typically exists between men and women and that these women are terrified of their abusers, knowing they can inflict harm on them at

will; all of which causes them to act in non-confrontational situations.

Considering the conclusion of the experts, the proportionality element remains a barrier to an argument of self-defence for battered women who kill their abusers.

### **Defensive Act must be Directed at the Attacker**

This element is not explicitly included in the self-defence statutes and common law in the foreign jurisdictions, although implicitly it exists. Under this element, the defender must act against the attacker and not another party; otherwise the defence would be one of necessity, not self-defence.<sup>70</sup>

### **A Duty to Flee?**

South African courts have not answered decisively whether a person must flee an attack, where s/he can do so safely, before acting in self-defence.<sup>71</sup> Taking the question one step further, is a person required to flee from her home if she can do so safely? These issues are directly related to the question of whether the accused had any other available alternatives but self-help, which directly relates to whether the defensive act was necessary.

Snyman argues that no such duty should exist, as "[a] duty to flee is a negation of the whole essence of private defence. Private defence deals with the defence of the legal order that is the upholding of justice. Fleeing is no defence, but a capitulation to injustice."<sup>72</sup>

Furthermore, he believes that the law should not require anyone to flee from her home.<sup>73</sup> Snyman concludes by arguing that whether a duty to flee exists is purely academic because the courts typically ask only whether a person was entitled to defend herself.<sup>74</sup>

Burchell takes a contrary view, stating: "Where the threat is one of personal injury the obvious possible way of avoiding the attack is to flee. Thus, if the harm can be avoided by flight the accused should flee."<sup>75</sup> He qualifies this statement, however, by pointing out that courts should be careful when enforcing this duty because "a person faced with a sudden attack" may not realise the possibility of fleeing.<sup>76</sup> Furthermore a person should not be required to flee if it would be dangerous for her to do so.<sup>77</sup>

At least one court has required an abused woman to flee her home rather than take defensive action. In *Nape v State*, CC67/97 (on file with CSV), the lower court wrote:

The accused had a wide range of options open to her at the time of the commission of the offence, such as removing the firearm from where it was placed, going away from the house together with the children even if it was late. Nothing could be more risky than staying in a house where somebody was threatening to use a firearm against you. She could also have reported the deceased's threats either to the neighbours, the relatives or to the police.

The Supreme Court of Appeal seems to support this view when it determined that an intelligent woman should have known she had options other than killing her abuser. The implication is that having an education meant she could simply walk away from the abuse.

<sup>78</sup>

These decisions suggest that regardless of a general duty to flee an attack, abused women have a special duty to retreat that does not exist for other people facing threats to their lives. Neither court suggested that the threat to the woman was non-existent. Instead, their response was that in the face of a threat, the woman must flee.

One judge supports this view. He explained that a woman must leave the home if it would stop the abusive situation. If she could flee safely, she could not prove an absence of reasonable alternatives. This approach seems implicit in the discussion amongst nearly all practitioners, as most felt that a woman could prove self-defence only if she could show that the police were unhelpful and the abuser would not allow her to leave.

Even to the extent that other defenders do not have a duty to flee, one advocate expressed the view that the requirement for battered women who kill in non-confrontational situations will remain. He explained that in an appeal of one of these cases, one of the first questions the court asked him was why the woman did not divorce the deceased, rather than kill him. Again, this advocate's conclusion places a burden on abused women that may not exist for other defendants.

One academic voiced the opinion that a woman can always leave the relationship, even if it requires her to go into hiding to avoid her abuser. He believes this approach is consistent with a witness protection programme where a witness who fears for her life goes into hiding rather than take the life of the person who might be threatening her.

Finally, another academic reached a very different conclusion, stating that under criminal law, no one has a duty to flee from her home.

To the extent a duty to retreat from one's home exists, South Africa is in the minority of common law jurisdictions considered in this research. Secondly, based on experience and the suggestions of other academics, even if South Africa does not have a duty to retreat, one would be applied to abused women who kill. This places an unfair burden on an abused woman, particularly since it is based on the assumption that a woman can leave her abuser. It fails to reflect the danger women face when they leave their abusers; it further fails to reflect that fleeing in the middle of the night, never to return, is highly unrealistic. It shows a lack of understanding of the experiences of abused women and evidences the gendered application of the criminal law.

### ***2.1.2 Battered Women's Claims of Self-Defence***

CALS has been unable to locate any cases in which a battered woman who killed in a non-confrontational situation argued self-defence. Considering the interviews with the criminal law experts, this is not surprising.

CALS found two cases that may be relevant to this analysis, although the accused in one did not argue self-defence. In the first of the two cases, *S v Shapiro*, 1994 (1) SACR 112 (A), the accused killed a drug dealer who threatened the life of his fiancée. The couple had been friends with the drug dealer for a period of time when the dealer began accusing the fiancée of having stolen cocaine from him. The dealer threatened the fiancée's life several times. The couple feared the dealer, as he had a reputation for violence when he felt he had been wronged and was a "monster" when abusing cocaine, which was the case prior to his

death.

Over the ten days prior to his death, the dealer threatened the fiancée with death on no less than three occasions. Once he slapped her, and on another occasion, he "attacked her". The fiancée was intending to leave for Israel to avoid the dealer. The day before she left, the dealer came to her home and choked her until the building manager came by. The dealer threatened to kill her if she did not return the cocaine. At the same time, the dealer told the fiancée he had just shot his wife and intended to shoot his mother-in-law.

Upon hearing of the event, the accused came home. His fiancée was crying hysterically and he saw the marks on her neck from being choked. He grabbed a firearm, drove to the dealer's and shot him. He said he feared the dealer wanted to kill his fiancée and felt the most recent incident confirmed those fears.

The High Court rejected the accused's claim of private defence and putative private defence, concluding, "... it is our view that this was not an instance of private defence but an instance of private execution."<sup>79</sup> With respect to sentencing, the court stated: "You have taken the law into your own hands with grave consequences. That is something which (sic) this Court may not condone and which society cannot tolerate. Persons who do that must realise that their actions will be severely censured by the courts."<sup>80</sup>

Ultimately, the High Court convicted the accused of murder with diminished capacity serving as a mitigating factor. The accused received a seven-year sentence of imprisonment, four of which were suspended. The Appellate Division upheld the sentence.

Several of the experts said the reason private defence and putative private defence failed in this case was that the accused and the fiancée never tried to use formal channels such as the police to solve the problem with the dealer.

Although not argued as a self-defence case, *S v Campher*, 1987 (1) SA 940 (A), fits within the types of cases that should be seen as self-defence. The husband had been abusing the wife for nine months. On a particular day, he had been physically abusive, at which point the accused took a firearm and threatened to kill him if he did not stop. He became emotionally abusive, forcing her to help him drill a hole in a lock. When the hole came out crooked, the husband forced his wife onto her knees to pray that the hole straightened out. At that point, she had the firearm close at hand and shot him. The three members of the bench who heard the trial did not agree on their conclusions. Ultimately, the accused was convicted of murder with extenuating circumstances.

What is unclear is why the court did not see the emotional abuse, coupled with an implicit threat that if the hole did not magically straighten, the husband would continue to abuse her, as an unlawful act against which she was defending herself. The wife had already threatened her husband with a firearm to get him to stop abusing her.

These cases highlight the reluctance of courts to find self-defence when a person is confronted with anything but an immediate attack. They evidence the difficulty of proving imminence, although the threat of a future attack in both cases was more than speculative. They also highlight that the courts view each attack individually, rather than as part of a

continuing threat. This greatly disadvantages accused women's attempts to argue defences as it misunderstands the nature of abusive relationships. The decisions also ignore the cumulative effect of the fear these women (and those protecting them) experience through each incident of abuse.

### *2.1.3 Comments of the Criminal Law Experts*

The report notes that a few of the criminal law experts recognise the inherent gender bias in criminal law defences. One judge explained that the criminal justice system is manifestly unfair to women since many battered women have not been able to resort to extra-legal remedies to the same extent as men. Overall, the judge believes the criminal justice system was developed by men for men, with more of an understanding of heat of passion reactions than for the way in which women think and work. The judge argued that women are socialised to think through their actions more than men are. Criminal defences do not recognise that some women will plan how to defend themselves.

Another judge stated the problem differently. He believes judges need to understand that the law has not always developed in a manner sensitive to the problems experienced by marginalised and oppressed sections of society.

Furthermore, most of the criminal law experts recognised that women have great difficulties accessing the legal remedies provided by the Domestic Violence Act and that the police are often unwilling to intervene in domestic violence. Because of this, one judge suggested that legislation would do little to change women's situations in the absence of societal and attitudinal change.

Unfortunately, the majority of practitioners interviewed started the discussions from the premise that unless a woman successfully argues non-pathological criminal incapacity, she could not benefit from criminal defence law. Instead, she needed to have the abuse considered in mitigation of sentence. The premise changed only after often lengthy discussions of the problems women have accessing formal channels to stop the abuse, as well as the real experiences with violence and the problems women face leaving abusive relationships. Without this context, most would not have even begun to consider any other defences for battered women who kill their abusers in non-confrontational situations.

#### *2.1.3.1 Development of the Common Law or Statutory Reform?*

Most of the criminal law experts believe that the common law defence of self-defence is wide enough to include battered women who kill in non-confrontational situations. Most believe that with proper advocacy and evidence, a woman could succeed on a claim of self-defence. Much would depend on the woman's convincing the court of her fear and reasons for not leaving. If the right case is brought to the courts, one in which a battered woman tried to leave but was dragged back into the situation and in which she tried to go to the police but the police failed to do anything, then the courts should find self-defence. Several advocates explained that the problem is that no one has tried to make the argument.

Several of the criminal law experts felt that a major obstacle to battered women's claims to self-defence lies in poor advocacy and a lack of proper social context and psychological/psychiatric evidence, rather than the framing of the elements of the defence.

To ensure the credibility of the social context evidence and the psychological evidence, four advocates believe the best strategy is for the woman's expert to testify only after hearing all the evidence. This protects the witness from the suggestion that s/he only relied on the woman's statements when assessing her psychology, rather than the objective facts. Thus, with the proper use of evidence, self-defence reform could be unnecessary.

One judge emphasised the above conclusions. Based on his experience in hearing domestic violence cases, the judge has rarely seen proper arguments and proper evidence of a pattern of abuse put before the court. Further, he believes there are insufficient experts who are sensitive to the pattern of abuse to be able to explain why the abuse is predictable and inevitable.

Although nearly all the criminal law experts thought these battered women could argue self-defence under the common law, the majority recommended statutory reform. One academic added that since the CSVr is seeking a large reform of the defence, the reform should fall within the province of the legislature. A judge further expressed the fear that relying on a common law reform through case law could be problematic if more conservative judges hear the cases and important evidence surrounding the social context of battering is not presented. This point was highlighted by one judge who said he would not expand the common law definition of imminence, which would be necessary to open self-defence to these women, for fear of setting precedent that would open the door to abuse of the defence.

An advocate strongly argued that legislation is not only unnecessary but could open the floodgates to spurious claims.

#### *2.1.3.2 Recommendations of Criminal Law Experts*

##### **General Comment**

One judge and one academic questioned the CSVr recommendations in Document 1 on the basis that many of these reforms already exist under South African common law.<sup>81</sup>

##### **Reform of Unlawful Act Requirement**

One judge expressed concern about the type of behaviour that would justify killing the abuser under the recommended statute. He asked whether a woman could kill her abuser for sexual abuse and rape, a proposition with which he does not agree because of the importance of the right to life protected by the Constitution.

##### **Reform of Imminence**

Two judges were concerned that the self-defence statute recommendation in Document 1 was too broad. One of the judges would rather see a statute that catches the essence of the problem these women have accessing self-defence, focusing on the elimination of the requirement of an imminent attack. He thought South Africa could follow Canada's lead by eliminating an imminence requirement to allow access to a defence where the person could show she had no reasonable alternative to killing her abuser, even in the absence of an imminent threat. However, a different judge concluded that South Africa should not follow the Canadian approach because of the social context differences between the two countries, particularly with respect to crime. This judge does not account for the fact that spousal

killing occurs in both countries.

Regarding the suggested reform to remove the imminence requirement that presently exists in self-defence, one judge warned against a shift towards allowing the proportionality requirement to then exclude these women.

### **Reform of Duty to Retreat**

One judge concluded that if the reform seeks to end a duty to retreat, it should apply to victims of domestic violence only.

### **Create a Modified Necessity Defence**

One academic proposed creating a statute that recognises an alternative form of necessity, where one can prove the absence of available alternatives even where there is no imminent attack and that an attack is inevitable, which would allow a person to resort to self-help.

### **Create a Victim's Defence**

Three judges and an advocate recommended creating a specific victim's defence specifically for victims of domestic violence. According to two of the judges, the legislation must explicitly exclude imminence as a requirement of the defence. One of the judges would qualify the defence by requiring that the woman exhausted all remedies before relying on the statute. Another judge felt that the statute must specifically include the different types of evidence necessary to prove private defence in a non-confrontational situation. Should a special victims defence be created, one advocate suggested that women who hire killers should not be allowed to use the defence.

Finally, one advocate suggested creating a separate defence based on battered women's syndrome.

### **Develop a Common Law Victim's Defence**

Using the common law, one judge recommended that instead of trying to pigeonhole battered women who kill in non-confrontational situations into self-defence, the advocate should frame the argument as a victim's defence based on self-preservation. He believed this was possible under the common law because of the compelling facts. The judge then explained the self-preservation argument based on the scenario in which the woman tried to go to the police, who were unhelpful. She tried to leave the abuser, but he followed her. All of this would show that she had no escape from inevitable abuse. If the advocate focuses on the facts and on the argument of self-preservation, rather than self-defence, the woman could be acquitted.

### **General Recommendation**

One judge was concerned to ensure that the reforms did not allow more people to resort to self-help rather than require them to seek institutional protections. He was concerned that shifting reliance away from institutional protection would allow people to justify killing more easily. This recommendation assumed that adequate institutional support for abused women already exists.

### **Conclusion**

Overall, a narrow majority of the experts advocated for statutory reform of self-defence to

open access to battered women who kill. Within this majority, most proposed a separate victim's defence. Nearly all the experts warned that any statute must be narrowly tailored to ensure that it is not opened to spurious claims of self-defence.

### *2.1.3.3 Responses of Criminal Law Experts to Women who Hire Third-Party Killers*

A segment of battered women who kill in non-confrontational situations contract the killings with third parties. Several of the experts commented on this phenomenon. One academic felt 'contract killing' cases would be the least likely to succeed on a claim of self-defence. A judge and two advocates suggested that if the woman could take the trouble to plan the murder, it would be hard to find that she had no alternatives to protect herself.

Two advocates and two judges think it may still be possible to argue self-defence even if a woman hired a third-party killer but it will be very difficult. If the court believes the woman needed to strike pre-emptively to stop her abuser from causing severe bodily harm or death, in theory it should not matter whether she used a contract killer as her weapon.

Finally, two experts suggested that such a defence would be impossible if the woman hired a killer. As a judge explained, third-party killer cases are classically self-help cases; they are "so coldly self-help" that they "stick in most people's throats".

### *2.1.4 Other Recommendations*

In addition to the reform recommendations described by the criminal law experts and contained in Chapter 3 of Document 1, CALS located a different recommendation for the reform of self-defence. Andrew Paizes argues that self-defence should have two prongs to its inquiry: "the first is whether you are, in law, entitled to inflict on your assailant the harm in question in order to prevent harm being done to you, and the second is whether, if in fact you were not entitled to do so, you can be blamed for having acted the way you have."<sup>82</sup> If a reasonable person had acted in the same manner as the accused, regardless of whether the action was unlawful, the person could not have had the requisite mens rea (criminal intent) to commit the crime and could also not have acted negligently; therefore s/he must be acquitted. This approach is consistent with the legal principles of the defence of compulsion described later in section 3.5.

### *2.1.5 Conclusion*

The consensus of criminal law experts and the review of the case law suggest that although it may be possible for a woman who killed her abuser to argue self-defence under the common law, these cases will be difficult. There are some experts who feel it was unnecessary to develop statutory reform to include these women into self-defence, as the law is sufficiently broad. A closer examination of the application of self-defence in the case law and of the opinions of the experts suggest that in reality most of the elements of self-defence present major obstacles for battered women who kill their abusers in non-confrontational situations. Much of this seems to stem from the belief that an abused woman can always safely leave the abusive situation and from an overall lack of understanding of these women's experiences.

Further, the majority of experts recommend that advocates of these women must embark on



a statutory law reform process, favouring the creation of a separate victim's defence statute.

## 2.2 Necessity

Criminal accused also use the necessity defence to negate the element of unlawfulness the prosecution is required to prove before a person can be convicted of a crime. As described in Chapter 5 of Document 1, courts developed the necessity defence to deal with situations in which people protect themselves, others or their interests through unlawful behaviour from harm caused by lawful conduct.<sup>83</sup> The courts give people the choice of the lesser of two evils – having their interests infringed by a lawful act or acting unlawfully.<sup>84</sup> A successful defence of necessity means that violating the law is less bad, and therefore more justifiable, than allowing the expected harm to occur.

In his treatise, Burchell explains the necessity defence in the light of criminal punishment goals. He notes that punishing someone who acted out of necessity serves no useful goal. Using a utilitarian argument, it would be better for society if the person actually chose the lesser of two evil choices. It would be seemingly unjust to punish someone for making a reasonable choice. Nor would the deterrent theory work because the defence assumes a person weighed the options before making a choice.<sup>85</sup>

The purpose of considering the necessity defence is twofold. First, Document 1 (section 5.3) examines recommendations for reforming the necessity defence to open it to battered women who kill their abusers in non-confrontational situations. Proponents argue that if the woman can show her action is necessary – based on evidence that the abuse is inevitable and inescapable – she should be allowed to access this justification defence. They hope it will allow a woman to respond to her abuser when defensive action becomes necessary, even in the absence of an imminent threat or attack. The second reason the defence is included in this document is that it is a defence to murder in very limited circumstances.

### 2.2.1 Elements

An accused must provide a foundation for each of the following elements:

- Her act must have been to protect a legally recognised interest;
- She was in danger from a threat of harm other than from unlawful conduct;
- This threat had begun or was imminent;
- The harm could not be stopped in any other way;
- The person must not be legally required to submit to the harm;
- The protective act must not be out of proportion with the harm expected;
- The accused must have acted reasonably.<sup>86</sup>

Courts apply the elements of the defence of necessity strictly and narrowly.<sup>87</sup> In his treatise, Snyman suggests this is because the defence is harder to justify on ethical grounds.<sup>88</sup> Whereas self-defence allows you to protect yourself from an unlawful attack, necessity allows you to protect your interests against lawful behaviour.

It is unclear whether courts allow an accused to argue this defence even if s/he created the necessity. Snyman suggests they should allow for the argument or else it "would mean that

because of X's carelessness, her baby swallowed an overdose of pills, X would not be allowed to exceed the speed limit while rushing the baby to the hospital, but would have to resign herself to the child's dying."<sup>89</sup> However, the court in *S v Kibi*, 1978 (4) SA 173 (EC) seems to have added the element that the threat must not have been caused by the accused.<sup>90</sup>

### **Legally recognised interest**

To use the necessity defence, an accused must lay the foundation that s/he was protecting a legally recognised interest when s/he acted. There appear to be no specific limitations on the types of legally recognised interests that can justify a necessity claim. In their respective treatises, Snyman and Burchell recommend that in addition to the legal interests of life, bodily integrity and property,<sup>91</sup> a person may protect against attacks on dignity, freedom and chastity (or such interests of another).<sup>92</sup> An accused, however, cannot use the defence if the legally recognised interest is purely economic.<sup>93</sup>

South African courts would probably have difficulty locating the act against which the accused was defending when a battered woman kills her abuser in a non-confrontational situation. The necessity defence is interpreted much the same as self-defence, which means the problems women face meeting the element of an act under self-defence will exist under necessity.

### **Threat of harm**

A person who acts under necessity must be responding to some threat of harm. There are no specific requirements for what or who must have precipitated the harm, meaning "It is immaterial whether the threat of harm takes the form of compulsion by a human being or emanates from a non-human agency such as force of circumstances."<sup>94</sup>

Despite this inclusive approach, the main barrier to abused women who wish to use this defence is that its purpose is not to allow a person to respond to an unlawful attack by another individual, but to allow her to respond to a threat to her interests from another source. As the Appellate Division wrote in *S v Goliath*:

In our legal system a distinction is drawn between self-defence and necessity as grounds which (sic) exclude punishment. In the case of self-defence a person acts to avert an unlawful attack made on his rights by another person. In the case of necessity a person infringes upon the rights of another under force of circumstances which (sic) are created by forces of nature or a third person.<sup>95</sup>

Because the threat of harm must come from something other than an unlawful act, battered women who kill their abusers cannot argue this defence.

Interestingly, unlike most of the comparative law jurisdictions that do not recognise a defence of necessity to murder, South Africa provides more opportunity for a person to argue that his/her interest in life outweighs the interests in life of another. If this defence was reformed to allow a person to act in necessity, even against an unlawful attack, this difference could allow access to the defence to battered women who kill their abusers in non-confrontational situations. This would allow courts to recognise the domestic violence

victim's interest in life outweighs the abuser's interest in life when the abuser is threatening the victim's life.

### **Imminence**

Like self-defence, the necessity defence requires that the threatened harm be imminent – meaning that it must be immediately threatened or have already occurred, but not yet have been concluded.<sup>96</sup> The court in *S v Mtwetwa* explained imminence differently: "The question of the imminence of the threat relates to the probability of it being put into effect and the means available to the accused to avert the harm with which he had been threatened." This language could be particularly helpful to battered women who could use evidence of a pattern of abuse to show the probability of harm and, depending on the circumstances, may be able to show she had no alternative.

Despite the helpful language in the *Mtwetwa* decision, the *Kibi* decision seems likely to inhibit the use of the necessity defence for battered women who kill in non-confrontational situations. In *Kibi*, the court required an explicit, continuing threat to justify the imminence element of the defence. The *Kibi* court concluded that the accused did not meet this element when he argued that the reason he lied in his testimony was that he was being tortured into doing so. The accused explained that he had been tortured and persistently interrogated on 24 October 1977 and out of fear of more of such treatment, he lied in his testimony to court in the following days. The court concluded: "Whatever misgivings the assaults on 24 October 1977 might have had on the appellant it was not alleged that there were any further assaults during the next ensuing 11 days."<sup>97</sup>

In the *Kibi* decision, without an explicit, on-going threat, the court was not convinced the accused acted out of necessity.<sup>98</sup> This reading of imminence would prove problematic for abused women who understand the ongoing implicit threat where no explicit threat exists.

The decision in *S v Mandela*, 2001 (1) SACR 156 (C) seems to further inhibit a wider view of the definition of imminence. In *Mandela*, the accused argued compulsion as a defence to murder after he was told that if he did not kill an acquaintance the next day, he would be killed. The court accepted the threat existed but could not locate imminence.<sup>99</sup> The court was not convinced that the accused could not have found a different solution to deal with the threat before it would be carried out the following day.

The *Mandela* judgment leaves open the question of whether the accused could have successfully defended against a charge of murder had he gone to the police for help and the police did nothing. Based on the interviews with the criminal experts, however, even that might not be enough for a court to conclude there were not other solutions. Nearly all the experts stated that a battered woman must attempt to leave her abuser before she could claim no other alternatives were open to her. Following this line of reasoning, the accused in *Mandela* must have tried to leave and to go to the police, unsuccessfully, before he could have argued necessity.

As in self-defence, the imminence requirement creates an enormous barrier to the defence of necessity (assuming the defence was reformed to allow a person to respond to an unlawful attack.)

### **No other option**

The defence of necessity requires the accused to provide a foundation to meet the element that s/he had no less harmful option than the course s/he took to defend the legally recognised interest. As seen in the above section as well as in Document 1, the elements of imminence and no other option are directly related, as courts use imminence to explain the lack of alternatives.

With respect to abused women who kill, many of the criminal law experts believe an abused woman always has the option of leaving her abuser, particularly if she killed during a non-confrontational situation, which would exclude these women from the defence.

### **Proportionality**

The proportionality requirement of this defence is a large obstacle for many accused. The accused must literally choose the lesser of the two evils – or choose to infringe the lesser interest to benefit from the defence. This requires the courts to weigh the two interests that conflict.<sup>100</sup>

Importantly, in very limited circumstances, South African courts have allowed a person to argue necessity when s/he was given a choice to kill another person or to be killed. These cases are referred to as compulsion cases, several of which have already been described.

### **Reasonableness**

The reasonableness standard for necessity is identical to the standard for self-defence. Reasonableness will be determined based on a reasonable person in the same circumstances as the accused at the time s/he acted.<sup>101</sup> In his treatise, Burchell defined the test as: "whether, in all the circumstances, a reasonable person would be expected to resist the threat."<sup>102</sup>

As the necessity defence exists now, reasonableness remains an obstacle for battered women who kill their abusers. Based on discussions with criminal law experts, many people believe that women who kill in non-confrontational situations cannot be acting reasonably. For the reasons described previously, this conclusion shows that many people do not understand the experiences of abused women.

#### **2.2.2 Recommendations**

Reform recommendations for battered women who kill their abusers within the defence of necessity are described fully in section 5.3 of Document 1.

#### **2.2.3 Conclusion**

Those who suggest using the necessity defence for battered women who kill their abusers hoped the defence would allow for a broader definition of necessity, excluding a temporal requirement of imminence. Even to the extent a court may adopt the Mtwetwa approach to imminence, courts will have a difficult time allowing a person to defend against an unlawful attacker under necessity, when theoretically the act belongs under self-defence. The defence would need to undergo many reforms, including to the theoretical underpinnings of the defence, before it could be used for battered women who kill; this is

the same conclusion reached in Chapter 5 of Document 1.

### **Chapter 3: Excuse defences for battered women who kill**

#### **3.1 Putative Private Defence**

Putative private defence applies to those situations in which a person mistakenly believed s/he was acting in private defence.<sup>103</sup> It negates the mens rea element of intention the prosecution is required to prove before a court will convict an accused of murder.<sup>104</sup> Because s/he thought she was acting lawfully, a court cannot conclude s/he intended to act unlawfully.<sup>105</sup> An accused that succeeds with this defence will not be convicted of murder, but could be convicted of culpable homicide.<sup>106</sup> It is for this reason that it is a partial defence, not a full defence.

Once the charges are reduced to culpable homicide, if a prosecutor proves beyond a reasonable doubt the accused was negligent in believing s/he was acting lawfully, s/he could be convicted; if not, s/he will be acquitted of both murder and culpable homicide charges. Stated differently, "The issue would be whether a reasonable man in the same circumstances as X, and given X's capacities and knowledge, would have believed that he was legally entitled to kill Y. If the reasonable man would not have made the mistake X made, X would have the mens rea of culpable homicide."<sup>107</sup>

##### **3.1.1 Elements**

Putative private defence requires a person to honestly believe s/he was acting in private defence, but that the person either: (1) mistakenly held that belief; or (2) exceeded the bounds of private defence.<sup>108</sup>

##### **Honest Belief**

The most important requirement of putative private defence is that the accused honestly believed s/he was acting in private defence. An accused who is aware that s/he is acting unlawfully, or foresees that s/he could be acting unlawfully, including by being aware or foreseeing that s/he may be exceeding the bounds of private defence, cannot meet the elements of this defence and can be convicted of murder.<sup>109</sup>

The test for determining whether an accused held an honest belief s/he was acting in private defence is subjective.<sup>110</sup> According to the criminal law experts, however, in testing the credibility of the accused, and therefore his/her honest belief, the court will consider whether a reasonable person would have held that belief. The more unreasonable the accused's claimed honest belief, the less likely the court will consider him/her to be credible.

Two criminal law experts believe this credibility test could limit battered women's access to putative self-defence. As one academic explained, no woman who kills without the appearance of an imminent attack could have reasonably believed she was acting lawfully. These opinions illuminate the difficulty abused women will have accessing putative self-defence. They evidence the failure of the criminal law system to fully understand women's

experiences with violence. As a result, courts (and practitioners) will continue to believe not only that abused women can leave their abusers but also that the option is obvious to the women. Therefore courts will not find it credible that these women honestly believed they were defending themselves.

### **Exceeded Bounds of Self-Defence**

There are two ways in which a person may be disqualified from self-defence but could argue putative self-defence. The first is when a person exceeds the bounds of private defence by using too much force when defending against an unlawful act.<sup>111</sup> If the person subjectively realised the possibility that s/he was exceeding those limits when s/he killed an attacker, s/he cannot argue putative private defence and should be convicted of murder. As the Appellate Division described in *S v Ntuli*, 1975 (1) SA 429, "If you kill intentionally within the limits of self-defence, you are not guilty. If you exceed those limits moderately you are guilty of culpable homicide; if immoderately, you are guilty of murder."<sup>112</sup>

Women who kill their abusers may have difficulty explaining how they did not realise they were exceeding the bounds of self-defence when they killed a passive person in a non-confrontational situation.

### **Mistake of Fact**

The second method by which a person may argue putative private defence is if s/he honestly, but mistakenly believed s/he needed to act defensively.<sup>113</sup> This formulation is different from putative self-defence in other jurisdictions, where a person who honestly, but unreasonably believes s/he needed to act in self-defence can meet the elements of putative self-defence.

One could argue that this is a semantic debate. One judge, however, concluded that battered women who kill in non-confrontational situations would have difficulty meeting the elements of putative private defence because courts typically apply the defence when a person mistakenly believes there is an attack and where there is some evidence to suggest an attack.<sup>114</sup> She feels the latter element is missing in the non-confrontational killing cases.<sup>115</sup> In contrast, another judge concluded that the mistake occurs when a woman believes she has no alternative but to kill, although she does have other available options to protect herself.

It is unclear which interpretation will prove true. Should the courts follow the former interpretation, requiring some evidence to justify the woman's conclusion that an attack was going to occur, the woman might be able to use a pattern of abuse to provide the evidence. The problem with this approach is that it will become far too easy for a court to justify a finding of putative self-defence, rather than self-defence, in all non-confrontational cases.

The better approach for including abused women within this defence is to follow the foreign law approach that allows the accused access to the defence when she believes she was acting in self-defence but the belief was unreasonable.

#### ***3.1.2 Recommendations of Criminal Law Experts***

Most of the experts interviewed believe that battered women who kill in non-

confrontational situations could argue putative self-defence where they cannot prove the inescapability of the abuse (that she had no other options)<sup>116</sup> or its inevitability. Without explanation, however, one judge stated that opening putative self-defence to battered women who kill in non-confrontational situations presents philosophical and policy problems.

One judge suggested that putative self-defence is open only to those women who try other options to escape the abuse before resorting to killing their abusers. This suggests a reasonableness requirement that is otherwise not an element of putative self-defence. It seems to create an added barrier for abused women that does not exist for others who claim the defence.

One advocate felt that battered women who kill their abusers in non-confrontational situations, because they believed they were defending their lives, should argue putative self-defence. Otherwise, he said a battered woman could never reasonably believe she was acting lawfully in the absence of an imminent attack. Advocates for abused women fear this approach. It suggests that one result of domestic violence and of women's fear of their abusers is that they lose their ability to act like a reasonable person. This approach misunderstands the experiences of abuse victims.

Another advocate argued this is the only defence available for a woman who hires a third party to kill her abuser. This approach fails to account for situations in which women can show the necessity of responding in self-defence, even without an imminent attack. If a woman acts in self-defence in a non-confrontational situation, it is logically inconsistent to limit the means she uses to defend herself.

One academic believes that not only could some of these women access this defence, but also a few could avoid punishment completely because the prosecution would not be able to prove they were negligent in believing they needed to kill their abusers. He suggested that social context evidence could show the woman did not unreasonably make the mistake. In contrast, another academic feels it will be a very rare case in which a battered woman who kills in a non-confrontational situation will be acquitted of culpable homicide once she uses putative self-defence to negate a murder charge.

Two advocates recommended a method for bypassing the potential hurdle created by the credibility test. They suggested using expert psychological evidence of the effects of abuse to help determine that the woman honestly believed she was defending herself. One of these advocates also suggested using this evidence to explain why the woman was not negligent in her beliefs, and therefore should be acquitted of culpable homicide.

Of great concern to proponents of this defence is that four advocates reported that courts do not like putative self-defence, which means it could be very difficult for these women to argue the defence.

Finally, taking a minority position, one judge concluded that because putative private defence requires a mistake of fact, something missing in the battered women cases, the legislature must create a putative victims' defence to allow access to a partial defence to murder.

### 3.1.3 Conclusion

Based on the case law and the majority of interviewees' opinions, putative private defence appears to be a viable option presently for battered women who kill. The research noted some concerns, such as whether a credibility test as to the honest belief will exclude many women and whether a court must locate a mistake before applying the defence. Expert testimony could be used to aid women faced with either of these problems.

### 3.2 Putative Necessity Defence

Interestingly, in his treatise, Burchell suggests that courts could recognise a putative necessity defence, much like putative private defence.<sup>117</sup> "Where the accused genuinely but mistakenly believed that he or she was acting in a situation of necessity then no liability for an offence based on intention could result because knowledge of unlawfulness would be lacking."<sup>118</sup> The defence would reduce the charge to culpable homicide, at which point the prosecution would need to prove the accused negligently reached the mistaken conclusion.

This defence only becomes important for battered women who kill their abusers if the law of necessity is reformed to accommodate these women.

### 3.3 Provocation

South Africa does not recognise a separate partial-excuse defence of provocation, although until around 1970 provocation was a separate defence.<sup>119</sup> The rationale for the change seems to be a desire to stop criminal law from rewarding the short-tempered person for acting impulsively with a special defence and that "society expects its members ... to keep their emotions sufficiently in check to avoid harming others."<sup>120</sup> Instead, an accused may argue provocation as a factor that should mitigate his/her sentence, or in extreme cases that the provocation resulted in non-pathological criminal incapacity.<sup>121</sup> Arguably, provocation can also be used to counter a finding of intention.

For purposes of this discussion, severe emotional stress will be included within the confines of provocation, as that is how courts and academics treat emotional stress.<sup>122</sup> This point is particularly important in the context of battered women who kill their abusers in non-confrontational situations because the build-up of stress is typically what provokes their actions.

This report will discuss provocation as a mitigating factor for sentencing in section 4.2 below. It will also discuss provocation that results in criminal incapacity in section 3.6 below. This section only explores whether the accused can defend against the prosecution's evidence that s/he intended to kill the deceased.

South African case law and legal commentary dispute whether an accused may use provocation to defend against a finding of intention. In murder cases this would mean an accused could be convicted of culpable homicide only, and not murder. The ambiguity lies in the reading of the *Eadie* decision. In *Eadie*, the Supreme Court of Appeal stated that:

Mitigating factors should rightly be taken into account during sentencing. When



an accused acts in an aggressive goal directed and focused manner, spurred on by anger or some other emotion, whilst still able to appreciate the difference between right and wrong and while still able to direct and control his actions, it stretches credulity when he then claims, after assaulting or killing someone that at some stage during the directed and planned manoeuvre, he lost his ability to control his actions. Reduced to its essence it amounts to this: the accused is claiming that his uncontrolled act just happens to coincide with the demise of the person who prior to the act was the object of his anger, jealousy or hatred.  
[123](#)

Later the court stated: "The message that must reach society is that consciously giving into one's anger or to other emotions and endangering the lives of motorists or other members of society will not be tolerated and will be met with the full force of the law."[124](#) The court rejected that a person provoked into goal-directed and controlled actions can argue total loss of control resulting in legal incapacity (which will be discussed fully in section 3.6). What remains unclear is whether provocation resulting in such controlled behaviour can negate intention, which would reduce a charge to culpable homicide.

A close look at the *Eadie* decision leads to the conclusion that the court envisages that provocation results either in uncontrolled, automatic behaviour deserving of a defence of non-pathological criminal incapacity, or in a person's "consciously giv[ing] into one's anger", which negates a positive defence. Unless a person can show non-pathological criminal incapacity, s/he must have had some control over his/her behaviour, and therefore acted intentionally, possibly simply by losing control. An accused who falls into the latter category will have no choice but to use the provocation as a mitigating factor at sentencing.

This reading of *Eadie* is supported by an earlier Supreme Court of Appeal decision in which the court wrote: "Criminal conduct arising from an argument or some or other emotional conflict is more often than not preceded by some sort of provocation. Loss of temper in the ordinary sense is a common occurrence. It may in appropriate circumstances mitigate, but it does not exonerate."[125](#)

Two advocates agree with this reading of *Eadie* decision.

To the extent provocation does serve to negate the element of intention, it assumes that the accused committed a voluntary act but was unable to appreciate the unlawfulness of his/her conduct at the moment s/he acted.[126](#) Such a failure to appreciate unlawfulness excludes intention.[127](#)

Because provocation is not a separate defence, it does not have particular elements. Instead:

... liability is determined simply by asking the ordinary questions relating to liability, namely whether, in spite of the provocation, there was an act which complied with the definitional elements of the crime, whether the act was unlawful, whether X has criminal capacity and whether he acted intentionally or negligently.

Typical elements of the defence of provocation in foreign jurisdictions are factors for

consideration in assessing liability.

An accused who wishes to rely on provocation to negate intention must lay the proper foundation in evidence of the provocation and its effects on him/her.<sup>128</sup> A claim that s/he "was so enraged that [s/]he did not know what [s/]he was doing" will not be sufficient to meet this burden,<sup>129</sup> particularly if the provocation is of a type commonly faced in everyday life. Instead, courts are likely to apply the subjective/objective test defined in *Eadie*. They will "test the accused's evidence about his state of mind, not only against his prior and subsequent conduct, but also against the court's experience of human behaviour and social interaction."<sup>130</sup>

This is the same reasonableness test applied under putative self-defence. It requires evidence that the person honestly responded to the provocation with a loss of self-control. To determine whether the response was honest, the court tests the credibility of the accused by testing whether a reasonable person would have responded the same way. The less likely a reasonable person would have responded to the provocation with loss of control, the less likely the court would believe the person acted that way.

Another factor South African courts consider is whether the accused had time to cool off before responding to the provocation.<sup>131</sup> This factor, however, is not to be decided in a "mechanical fashion",<sup>132</sup> which appears to be the approach of foreign jurisdictions. Courts take a similar approach when considering the proportionality between the provoking act and the accused's response.<sup>133</sup>

There are no specific requirements as to what the provoking act must be. It may be insulting or threatening words or it may be particular conduct on the part of the provoker.<sup>134</sup> Instead, the courts look at the emotion, whether "jealousy, mercy, anger or fear", as "the emotion is the natural response to some circumstance ... that has driven or 'provoked' the actor in doing what he or she does."<sup>135</sup> The accused may also respond to provocation aimed at another person, rather than him/herself, particularly if there is a relationship between the third party and the accused.<sup>136</sup>

Arguing provocation, however, is a double-edge sword. Instead of negating intention, courts often find that the provocation confirms the accused's intention to murder.<sup>137</sup> The provocation provides the motive for the killing.<sup>138</sup> For example, in *S v Mokonto*, 1971 (2) SA 319 (A), the Appellate Division concluded that an accused intentionally killed a woman who had provoked him with a threat of death through witchcraft: "... if provocation played any part in his (the accused's) conduct, far from negating intention to kill it contributed to such intention ... . Hence there is no room for a verdict of culpable homicide."<sup>139</sup>

### **3.3.1 Recommendations of Criminal Law Experts**

If advocates for abused women who kill wish for a partial defence to murder based on extreme emotional stress or provocation, one judge recommended legislating for a special defence for victims of domestic violence.

### 3.3.2 Other Recommendations

The first reform recommendation for provocation is that in any consideration of the doctrine, whether for sentencing, as evidence of lack of intention or to prove criminal incapacity, the accused's behaviour must have been reasonable.<sup>140</sup> The rationale for this recommendation is that courts must consider moral blameworthiness when deciding on a sentence. This arguably "can be ascertained only by bearing in mind what the legal order could reasonably have expected of him."<sup>141</sup> Blameworthiness should be considered based on community standards. In light of the credibility test applied by the *Eadie* decision, one could argue that this reform has been adopted already.

In his treatise, Snyman disagrees with a reasonableness or objective approach to provocation. He concludes: "the problem with using an objective test is that it requires everyone, whatever his/her culture or background, to observe the same standard which would be what is 'fairly and reasonably expected of a white person of ordinary knowledge, experience and capacities'."<sup>142</sup>

Another reform recommendation is to require courts to find provocation as a mitigating factor, a negation of intention, or as resulting in criminal incapacity only if the provoking act is unlawful.<sup>143</sup> One judge concluded that this is de facto the law in South Africa, at least as applied by the "good" judges. This approach protects against men using provocation to explain femicide.

A final recommendation is to create a partial-excuse defence based on provocation where the provoking act is unlawful. This would fill the gap in South African criminal law, which has no defence for a person who feels they lost control other than if they were acting as an automaton at the time of the commission of the crime. The benefit of the defence would be that an accused who meets the defence would not be convicted of murder, which for battered women who kill their abusers appears appropriate. Secondly, it would force the court to consider what are normally mitigating factors when determining liability. Finally, it would protect against femicide being even partially excused. A man will not be able to argue the effects of jealousy, possessiveness and anger at a woman's lawful behaviour to reduce his charges for killing her.<sup>144</sup> One judge supports this recommendation because he fears his colleagues may not be able to understand the abuse as a mitigating factor.

### 3.3.3 Conclusion

To the extent provocation is a consideration for any of the three purposes for which it may be used, South Africa provides the widest latitude in interpretation. Unlike most of the foreign jurisdictions researched, South Africa readily accepts the cumulative effects of emotions, including of fear and emotional stress when determining whether the provoking act resulted in the accused's loss of self-control. This is particularly important for battered women who kill their abusers after losing control. Unfortunately, as will be described later in section 6.1, in practice courts fail to recognise the cumulative effects in many of these cases.

### 3.4 Diminished Capacity

South African criminal law does not have a partial-excuse defence of diminished capacity. Courts consider diminished capacity when deciding whether to mitigate a sentence of an accused, treating it identically to provocation. The broad approach to the types of emotions and factors that can result in diminished capacity could greatly benefit battered women who kill if applied to them properly.

### 3.5 Necessity as an Excuse

As described in section 2.2 earlier, necessity typically serves as a justification for unlawful behaviour against an innocent victim. South Africa also recognises necessity as a full excuse to murder in very limited circumstances. The only such circumstances in which courts have recognised necessity as an excuse is when the accused was under the force of compulsion of a third party to kill the victim.<sup>145</sup> The theory behind this defence is that if a reasonable person had submitted to the compulsion, then it would be unfair to expect the accused to have acted as a hero and a martyr by doing more than a reasonable person would do.<sup>146</sup> Thus the accused cannot "be blamed for committing an unlawful act – even if she acts intentionally and with awareness of unlawfulness."<sup>147</sup> As an excuse, the act itself remains unlawful but the accused cannot be blamed for his/her actions.

To qualify for a defence of compulsion, or necessity as an excuse, the accused must be aware of the threat and must believe that the third party will follow through the threat.<sup>148</sup> If there are any other available means to avoid committing the unlawful killing, the accused cannot invoke this defence.<sup>149</sup> As seen in the case *S v Mandela*, 2001 (1) SACR 156 (C), the prior requirement of no other means to avoid the threat translates into an imminence requirement. In *Mandela*, the accused killed an acquaintance following a threat and the belief that if he did not, he would be killed himself the next day. The Cape High Court wrote:

A person who is faced with the most agonising of choice of safeguarding his own right to life at the expense of another's right to life may be regarded as not having the requisite mens rea (although he may have culpa when he fails an objective test). However given the exquisite balance between the conflict between the two right bearers of this most precious of rights, a Court can only find necessity to be a defence, such that the accused then lacks the requisite culpability, in circumstances where the danger of death cannot be averted, save by acts of heroism which extend beyond the capacity that should, and can, be demanded of the reasonable person.<sup>150</sup>

The court concluded that because the accused did not expect the third party to follow through on the threat until the following day, "there was no immediacy of life threatening compulsion."<sup>151</sup> The court accepted the threat as genuine. However, it stated: "Were a court to accept so low a standard in finding the existence of such a defence it would be guilty of demanding very little from members of our society, which is now a constitutional community based on fundamental principles including those of freedom, dignity, ubuntu and respect for life."<sup>152</sup> This latter statement is consistent with all of the defences to murder.

Although compulsion remains a defence to murder, there is some question of whether allowing such a defence violates the Constitution. Now that the right to life is explicitly protected by the Constitution, can a court essentially weigh one person's life against another's to determine whether a person acted reasonably under compulsion?<sup>153</sup>

The compulsion/necessity excuse defence is not presently applicable to battered women who kill their abusers. The defence assumes that a third party imposes a threat on the life of the accused to kill the victim. In the battered woman situation, one would be arguing that the victim compelled the accused to kill him,<sup>154</sup> a situation presently not covered by the compulsion/necessity excuse defence.

### **3.6 Non-Pathological Criminal Incapacity**

Non-pathological criminal incapacity is a defence that counters the element that an accused acted voluntarily, which is necessary to convict him/her of a crime.<sup>155</sup> Essentially, "the human mind must be in control of the act that he has performed" in order to be found criminally responsible.<sup>156</sup> Under this defence, an accused claims that s/he was incapable of self-control at the time s/he acted. As a result, she did not have the necessary cognitive function to commit the crime.<sup>157</sup> The accused also claims that a pathological mental problem or disease did not cause the incapacity and that it is of a temporary nature.<sup>158</sup> The cause of the incapacity is what differentiates this defence from insanity. If the loss of capacity is "due to factors such as intoxication, provocation and emotional stress, it is termed non-pathological incapacity."<sup>159</sup> If the accused succeeds at the defence, s/he must be acquitted of the crime.<sup>160</sup>

The legal theory behind this defence is that if a person was unable to control him/herself, s/he should not be treated as culpable for having committed a crime. South African courts are wary of the application of the defence, fearing that it is far too easy for a criminal defendant to argue criminal incapacity.<sup>161</sup> As a result of this fear, the Supreme Court of Appeal, in its *Eadie* decision, clarified the principles of the defence in hopes that the courts would stop the accused from abusing the defence.<sup>162</sup> The *Eadie* decision is discussed fully below.

#### **3.6.1 Elements**

To succeed in a defence of non-pathological criminal incapacity, the accused must provide evidence of a precipitating event that caused him/her to lose the ability to distinguish right from wrong or act in accordance with what is right or wrong. Since the *Eadie* decision, non-pathological criminal incapacity is now treated as identical to sane-automatism, when a person acts without any will and as an automaton. In the court's words: "It must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism."<sup>163</sup>

As with all criminal defences, the accused must lay the foundation for each element of the defence and the prosecution must disprove the defence beyond a reasonable doubt.<sup>164</sup> The prosecution is aided in its burden by "the natural inferences that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily

give rise to criminal liability, does so consciously and voluntarily."<sup>165</sup> Further, courts will carefully scrutinise all elements of the evidence to stop the abuse of the defence.<sup>166</sup>

### **Loss of capacity**

To succeed on a defence of non-pathological criminal incapacity, a person must lay the foundation for a finding that she did not know what was right or wrong.<sup>167</sup> Also, that she could not act in accordance with that knowledge at the time the crime was committed.<sup>168</sup> While this has always been South Africa's test for criminal capacity, the *Eadie* decision questioned whether an accused could prove that despite retaining the ability to distinguish between right and wrong, s/he could not act based on that knowledge. The Supreme Court of Appeal wrote: "Whilst it may be difficult to visualise a situation where one retains the ability to distinguish between right and wrong yet loses the ability to control one's actions, it appears notionally possible."<sup>169</sup> This conclusion changes the nature of the defence as many courts found criminal incapacity based on what is now only "notionally possible."

Because that second method of showing incapacity – a loss of control when one knows it is wrong – has been called into doubt, it is no longer enough to show that the person had "an inability to restrain oneself, or an inability to resist temptation, or an inability to resist one's emotions."<sup>170</sup> As the Supreme Court of Appeal described, to allow someone to argue "the devil made me do it" to escape liability for a criminal act "does violence to the fundamentals of any self-respecting system of law."<sup>171</sup>

The court described the circumstances as rare in which a person would be able to meet the elements of the defence.<sup>172</sup> Some experts felt that as a result of the *Eadie* decision, it would now be nearly, if not actually, impossible to prove non-pathological criminal incapacity.

Courts determining an accused's capacity employ a subjective test to determine whether the accused suffered from non-pathological criminal incapacity at the time of the killing.<sup>173</sup> They ask whether the person suffered from criminal incapacity, and not whether a reasonable person in the accused's shoes would have suffered from such incapacity in the face of particular events.

However, before reaching a final conclusion, the courts must also employ an objective test – was it reasonable for the accused to have lost control – to determine the credibility of the accused's subjective claim.<sup>174</sup> If the accused fails the objective test, it calls into question whether, subjectively, s/he lost control. This is identical to the courts' approach to the question of the accused's honest belief raised under putative self-defence and whether the accused acted in response to a provocation. For example, in *Eadie*, one of the deciding factors against finding incapacity was that "... hundreds of thousands of people daily find themselves in similar or worse situations, yet they do not go out clubbing fellow motorists to death when their anger may be provoked."<sup>175</sup>

When adding the objective element to the determination of capacity, the Supreme Court of Appeal wrote that the defence was easily abused because of the "misapplication" of this test:

Part of the problem appears to be ... a too-ready acceptance of the accused's

*ipse dixit* concerning his state of mind. It appears ... to be justified to test the accused's evidence about his state of mind, not only against his prior and subsequent conduct but also against the court's experience of human behaviour and social interaction.<sup>176</sup>

Certain behaviours indicate whether a person suffered from non-pathological criminal incapacity. When properly employing this test, courts must consider the accused's actions at all times surrounding and during the unlawful act, watching for goal-directed, focused behaviour.<sup>177</sup> Goal-directed behaviour suggests the person was acting with control.<sup>178</sup> For example, in *S v Kali*, [2000] 2 All SA 181 (CK), the High Court concluded that the accused was not suffering from incapacity due to rage after he shot and killed members of his girlfriend's family but not everyone in the room. Although the court accepted the accused acted in rage, he could not benefit from the defence because "... his actions were directed at certain individuals only and do not reflect an involuntary or uncontrollable course of conduct."<sup>179</sup> A court, however, may find that an accused acted with incapacity if his/her actions appeared controlled, but where the actions were the type regularly performed by the accused.<sup>180</sup> Courts accept that a person maintains motor functions even while acting automatically but will only perform functions s/he has performed before.<sup>181</sup> Automaton do not control their actions; instead their body performs motor functions it remembers from previous occasions. So, for example, if a person takes the firearm from a safe using a key, which she has never done before, courts will conclude she was acting with control because the action is not part of her muscle memory.

When looking at the accused's actions after the killing, courts further consider whether the person appeared dazed and confused or in control. A person who appears in control is less likely to have suffered from non-pathological criminal incapacity. Confusion, however, is consistent with the behaviour of someone emerging from sane automatism.<sup>182</sup>

Another element courts look for to determine whether a person acted as an automaton is whether s/he remembers the event. They insist the accused must have "true absence of memory rather than a retrograde loss of memory after the event" as it is not uncommon for someone to suffer from amnesia after witnessing or participating in a horrific event."<sup>183</sup> An accused, however, cannot succeed in the defence merely by showing s/he acted irrationally, or that s/he cannot remember the event.<sup>184</sup> Courts need to assure themselves that they do not confuse someone's loss of temper with loss of control.

Courts further warn about using expert evidence to prove criminal incapacity:

The need for careful scrutiny of such evidence is rightly stressed. Facts, which (sic) can be relied upon as indicating that a person was acting in a state of automatism, are often consistent with the reasons for the commission of a deliberate, unlawful act. Thus – as one knows – stress, frustration, fatigue and provocation, for instance, may diminish self-control to the extent that, colloquially put, a person snaps and a conscious act amounting to a crime results.<sup>185</sup>

The hardest aspect of the element of capacity for battered women who kill in non-

confrontational situations to overcome is the evidence of goal-directed behaviour. A woman who hires a third-party killer cannot easily show she was acting as an automaton. Even women who do not use third parties may still have difficulty showing they were not acting in a goal-directed manner, partly because many will not be able to argue that they were, for example, in the habit of taking a firearm (particularly from a safe).<sup>186</sup> Unless the accused was in the habit of shooting a firearm, the argument will also be difficult.

### **Cause/Triggering Event**

As discussed earlier, the main restriction on what may cause the incapacity is that it must not be a pathological mental defect or disease, as that is what distinguishes this defence from insanity. Courts do look for a triggering event that sets off a state of automatism and that event must be sufficiently serious to cause such a state.<sup>187</sup> The Supreme Court of Appeal in *S v Henry*, 1999 (1) SACR 13, held that a:

Trigger mechanism ... was required to induce a state of psychogenic automatism. There had to be some emotionally charged event or provocation of extraordinary significance to the person concerned and the emotional arousal that it caused had to be of such a nature as to disturb the consciousness of the person concerned to the extent that it resulted in unconscious or automatic behaviour with consequential amnesia.<sup>188</sup>

There seem to be no specific requirements as to the precipitating event or the emotions that the event evokes.<sup>189</sup> The non-capacity could result from "emotional collapse, emotional stress, total disintegration of the personality, or it may be attributable to factors such as shock, fear, anger or tension."<sup>190</sup> A person may be responding to an immediate provocation or provocation or stress built up over a long period of time;<sup>191</sup> or, the incapacity may result from a combination of factors, such as stress and intoxication.<sup>192</sup> Or, s/he may be responding to the "insulting or oppressive conduct of another person, ... pre-menstrual stress suffered by a woman or ... overwhelming and debilitating social conditions."<sup>193</sup> South Africa places few limits on what may cause the incapacity for purposes of this defence.

Courts, however, are wary of finding a loss of criminal capacity as a result of provocation.<sup>194</sup> There is some suggestion that courts expect that only a build up of stress or provocation will cause a person to suffer from non-pathological criminal incapacity:

The chances of X's succeeding with this defence if he became emotionally disturbed for only a brief period before and during the act, are slender. It is significant that in many of the cases in which the defence succeeded or in which the court was at least prepared to consider it seriously, X's act was preceded by a very long period – months or years – in which his level of emotional stress increased progressively. The ultimate event which led to X's firing the fatal shot can be compared to the last drop in the bucket which caused it to overflow.<sup>195</sup>

Battered women who kill in non-confrontational situations may well find they have access to the defence if they acted without control.



For people who fear that men will be able to use provocation resulting in criminal incapacity to defend against killing their intimate female partners, those fears in South Africa are very real. As Snyman points out in his treatise, "if there is evidence of provocation the important question is not what was the nature of the provocative behaviour, but what effect it had on X's mind or mental condition." This means South African courts could acquit a man of killing his partner if he acted out of jealousy and possessiveness or was angry that she left him, as long as the emotion resulted in criminal incapacity.

Interestingly, one judge explained that "good" judges would find non-pathological criminal incapacity only if the accused responded to an unlawful triggering event/act. Although theoretically whether the trigger was a lawful act should be irrelevant, the "good" judges de facto make it relevant.

### ***3.6.2 Evidence***

Unlike insanity, where expert evidence is needed to support the defence, the law does not require expert back-up to a claim of non-pathological criminal incapacity as a defence to a wrongful act, although courts strongly advise it.<sup>196</sup> Expert evidence "may relate to such matters as the nature of the emotional stimulus which it is alleged served as a trigger mechanism for the condition, or the nature of the behaviour or aspects of it which may be indicative of the presence or absence of awareness and cognitive control."<sup>197</sup> Also, it is for the court "... to decide the issue of his criminal responsibility for his actions, having regard to the expert evidence and to all the facts of the case including the accused's actions before, during and after the relevant phase."<sup>198</sup>

### ***3.6.3 Battered Women's Claims of Non-Pathological Criminal Incapacity***

A review of the cases located in which battered women argued non-pathological criminal incapacity show it is accessible in certain circumstances, although women who kill using third-party killers are not able to do so.

Most of the cases in which abuse victims successfully argued this defence were identified and described by participants in the actual trials, rather than in published case law. As a result, the details of the cases are sketchy at best. In a case titled *S v Bekker*, an assessor described that the High Court of the Transvaal Provincial Division acquitted a woman who killed her abuser in a non-confrontational situation. The accused had given her husband muscle relaxants to stop him from fighting with her. She testified that she blacked out and awoke only after having killed her husband. Based on the evidence of psychologists and social workers, the court acquitted the accused on the basis of non-pathological criminal incapacity. The expert evidence seemed pivotal to the court's decision.

Similarly, according to the advocate on the matter of *S v De Beer*, another abused woman who killed her husband succeeded in proving non-pathological criminal incapacity through the evidence of experts. Although the woman testified that she told her husband "this is enough" after he both physically and verbally abused her, she said she blacked out and did not remember the event. The court found that despite the statement that suggested intent, because of her psychological make-up, she did not have the mental capacity to act intentionally. Again, the expert evidence was pivotal.

Several of the criminal experts mentioned hearing of other such cases in which battered women successfully utilised the defence although they killed in non-confrontational situations. None could provide copies of the decisions to which they referred.

The decision in *S v Wiid*, 1990 (1) SACR 561 (A) is one of the few reported decisions in which an abused woman who killed her abuser successfully argued non-pathological criminal incapacity. In *Wiid*, the husband had beaten his wife, leaving her with broken teeth, a broken nose and bruises on her face, and had threatened to kill her just before she shot him. The court accepted the combination of the abuse and the threat as the triggering act that resulted in the wife's criminal incapacity.

Interestingly, though, the court analysed whether the threat was real, meaning whether the husband was capable of carrying it out, before reaching this conclusion. It was not enough that he had just beaten her or that he made the threat at all. The court's analysis went one step further. It contradicted the finding of the lower court, that because the deceased could not have carried out the threat, the woman could not have been incapacitated by it. The discussion itself recognises a more objective test for incapacity, at least as applied to abused women.

Of the cases in which a battered woman did not succeed with a defence of non-pathological criminal incapacity, the largest obstacle seemed to be lack of proper expert testimony to support the accused's claim. For example, in *S v Campher*, 1987 (1) SA 940 (A), one of the three members of the bench that heard the appeal wrote:

From her (appellant's) evidence it is not possible to infer that she had lacked the ability to appreciate the wrongfulness of her act. It may be that she had acted on a subconscious impulse and had not at that moment realised that she was acting wrongfully, but since there was no psychiatric evidence in the case, I will assume that, when she fired the shot, she appreciated that she was acting wrongfully and that she thus had the necessary power of distinction.<sup>199</sup>

Other courts simply reject the expert evidence.<sup>200</sup>

The triggering event (provocation or emotional stress) itself can be a hurdle to abused people claiming this defence. For example, in *S v Ingram*, 1995 (1) SACR 1 (A), the Appellate Division could not locate a sufficiently strong triggering event to justify a loss of capacity. In this case, a husband shot his wife after she became drunk and verbally abusive. In the past, she had physically and verbally abused both the husband and her children, particularly when drunk. One method of controlling the abuse was to lock her in the bedroom or bathroom. As the children struggled to place the deceased in the bedroom, the accused took his firearm and killed her.

The court concluded that the struggle to isolate the deceased was not a sufficient trigger for incapacity: "The appellant had on previous occasions failed to isolate and restrain the deceased. There is no rational reason why on this particular occasion such failure should have operated as a trigger mechanism when it had not done so before."<sup>201</sup>

Based on the *Ingram* decision, a battered woman who kills her abuser needs to show that in

the woman's mind, the deceased's behaviour to which she was responding was the final straw, that she could take no more abuse, focusing on why this occasion was different from the past.

Abused people who kill in non-confrontational situations also struggle with a time lapse between the triggering event and when she responded to the event. The longer the lapse, the less likely a court will find she acted without criminal capacity, particularly if the accused displayed complex behaviour during the lapse.<sup>202</sup> This problem seems all the larger in the case of a woman who hires a third-party killer, since there could be a lapse of anything from days to months between the triggering event and when the abuser is killed. A judge noted that even if the triggering event was severe, in the time it takes to hire a third party or for the third party to kill the abuser, the accused will have had time to "cool down."

One advocate tried to argue non-pathological criminal incapacity in a hired-killer case on the basis of expert testimony. Although a killing appeared to be deliberate, goal-directed behaviour, it was more a consequence of being unable to retract the decision once the plan was set into motion. She struggled with too much internal turmoil and lost her ability to act in accordance with what she knew was right and wrong. The argument failed.

Perhaps a better argument is that abused women suffer from the effects of cumulative fear and provocation. An abused woman who lives in constant fear may not have the opportunity to cool down in any time lapse between the most obvious provoking event and when she kills or the hired killer kills. To view it otherwise often assumes that in between each incident of abuse everything is calm and fear-free. The Supreme Court of Kentucky disagreed with this assumption:

... extreme emotional disturbance may be more gradual than the flash point normally associated with sudden heat of passion ... . The fact that the triggering event may have festered for a time in Springer's (accused's) mind before the explosive event occurred does not preclude a finding that she killed her husband while under the influence of extreme emotional disturbance.<sup>203</sup>

#### ***3.6.4 Comments of Criminal Law Experts***

The criminal law experts interviewed for this research differed on whether battered women who kill in non-confrontational situations can access non-pathological criminal incapacity in light of *Eadie*. One academic and one judge concluded that the *Eadie* decision all but abolished the defence, making its application very rare. Several other experts felt that the defence remained substantially the same, as it turns on the facts of each case.

One advocate emphatically stated that this defence should be the only one available to battered women who kill their abusers in non-confrontational situations. He believed that if a woman faced abuse of such a nature that she had lost hope of life and then killed the abuser, psychological evidence will show she could not control her behaviour. This response is unfortunate as it assumes that a woman who believes she is killing in defence of her life can only succeed in a defence if she acted as an automaton. This severely limits the defence options for these women, while sending the message that battered women who kill their abusers in non-confrontational situations must have lost control.

One judge suggested that a battered woman who kills her abuser using a third-party killer may still argue non-pathological criminal incapacity despite the time lapse between the triggering event and her act and despite the apparently goal-directed behaviour. A successful defence would require expert testimony from psychologists and psychiatrists explaining why despite the goal-directed behaviour, the woman suffered from incapacity. A second judge took this further. He argued that a court must look at the premeditation within the psychological tunnel from which the woman cannot escape. She premeditates within circumstances where her psychology has been severely affected by the abuse. He saw an abused woman as a creature in a cage, who after being conditioned to believe there is no escape, cannot see the latch to open the cage and free herself. All of this represents non-capacity or diminished capacity.

The latter opinion causes some concern as it suggests that an abused woman's perceptions are inherently irrational unless this judge considers this defence to be one of many available to abused women.

While in theory one advocate agreed with the above positions, he felt that the more goal-directed her behaviour, the less credible her claim of incapacity, which is far more likely to be a problem for those women who hire others to kill their abusers.

Yet a third judge reached the conclusion that although hiring a third party seems to a reasonable response to an abusive situation, these women cannot argue non-pathological criminal incapacity. The facts, said the judge, show calculation and not diminished capacity. Three advocates agree with this approach, even if the woman presents psychiatric evidence of the effects of abuse on her psychology.

To the extent Eadie now requires evidence that the woman acted as an automaton to prove non-pathological criminal incapacity, it appears that women who hire third parties to kill their abusers will not be able to access this defence.

### ***3.6.5 Reform Recommendations***

Because members of the South African legal community, particularly the courts, fear that the criminally accused are able to utilise non-pathological criminal incapacity too easily, there is strong advocacy for reform of this defence.<sup>204</sup> The first recommendation changes the test for determining whether a person suffered from incapacity from a subjective test to an objective test.<sup>205</sup> Courts would focus less on the subjective feelings of the accused and more on whether an objective person would have responded to the trigger event by entering a state of automatism.

Proponents of this reform argue that as a matter of public policy, courts should not excuse an accused from the consequences of wrongful acts when she acted unreasonably. As Burchell puts it, "It could be argued that, in the interests of the security of the community, in cases of violence perpetrated under provocation or emotional stress, only reasonable lack of capacity for self-control or reasonable loss of self-control should excuse."<sup>206</sup> They hoped this would introduce a proportionality requirement between the provoking or stressful trigger and the accused's response to the triggering event.<sup>207</sup>

One proponent of such a reform argues, "factors such as gender and ethnicity should not be considered legally relevant." The argument is that including these elements would raise constitutional issues.<sup>208</sup> However, a person would test for "the reasonable person placed in the same abusive situation."<sup>209</sup> This approach, however, ignores that one purpose of including gender and race in a reasonableness test is to correct the historical bias that exists in the criminal law against these groups.

Another recommendation is to change this defence to a partial-excuse defence, which would reduce a charge of murder to culpable homicide.<sup>210</sup> If a reasonable person had acted in the same manner, the accused would escape liability because the state could not prove the negligence necessary to convict the accused for culpable homicide.

Because of what one judge considers the impossibility of non-pathological criminal incapacity after the *Eadie* decision, she believes that if reformers wish for a defence for battered women who kill their abusers because they lost control, Parliament will need to legislate one.

### 3.6 Conclusion

The *Eadie* decision severely limits the use of non-pathological criminal incapacity as a defence. Only if a person acts as an automaton can s/he benefit from the defence. While the defence has been and remains open to battered women who kill their abusers, it will be extremely difficult to prove. Evidence of goal-directed behaviour will impede women who hire third-party killers and women whose actions are not sufficiently frequent to result in muscle memory.

### 3.7 Insanity

South African criminal law recognises the defence of insanity, as governed by sections 77, 78 and 79 of the Criminal Procedure Act 51.<sup>211</sup> For the most part, this defence should be irrelevant for battered women who kill their abusers, as most will not meet the requirement of suffering from a mental illness or defect.

The defence is very similar to non-pathological criminal incapacity except that under this defence it must be a mental illness or defect that caused the accused to commit an unlawful act. Where it is different is that the defence requires psychiatric evidence to prove the mental illness or defect.<sup>212</sup> A diagnosis under the Mental Health Act is not sufficient evidence of a pathological problem resulting in a loss of capacity, although courts may consider the diagnosis when determining criminal capacity.<sup>213</sup> Nor is it enough for a court to find the accused suffers from insanity. It must also determine that the accused's unlawful act resulted from it.<sup>214</sup>

An accused who successfully argues insanity must be detained in a state hospital, regardless of the duration of the insanity.<sup>215</sup>

Some academics have questioned whether a battered woman who suffers from psychological harm as a result of the abuse, such as battered women's syndrome or post-

traumatic stress disorder, suffers from a pathological disorder.<sup>216</sup> While possible, such a finding would be a set back for advocates of this category of women.<sup>217</sup>

## **Chapter 4: Sentencing**

While the focus of the research is on criminal defences to murder, because South Africa only recognises what in some countries are defences to murder as factors mitigating sentence, sentencing is an important component to the research. Provocation and diminished capacity are two such examples. Neither of these exists as a separate defence, rather courts consider both factors when determining an appropriate sentence to a conviction.

Presently, South Africa has a statute that implements mandatory minimum sentences for certain crimes, including some types of murder.<sup>218</sup> The purpose of the statute is to ensure "... a severe, standardised and consistent response from the courts to the commission of such crimes."<sup>219</sup> The mandatory minimum sentence for premeditated murder, of which many battered women who kill their abusers in non-confrontational situations are convicted, is life imprisonment.

It is important to keep in mind that the statute is a temporary measure, until such time as the legislature deems the statute unnecessary.

### **4.1 Substantial and Compelling**

The statute provides some relief from mandatory minimum sentences in its clause that allows courts to determine if there are any substantial and compelling circumstances that justify reducing the sentence below the mandatory level.<sup>220</sup> If courts find such circumstances, they have broad discretion to impose a penalty. A court can choose whether to imprison the convicted accused, to suspend any such imprisonment or impose correctional supervision with or without conditions on him/her. Under section 274(1) of the Criminal Procedure Act No. 51 of 1977, "A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed." However, if the accused argues a defence, s/he must place the evidence of extenuating circumstances before the court during the merit stage of the trial.<sup>221</sup>

Even with murder convictions, courts can consider correctional supervision by determining "whether the particular offender, having regard to his personal circumstances, the nature of the crime and the interests of society must be removed from the community."<sup>222</sup> Courts have suspended sentences or required correctional supervision in cases where the convicted accused acted as a result of a "special relationship between the actor and victim."<sup>223</sup> This is particularly important in the battered women cases, as there is undoubtedly a special relationship between her and her abuser.

In fact, nearly all of the criminal law experts interviewed stated that battered women who kill their abusers, even in non-confrontational situations, are able to benefit and have benefited greatly from sentencing discretion. Nearly all could recall a case in which the abused woman received a suspended sentence or correctional supervision. They expressly

limited their opinions, however, to those women who did not hire a third-party killer.

Because of what they considered the general ease with which battered women have been able to have their sentences mitigated, initially most of the experts suggested that the battered women should look to mitigation of sentence, rather than a defence, when seeking to be released from imprisonment. One judge suggested that for the abused woman who reasonably could have escaped the relationship, sentence mitigation is the appropriate time to consider her circumstances.

The Supreme Court of Appeal explained the meaning of substantial and compelling circumstances in its decision *S v Malgas*, [2001] All SA 220 (SCA). The court began its discussion by emphasising that the provisions of the Criminal Procedure Act must be "read in the light of the values enshrined in the Constitution and, unless it does not prove possible to do so, interpreted in a manner that respects those values."<sup>224</sup>

With this in mind, the court set out a general concept of what is substantial and compelling first by describing what it is not:

Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.<sup>225</sup>

Next, the court explained that courts may continue to consider the extenuating circumstances that resulted in mitigation of sentence in the past when determining whether substantial and compelling circumstances exist.<sup>226</sup> The court declined to define substantial and compelling to mean exceptional.<sup>227</sup>

Rather than apply a formulaic test, the court concluded a determination of substantial and compelling is more instinctual:

Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.<sup>228</sup>

The injustice need not be "shocking."<sup>229</sup>

In considering how to sentence a convicted accused, however, the courts must recognise the mandatory minimum sentences as "generally appropriate" for the crime and that there must

be a "weighty justification" for departing from these sentences.<sup>230</sup>

Finally, the court refused to attempt to define substantial and compelling with reference to particular circumstances, concluding that such a task would be inordinately difficult.<sup>231</sup>

#### 4.2 Diminished Capacity/Provocation

South Africa recognises diminished capacity, whether or not as a result of a mental illness or defect, as a mitigating factor courts should consider when determining a convicted accused's sentence.<sup>232</sup> Provocation and severe emotional stress that do not result in non-pathological criminal incapacity may be considered at sentencing as evidence of diminished capacity.<sup>233</sup> The reason these factors are considered in mitigation of sentence is that persons acting under provocation, emotional stress or diminished capacity are considered less blameworthy than other accused.<sup>234</sup>

Because of the wide definition of provocation and stress as described in sections 3.3 and 3.4, abused women who kill their abusers should be able to argue that the courts must treat the abuse as a mitigating factor. While this has proved true in many cases, women who kill their abusers using hired killers have not had recourse to abuse as a mitigating factor.<sup>235</sup>

#### 4.3 Abused Persons who Kill

The research located two cases in which an abused person (one woman, one man) failed at the attempts to argue non-pathological criminal incapacity, but ultimately succeeded on an argument for diminished capacity in mitigation of sentence. In *Ingram*, fully described above, a husband shot his inebriated wife after she became verbally abusive and refused to be locked in her room. The Appellate Division could not locate a triggering event sufficient to result in criminal incapacity and noted goal-directed behaviour. The court concluded, however, that:

The appellant's circumstances evoke strong feelings of sympathy. He was the victim of unhappy home circumstances which (sic) impinged on the welfare of his children who, it can be accepted, he loves dearly. The tragic consequences of his deed will probably live with him forever. The learned trial judge correctly held that the appellant had acted under circumstances of diminished responsibility.<sup>236</sup>

The Appellate Division concluded that the convicted accused should qualify for correctional supervision.

The facts of *S v Campher*, 1987 (1) SA 940 (A), were described fully above in section 2.1.2. As a reminder, the husband had physically abused the wife just prior to forcing her on the ground to pray that a hole he drilled in a lock straightened by divine intervention. The wife had a firearm nearby, having threatened her husband with it to stop the earlier physical abuse. She then killed her husband. The court did not agree on whether the wife deserved a defence and ultimately convicted her of murder with extenuating circumstances.



#### **4.4 Reform Recommendations**

At least one judge recommends avoiding the situation where sentence mitigation determines the battered woman's fate, rather than a defence, because she feels that for many, sentence mitigation submits them to a lottery.

Another recommendation is to enact sentencing legislation specifically to cover the situation in which the convicted accused suffered abuse at the hands of the deceased. The purpose of the legislation would be to ensure that the courts consider the abuse as a possible mitigating factor at the sentencing stage. One judge agrees with this recommendation.

#### **4.5 Conclusion**

Many of the partial-excuse defences found in foreign jurisdictions are located at the sentencing mitigation stage in South Africa. Where in other jurisdictions persons who meet the elements of the partial-defences will be acquitted of murder, although they may be convicted of a lesser crime, South Africa treats these cases as murder. For battered women who kill their abusers, this seems to be insufficient recognition and understanding of the situations in which they found themselves. Mitigating sentence by itself does not go far enough in understanding the plight of battered women and in many of the situations it will be patently unfair to deem them murderers, even if they receive a non-custodial sentence.

### **Chapter 5: Evidence**

The three types of evidence abused women who kill need to have admitted at trial to provide them with a fair trial are:

- (1) Evidence of a past pattern of abuse;
  - (2) Evidence of the victim's past violent acts of which the accused was aware;
- and
- (3) Social context evidence of the effects of battering and of the institutional response to domestic violence. (For a description of the importance and relevance of these types of evidence, see Chapter 12 of Document 1.)

#### **5.1 Relevance**

South Africa's Criminal Procedure Act No. 51 of 1977 allows courts to admit all evidence relevant and material to the issues on trial. Section 210 reads: "Irrelevant evidence inadmissible. No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings." Courts determine relevance using common sense, "based upon a blend of logic and experience lying outside the law."<sup>237</sup>

Unfortunately, as seen in the comparative law review, many courts feel that the situation of abused women is a matter of common sense. They believe that understanding these women does not require special knowledge. But relying on common sense leads to the conclusion that a woman can always leave the relationship. It allows courts to use myths and stereotypes of battered women when reaching their decisions. For this reason, advocates for these women must explain why common sense does not lead to an understanding of the effects of abuse on these women or of their situations.

Courts assess whether the evidence allows for inferences about facts at issue in the trial to determine its relevancy.<sup>238</sup> They will not admit evidence with only a tangential relevance to the issues or which is too remote.<sup>239</sup> Nor will they admit evidence whose probative value, or relevance and importance, is outweighed by the prejudice it will cause.<sup>240</sup> Other factors the courts will consider are whether the evidence can/will cause "confusion of the issues, undue delay, waste of time, needless presentation of cumulative issues, the investigation of collateral issues that beg the very issue that the court has to decide, unnecessary expense and any other prejudicial factor."<sup>241</sup>

Any evidence that tends to explain an accused's motive for a crime will be considered relevant to the issues at trial.<sup>242</sup> This is true even if the search for motive leads to an examination of collateral issues or other prejudicial effects.<sup>243</sup> Of importance for women who kill their abusers is that it allows the history of abuse between the accused and the deceased, as well as the effects of the abuse on the accused to be admitted at trial. The evidence explains these women's motives.

Of the experts interviewed for this research, only one academic suggested that battered women who kill their abusers might have trouble convincing the court to hear evidence of the deceased's bad acts of which the accused was aware. Otherwise, each expert who had tried or heard a battered women case reported having had no problems with the admission of such evidence.

As described earlier, many criminal law experts interviewed for this research believe there is a reason battered women who killed their abusers in non-confrontational situations could not access defences. They say it is because their advocates have not presented the evidence of abuse and the effects of abuse through psychiatric and psychological testimony in these women's defence. The experts, including judges, advocates and academics, say if the evidence was adduced and argued properly, the defences would open up to include this category of women.

Two judges identified that the problem with admission of evidence is not that courts will not accept the evidence, but that there are insufficient psychiatrists and psychologists to testify to the effects of domestic violence on the victims.

Despite the experts' feeling that evidence of the past pattern of abuse and social context evidence could be admitted at trial, one judge and four advocates suggested that battered women would access the defences more easily if a statute set out how the evidence should be applied.

## **5.2 Character Evidence**

Typically when courts consider character evidence, it is usually to prove the good or bad character of the plaintiff, defendant, accused or complainant intended to credit or discredit them. When it comes to the complainant, courts will not admit evidence intended for any other purpose than to prove the complainant has a "bad character."<sup>244</sup> In a case of a battered woman's killing of her abuser, the evidence she seeks to admit concerns the deceased's prior bad acts and reputation for violence. The woman, through showing she was aware of the

abuser's reputation, shows the reasonableness of her fear of the deceased. Evidence of the deceased's past bad acts and reputation for violence could be relevant to elements of each of the criminal defences to murder, although one academic questioned whether this would be admissible.

### 5.3 Similar Fact Evidence

Evidence of a pattern of abuse and of past bad acts is typically offered by the prosecution to prove the accused's propensity towards committing crimes or the particular crime in the case.<sup>245</sup> Typically it is rejected as irrelevant to determining whether on this particular instance the accused committed the crime and as prejudicial to the accused.<sup>246</sup> Courts have concluded, "where ... the similar fact evidence does not go to show guilt on the part of an accused, prejudice is a far less sensitive issue."<sup>247</sup> Furthermore, according to one academic treatise, "there is nothing prohibiting the accused from seeking to have similar fact evidence admitted in her defence."<sup>248</sup>

In a case in which she has killed her abuser, a battered woman could use the evidence of the past pattern of abuse to explain why she honestly and reasonably feared for her life. She could argue self-defence and putative self-defence, and the cumulative trigger events for non-pathological criminal incapacity and diminished capacity. Thus a court should find similar fact evidence relevant to elements of defences and for mitigation of sentence. The evidence should not be viewed as prejudicial because it is not being used against the accused.

### 5.4 Expert Evidence

South African courts admit expert evidence when "by reason of their special knowledge and skill, they are better qualified to draw inferences than the judicial officer"<sup>249</sup> or where the expert evidence would merely be helpful to the court.<sup>250</sup> Evidence of the social context of domestic violence and the effects of abuse on the accused likely fall within the latter category.

To qualify as an expert, the witness must either have special knowledge of the field in which s/he is testifying, including by familiarising him/herself with the literature in the area, or s/he must have practical experience in the field, without formalised training.<sup>251</sup> The judge is responsible for determining whether a person qualifies as an expert, "the court must be satisfied that the witness possesses sufficient skill, training or experience to assist it. His qualifications have to be measured against the evidence he intends to give in order to determine whether they are sufficient to enable him to give relevant evidence."<sup>252</sup>

The expert evidence must be relevant to issues at hand before a court will admit it.<sup>253</sup>

The expert should state his/her reasons for the opinion, including whether the opinion is based on facts within his/her personal knowledge or what s/he heard in court.<sup>254</sup> One important problem with expert testimony identified in several battered women cases occurs when the expert's opinion is based on what s/he is told by the accused and the court rejects that factual basis. In these cases, if the court rejects the basis, it must reject the expert

opinion/conclusions drawn from the rejected basis.<sup>255</sup> This leads to a conclusion that the expert is not credible. This is not an uncommon problem.<sup>256</sup>

Most experts interviewed agreed that battered women who kill their abusers would need to place expert psychiatric or psychological evidence of the effects of abuse on the accused before the court. One judge warned that courts favour testimony of psychiatrists over psychologists and testimony of psychologists over social workers.

### 5.5 Recommendations

One judge and four advocates recommend the implementation of a statute that identifies the types of evidence that should be admitted to determine the elements of the different defences.

### 5.6 Conclusion

There appear to be no difficulties in admitting evidence of a past pattern of abuse and of the social context evidence of battering into a criminal trial of a battered woman who killed her abuser. There is some question as to whether evidence of the deceased's past bad acts not involving the accused will be admitted. While this places battered women who kill in South Africa in a better position than women in other countries, it appears something needs to be done to inform advocates and judges how the evidence should be used for the elements of each defence, whether by training or by statute.

## Chapter 6: Trends in abused women cases

This section of the report describes the general patterns in how the South African legal system treats battered women who kill their abusers, as well as any patterns in the cases involving femicide that highlight unfair treatment.

### 6.1 Abused Women Cases in Practice

When reviewing cases in which a battered woman killed her abuser, several patterns become evident:

1. **Unless a woman is being physically abused at the moment she kills her abuser, courts treat the physical abuse and threat of abuse as over.** This narrows the contours of imminence, treating any break in violence as the end of violence and any response following that break as revenge. It excludes a finding of an unlawful act against which the woman is defending for the same reason. Both of these elements are necessary to prove self-defence.<sup>257</sup>

Many of the practitioners interviewed for this research agreed with this approach unless a woman could prove a pattern of abuse sufficient to explain why she was responding to an imminent, unlawful attack.

This approach of courts to a finding of an imminent, unlawful attack is unfortunate as it limits a woman's ability to respond to a threat to her life when it becomes

evident that her life is at risk. It ignores the effects of cumulative fear on the women and the reality of the dynamics of abusive relationships, which is that the threat of abuse does not end simply because the episode of abuse ends. In a case in which a woman killed her sleeping husband after he had threatened to kill her minutes before falling asleep, the Northern Territory Supreme Court recognised the on-going nature of the threat from a sleeping man:

At the time the threat was uttered there was an ability (actual and apparent) to carry out the threat when the stipulated time came. On the facts, short of being disabled from affecting the threat, whether by pre-emptive strike or the accused's flight or otherwise, the deceased's ability to carry out the threat continued.<sup>258</sup>

The South African courts' approach to imminence also ignores that signals other than an overt threat could evidence the abuser's intention to begin abusing the woman. As the Supreme Court of Washington wrote:

That the triggering behaviour and the abusive episode are divided by time does not necessarily negate the reasonableness of the defendant's perception of imminent harm. Even an otherwise innocuous comment, which occurred days before the homicide, could be highly relevant when the evidence shows that such a comment inevitably signaled the beginning of an abusive episode.<sup>259</sup>

Forcing a woman to wait to respond until she is in the midst of abuse ignores these signals of abuse and further places her at great risk of harm. Leaving is not necessarily a solution. Statistics show that the most dangerous time for a woman is when she tries to leave her abusive relationship.<sup>260</sup> Under the South African approach, however, only if the woman puts her bodily integrity at risk will she be able to argue she could not escape the abuse and therefore could argue self-defence. The Court of Appeal of New Mexico felt that "To require a battered person to await a blatant, deadly assault before she can act in defence of herself would not only ignore unpleasant reality, but would amount to sentencing her to 'murder by installment'."<sup>261</sup> The Supreme Court of Canada agreed.<sup>262</sup>

**2. No abused woman who has killed in a non-confrontational situation has attempted to argue a defence other than non-pathological criminal incapacity.**

<sup>263</sup> Many of the criminal law experts opined that the reason for this is that advocates are afraid to make the non-traditional arguments necessary to prove the defences. From the interviews, however, it seems that the problem also lies with the judicial officers hearing the case. Interviewees expressed that many of the experts were reluctant to apply traditional defence law to abused women who kill in non-confrontational situations. Even when they sympathised with the woman, many felt the majority of the women will need sentence mitigation and not defence law to help them.

This finding evidences that abused women who kill face large obstacles to accessing traditional defences. This is seemingly because the advocates and judicial officers

do not understand their experiences with abuse and the nature of an abusive relationship.

3. **Some victims of abuse have been able to successfully argue non-pathological criminal incapacity.**<sup>264</sup> This shows that women who kill their abusers can access at least one criminal defence to murder under South African criminal law. The disadvantages, however, are great. First, the only successful defence is one that is narrowly applied and is likely to exclude most abused women who kill. As described in section 3.6, the Eadie decision intentionally made this defence harder to prove.

Secondly, the only defence that these women can access requires them to show they lost control. Limiting an abused woman's defence to non-pathological criminal incapacity overlooks the situation where a woman rationally responded to cumulative fear and abuse through defensive force. Furthermore, restricting abused women to this defence restricts them to a typically more masculine response to emotional stress and provocation, such as the immediate loss of self-control. The defence does not protect women who are socialised to respond to provocation and stress more thoughtfully and with control.

4. **Most abused women who kill their abusers in a non-confrontational situation plead guilty to a charge of murder.** The experts interviewed for this report suggest that the reason is that no one is willing to make the hard argument for the inclusion of these women in traditional defences. Many cannot see how they could be included. This finding suggests that attitudes towards abused women who kill in non-confrontational situations will need to be changed before such women can gain access to the traditional defences.
5. **South African courts place a duty to flee on abused women, regardless of the defence she pleads or whether she pleads a defence.** In many of the cases in which abused women killed their abusers, courts enter into some discussion of whether the woman could have left before reaching a decision on the defence of non-pathological criminal incapacity or when considering sentencing mitigation. The question is raised even if the woman claimed she acted because she lost control.

For example, in *Nape v State*, CC67/97,<sup>265</sup> an appellate court reviewed a case in which just prior to the killing, the deceased assaulted his wife and cocked his firearm, threatening to kill her and her children. He had told his wife just a few months before that he had bought the pistol so he could kill her with it. When he fell asleep, his wife used the pistol to kill him. The lower court being reviewed had concluded:

The accused had a wide range of options open to her at the time of the commission of the offence, such as removing the firearm from where it was placed, going away from the house together with the children even if it was late. Nothing could be more risky than staying in a house where somebody was threatening to use a firearm against you. She could also have reported the deceased's threats either to the neighbours, the

relatives or to the police.

The failure to flee in part resulted in a 10-year sentence, which was reduced on appeal to 10 years with five suspended. Neither court considered whether leaving would have stopped the abuse. They assumed instead that the woman could safely leave the relationship, a suggestion that can be refuted by studies that show women are most at risk of harm from their abusive partners when they try to leave.<sup>266</sup>

Nearly all the experts interviewed concluded that an abused woman must try to leave her abuser before she can qualify for self-defence, and perhaps for putative self-defence. Since other people are not expected to flee from their own homes when encountering an unlawful attack, this creates an added burden to abused woman that is not placed on other criminally accused.

Implicitly, this duty to flee as applied to abused women only asks why an abused woman did not leave her abuser and, if she could not leave him at the moment she killed, why she did not leave him while the option was still available. As the Canadian Supreme Court noted, a woman does not waive her right to self-defence for failing to leave a relationship before self-defence became necessary.<sup>267</sup> Or, as Victoria Nourse explained in an article, "We do not ask of the man in the barroom brawl that he leave the bar before the occurrence of an anticipated fight, but we do ask the battered woman threatened with abuse why she did not leave the relationship."<sup>268</sup>

- 6. Linked to the above finding, courts assume that a woman can always leave her abuser.** As described in the Document 1 section 2.1.7 and throughout this report, this assumption is often false and is based on a misconceived understanding of the dynamics of abusive relationships and the options available to abused women.<sup>269</sup> The courts do not consider the risks women face or that abusers often threaten the women with more violence or death if they try to leave. This position also fails to consider that it may be reasonable for the women to believe the abusers will carry out their threats because of their experiences of abuse at the hands of their abusers.

As seen in paragraph 5, courts also require a woman to leave, possibly in the middle of the night, without regard to where she will go and whether she can take her children. This assumption fails to consider the realities of the lives of victims of domestic violence.

The belief that women can leave an abusive relationship inhibits most abused women from accessing criminal defences. Courts also feel that the woman could not have reasonably believed she needed to act in self-defence. Nor can her honest belief in the need for self-defence be credible, as required for putative self-defence, because reasonably she could have ended the abuse simply by leaving the abuser.<sup>270</sup>

South African courts have decided that a reasonable person could always leave their abusers. They determine reasonableness based on common sense without reference to women's experiences with abuse. Common sense, however, leads to mistaken views of those experiences. The Supreme Court of Canada highlighted the gendered

construction of what is reasonable in challenging whether men could truly understand whether leaving is a reasonable option available to abused women. The majority wrote:

If it strains credibility to imagine what the 'ordinary man' would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances, which are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man.'<sup>271</sup>

To correct this gender bias, the court wrote in a later decision: "the perspectives of women which have historically been ignored, must now equally inform the 'objective' standard of the reasonable person in relation to self-defence."<sup>272</sup>

- 7. Courts reach decisions in trials of abused women who kill based on stereotypes and misconceptions about them.** Using stereotypes to justify refusing to accept a defence or sentence mitigation shows a true lack of understanding of the effects of abuse on victims and of the experiences of domestic violence victims.

Several of the examples of stereotyping involve a court's attempt to suggest that the woman is too strong emotionally not to have escaped the abuse. For example, in one abused woman case, the court noted that the woman was strong emotionally because she had been able to endure the abuse for so long.<sup>273</sup> This conclusion is consistent with one of the many abused women's stereotype that if the woman stayed in the relationship the abuse must not have been that bad or she must have been a masochist.<sup>274</sup> In *Lavallee*, the Supreme Court of Canada wrote:

... a woman who comes before a judge or jury with the claim that she has been battered and suggests that this may be a relevant factor in evaluating her subsequent action still faces the prospect of being condemned by popular mythology about domestic violence. Either she was not as badly beaten as she claims or she would have left the man long ago. Or, if she was battered that severely, she must have stayed out of some masochistic enjoyment of it.<sup>275</sup>

In another case the woman received a 10-year sentence, two years of which were suspended, partly because the court believed the woman could stand up for herself if she chose, as she had stabbed her husband during another period of abuse.<sup>276</sup> This approach suggests that if the woman was capable of standing up for herself previously, she could, first, leave the relationship, but second, did not need to defend herself by killing her abuser in a non-confrontational situation.

The positions of the two judges in the above two examples are contradictory. They show that courts will find a way to interpret the abused women's behaviour to deny abused women access to defences or strong sentence mitigation. In the first instance, the woman was emotionally strong because she took the abuse without fighting



back. In the second instance, she was emotionally strong because she fought back against the abuse. The abused woman receives little sympathy no matter how she responds to the abuse. This suggests that courts have difficulty understanding abused women's experiences and the effects of the abuse on them.

The Supreme Court of Appeal assumed in a separate case that because the abused woman was educated she had options other women did not. The court assumed she was capable of defending herself.<sup>277</sup> This suggests the court adopted the stereotype that victims of domestic violence are members of lower socio-economic or historically disadvantaged groups.<sup>278</sup> Other women cannot be "victims". It also shares the same flaws as the above stereotypes.

Because of the courts' belief that these women were emotionally strong or capable of defending themselves, they were not entitled to lesser sentences because they were responding to abuse at the hands of their intimate partner. This treatment misconceives the effects of abuse on women and misunderstands their experiences.

Following the courts' line of reasoning, several criminal law experts felt if a woman had the strength, courage and resources to hire someone to kill her abuser or to kill the abuser while he was passive, she should have had the strength, courage and resources to leave the relationship. She either has to deal passively with the abuse or kill only when she feels at her most vulnerable to justify self-defence. This perspective ignores that women feel disempowered and defenceless and are often too frightened to wait for a confrontation before defending themselves.

Ultimately, reliance on stereotypes and misconceptions allows courts to ignore the victimisation of abused women.

8. **In some of the cases in which domestic violence victims killed their abusers in non-confrontational situations, women either received wholly suspended sentences or correctional supervision because of the abuse suffered at the hands of the deceased.** In two of the cases, the appeal courts recommended correctional supervision. In one, the woman received a ten-year-suspended sentence, three years of which was under correctional supervision and three years under house arrest, along with other conditions. In the last of the cases, the woman received a five-year-suspended sentence.<sup>279</sup>

There are a substantial number of cases, however, in which a woman who killed her abuser received a sentence of more than five years imprisonment. The inconsistency in the approach suggests that abused women may be at the mercy of the individual judicial officer and his/her attitudes towards domestic violence victims when it comes to sentencing. This inconsistent approach is worrisome, particularly since several of the experts interviewed believe that in the majority of these cases, the abuse should be considered at sentencing and not as part of a defence.

For a full description of the sentencing battered women receive for killing their abusers, along with a comparison to the sentences of men who kill their intimate partners, see L Vetten and C Ngwane. (2003). *"I Love You to Destruction": Selected*

*Preliminary Findings from a Five-Year Analysis of Convictions and Sentences for Spousal Killings in Three Gauteng Courts.* Forthcoming: Centre for the Study of Violence and Reconciliation.

9. **Courts may find provocation as a mitigating factor if a woman killed her abuser herself and just after an incident of abuse.** In *Potgieter* and in *Larsen*, the courts considered the abuse just prior to the killing as a sufficient mitigating factor to justify correctional supervision.<sup>280</sup> The Appellate Division reached the same conclusion in another case although the abuse just prior to the killing was verbal, but indicative that it would turn into physical abuse.<sup>281</sup> One woman received a sentence of five years, two of which were suspended, for killing her abuser because the court treated the fact that the accused and deceased had been fighting immediately before she killed him as a mitigating factor.<sup>282</sup>

While a court's understanding of abuse as provocation may help some abused women, this finding further identifies the gendered nature of criminal defence law and sentencing law. Where the woman responds in what is a typically male manner, the courts will excuse her behaviour, at least in part.

10. **A few of the women who killed their abusers received sentences of between five and 10 years specifically because they killed in non-confrontational situations.** One court reduced the sentence of a battered woman who killed her abuser from 10 years to 10 years with five suspended. The court concluded that although "the deceased brutalised the appellant . . . . This is not a case where a wholly suspended sentence is appropriate, because inter alia the deceased was asleep and drunk and did not at the time pose any danger to the appellant."<sup>283</sup>

This finding is particularly important because it highlights that courts might have some difficulty understanding why women kill in non-confrontational situations and the effects of cumulative fear and battering on an abused women.

11. **Courts do not discuss or treat abuse as a mitigating factor in cases where abused women hire third parties to kill their abusers.** Courts sentence women who hire third parties to kill their abusers to high sentences (more than ten years),<sup>284</sup> typically without treating the abuse between the woman and the deceased as a mitigating factor. The reason seems to be that courts find that the aggravating factor of a contract killing far outweighs the mitigating factor that the accused was a domestic violence victim at the hands of the deceased.<sup>285</sup> Secondly, the courts are very concerned with the element of planning.<sup>286</sup> Another possible explanation of the difference between hired-killer cases and the cases in which the woman kills the abuser herself is that in the latter cases she is responding to a more recent attack.<sup>287</sup> That does not prove true when one reviews the cases cited above.

In only one of the cases in which a battered woman hired a third party to kill her abuser did the court enter into a discussion of the abuse for more than just one sentence stating that it occurred.<sup>288</sup> In that case, the court did not find the abuse a mitigating factor. A few cases suggested that because the abuser was dead and he

could not refute the abuse, it is unclear whether the abuse occurred.<sup>289</sup>

This finding suggests that courts cannot see past the hiring of a third-party killer to what actually caused the woman to seek his/her help; that they cannot understand the position in which many of these women find themselves. The courts do not understand abused women's feelings of disempowerment in the face of their abusers, and that these women may feel too weak to respond to her abuser directly and/or in the middle of a confrontation. Further, they do not understand the fear these women feel as a result of abuse, which could lead them to defend themselves or respond to the abuse through a hired killer.

**12. Courts are much more willing to understand men's experiences that lead them to act violently than women's experiences.** In some cases, courts go so far as to explain why men abuse. For example, in a case in which a husband killed his wife for cheating on him, a High Court wrote: "Men ... sometimes tend to over-react, but in doing so, are quite frequently, the real victims of their wives' inconstancy. As such they should be dealt with sternly yet mercifully."<sup>290</sup> The husband received a sentence of six months' imprisonment, five months of which were suspended.

In several cases, the husbands were treated lightly for the murders despite having physically abused their partners in the past.<sup>291</sup> In one such case on appeal, the court wrote:

... the sentence imposed by the learned magistrate appears to me, if anything, to have been on the light side. I can see no reason for interfering with it. This was, after all, a case of domestic violence and even though the appellant's particular make-up might have played a significant role in the killing, no court can simply condone the killing or the taking of a life with such facility.<sup>292</sup>

One man who killed his wife during an incident of domestic violence received a fifteen-year sentence wholly suspended, which was overturned on appeal.<sup>293</sup> Also overturned on appeal was the light sentence of a man who killed his ex-wife because he was suffering from depression arising from their divorce and after he had assaulted and threatened to kill her on several occasions. The lower court had stated: "Behind the bare facts of a deliberate killing ... lies a story of heartache and obsessive love which evokes compassion ... . My human inclination is one of compassion and sympathy for the accused. He has suffered grievously and the agonies of the heart and longing must have been terrible indeed."<sup>294</sup>

While it is heartening that on appeal some of the light sentences are being overturned in favour of harsher sentencing, it does not change the fact that the lower courts, where most criminal cases are concluded, give so much sympathy to men who abuse and ultimately kill their intimate partners.

A man convicted of killing two people and attempting to kill two more received an effective sentence of four years' imprisonment.<sup>295</sup> He killed the two when he

discovered, after flirting with them, that they were men dressed as women and then attempted to kill two of his friends who failed to tell him this.

Other instances in which courts found mitigating circumstances for men who killed their intimate partners include: a woman's causing a man stress,<sup>296</sup> a woman's leaving or spurning a man,<sup>297</sup> a partner's cheating on him,<sup>298</sup> a woman's refusing a man custody of their children,<sup>299</sup> and a man's being under emotional stress.<sup>300</sup>

Women whose circumstances match those of men often are treated just as leniently. In *S v Smith*, 1990 (1) SACR 130 (A), the court reduced the sentence of a woman who killed her lover from six years' imprisonment to three. The lover was stringing the woman along, fluctuating between living with her and living with his wife. The court concluded:

... her shooting of the deceased was the final result of a prolonged period of sustained and mounting mental strain of which the deceased was the cause. Whether it was the result of anger, frustration or humiliation, or more than one of these emotions is immaterial. What is plain is that they must have substantially reduced her power of restraint and self-control.<sup>301</sup>

The finding that courts understand men's experiences more than women's becomes more obvious when looking at the fact that women who kill their abusers using third-party killers do not benefit from abuse as a mitigating factor. Their behaviour seems cold and calculated, regardless of the build up of fear and the effects of abuse on them. Yet these same courts give reduced or lower sentences to abusive men who kill their intimate partners for reasons that include the partner leaving or divorcing them. Victoria Nourse has highlighted this injustice:

Whereas men's claims of provoked distress may be triggered by lawful and protected rejections (e.g. filing for divorce), women's claims of self-defence are typically triggered by something the law unequivocally condemns (i.e. violence). As a result, the combination of these doctrines can, in some jurisdictions lead to a cruel dilemma for the battered woman: If she leaves and is killed, the law may say that the very act of leaving provoked her killer's distress. But if she acts on her own fears and kills him, the law may question her claim for compassion precisely because she did not leave.

The Supreme Court of Canada noted the importance of correcting the historical gender bias that exists in criminal law.

- 13. Courts unfairly favour male responses to provocation and stress over typically female responses.** Courts understand an immediate, "hot-blooded" response to provocation and stress, without understanding that some people, women in particular, may respond to the same emotions in something other than a heat of passion response.<sup>302</sup> One judge thought that women are socialised to think through their actions more than men are. However, criminal law defences do not recognise

that some women will plan how to defend themselves. Nor do they recognise that "extreme emotional disturbance 'may be more gradual than the flash point normally associated with sudden heat of passion.'"<sup>303</sup> This highlights the unfair treatment of abused women who kill in non-confrontational situations, particularly those who hire third-party killers.

Women who suffer abuse at the hands of the deceased are severely disempowered by the deceased. They are fearful of the abuser, knowing he is capable of harming them at will. The sheer size differential between the woman and her abuser and the socialisation differences between them impact on her fear of her abuser and her feelings of helplessness. All of these factors keep many women from acting in the heat of passion that typically mitigates men's sentences. Yet the courts are only willing to understand what are typically men's responses to emotional stress and provocation.

## **6.2 Conclusion**

Women who kill their abusers in non-confrontational situations have great difficulty accessing criminal defences to murder. These findings suggest that courts do not understand women's experiences with violence and the effects of abuse on them. This is evidenced by the fact that courts assume that a woman can always leave her abuser and that courts require women to fit their experiences into a male model of a heat of passion response to provocation. Women who hire third-party killers are the least likely to benefit from traditional defences and from sentence mitigation.

## **Chapter 7: Preliminary recommendations & legislative models**

This chapter provides the preliminary recommendations and legislative models for reform of criminal defences based on the research into South African criminal law and its treatment of women who kill their abusers. The final recommendations are contained in Chapter 8. They are based on the outcome of a *Justice for Women Campaign* workshop held on 5-6 July 2003 at which Document 1 and this document were fully discussed.

At the outset it is important to note that the purpose of this research is to devise ways to open up all the different types of criminal defences to battered women who kill their abusers. This does not mean applying one defence to all situations; instead it means recognising that abused women kill for different reasons. Some kill because they think they are defending their lives, others because they lost control. The best choice of defences for these women will be ones that do not stereotype abused women, hold women to a lower standard of accountability than other criminal defendants or provide the abusers with new defences for killing their partners. For these reasons, the recommendations seek to open up self-defence, putative self-defence, diminished capacity and provocation to abused women who kill their abusers in non-confrontational situations.

From an overview of criminal law and the interviews with criminal law experts, South African criminal defence law appears broad enough to provide abused women with access to its defences. Despite this, just over half of the experts suggest that reformers should seek legislative reform of these defences to accommodate battered women who kill their

abusers. The main reasons the group of experts suggest statutory reform is concern that the courts will be unwilling to reach the hard decision of providing battered women who kill in non-confrontational situations with access to the traditional defences. Courts either fear opening the defences to abuse or do not understand how the defences apply to these women. They cautioned, however, that any statute must be very narrow to protect it from abuse.

Those not in favour of statutory reform generally felt that the law as it exists now is capable of accommodating these women. A few of the experts feared that any statute would be too broad and would be subject to abuse. One judge expressed concern that judges would exhibit backlash against the statute. He also thought that foregoing legislative changes for change through the common law would provide women with better access to the defences. Then, judges hearing these cases would be able to examine the defences on a case-by-case basis, which would allow the courts to work with the nuances of the cases. His one reservation to this approach is that some judges will take a restrictive approach to self-defence because they believe that people resort to self-help too easily and kill too easily in South Africa. Another judge stated that statutory change would do little to help these women, as it will not change society's attitudes.

Because no woman who has killed in a non-confrontational situation has yet tried to argue anything other than non-pathological criminal incapacity, it remains unclear what obstacles these women will confront in practice. From the research on battered women cases generally, some of these obstacles can be identified in advance. It is already clear that women who kill their abusers by hiring a third party will potentially have insurmountable problems accessing the defences. Because a number of these women hire killers, this obstacle cannot be ignored.

Another barrier identified is the advocacy these women receive at trial. Throughout the interviews, the criminal law experts emphasised that few women are willing to try these defences and often the advocates do not prepare these cases properly. Given the finding that courts stereotype battered women or misunderstand their experiences with abuse generally, good advocacy and expert evidence on the effects of abuse and the social context of abuse becomes all the more important.

With the information from this research, CALS recommends taking a multi-pronged approach. When a case identified as having the "right" facts (as described in section 2.1.3) comes to the attention of battered women advocates, it should be run as a test case, following the same advice. Because there are serious reservations to simply relying on the common law to develop sufficiently to provide these women access to defences, statutory law reform also should be sought.

In addition to these approaches toward reforming the law, it is recommended that judicial workshops as well as training for criminal defence advocates to help them understand the experiences of abused women and the effects of abuse on the women be conducted. Both groups of practitioners also need to be exposed to how traditional defences could be utilised for these women.

## 7.1 Self-Defence

Over and over again, the criminal law experts advised that any statute must be simple and narrow. They expressed fear that the statute Document 1 recommended was too broad. A few mentioned that it seemed complex. At the same time, some experts recommended that any statute should include the types of evidence courts might consider and that the statute should explicitly eliminate the imminence requirement.

Many of the experts recommended creating a specialised victim's defence. One expert raised the question of whether a special victim's defence or separate provisions applicable to victims raises constitutional issues. Some might claim that a victim's defence gives certain accuseds advantages that other accuseds do not have. Because South Africa recognises the historical disadvantage of domestic violence victims, South African courts are unlikely to find the discrimination between accuseds unfair. This is particularly so because the provisions of the recommended statute are intended to correct the historical exclusion of women's experiences from criminal defence law.

CALS chose not to recommend the creation of a separate victim's defence for several reasons. First CALS fears that a separate victim's statute will create the impression that abused women are being held to a lower standard of accountability than other criminally accused. Second, CALS fears that a separate defence will result in further stereotyping of abused women.<sup>304</sup> In some instances, however, CALS recommends provisions within statutes of traditional defences that are targeted for domestic violence victims.

Each of the recommendations made in Chapter 13 of Document 1 remains the recommendations of the CSVR and CALS. Rather than replace the recommended statute from the previous research document, which was based on foreign law, this report will provide an alternative statute, informed by the viewpoints of the criminal law experts and South African law, for consideration.

As a reminder, nearly all elements of self-defence create some obstacle for abused women who kill. In this recommendation, self-defence is redefined to exclude the imminence requirement following the Canadian model. It then adds provisions specifically to aid accuseds who were victims of domestic violence at the hands of the deceased, including special evidence provisions.

### *Self-defence:*

(1) Every one who is unlawfully assaulted is justified in repelling force by force if the force s/he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him/her to defend him/herself.

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the attack is justified in law if:

(a) S/he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(b) S/he believes, on reasonable grounds under the circumstances, that s/he cannot otherwise preserve him/herself from death or grievous bodily harm.

(3) Every one who believes, on reasonable grounds under the circumstances, that s/he was defending against an unlawful assault even if an assault was not imminently threatened is justified if defensive action was necessary.

(4) In the context of domestic violence, belief that an accused is defending against an unlawful assault on the present occasion can be inferred from a past pattern of abuse.

(5) In the context of domestic violence, an accused shall be permitted to introduce any or all of the following or any other relevant evidence establishing justifiable conduct:

(a) Evidence that the accused is or has been the victim of acts of physical, sexual or psychological harm or abuse at the hands of the victim;

(b) Evidence of the victim's dangerous propensities of which the accused was aware; and

(c) Evidence by expert testimony regarding abusive relationships; the nature and effects of physical, sexual or psychological abuse and response thereto; the relevant facts and circumstances that form the basis for such opinion; and any other expert testimony relevant to a claim of self-defence.

## **7.2 Putative Self-Defence**

South Africa already recognises a common law putative self-defence. The defence as it exists now is potentially problematic because it may be limited to those accuseds able to show the appearance of an attack although it turned out to be mistaken. To protect against this problem, CALS recommends codification of the defence based on the model provided in the Discussion Document, which reads:

An accused's conduct is partially excused if s/he believes that the facts are such that his/her conduct is necessary and appropriate for any of the purposes that would establish a justification under the common law or statutory law, even though his/her belief is unreasonable.

This statute would be read in conjunction with the self-defence statute, and therefore it would allow a woman who kills in a non-confrontational situation to argue the defence even if she could not provide some evidence of an imminent assault. Instead, if she honestly, but unreasonably believed that defensive action was necessary, she could qualify for the defence.

## **7.3 Provocation/Diminished Capacity**

Because South Africa does not recognise a partial defence of provocation and/or diminished capacity, reformers must decide whether to keep provocation and/or diminished capacity as



factors for courts to consider in mitigation of sentence or whether to create a new, partial defence.

One judge suggested that leaving the fate of battered women who kill to sentencing is like placing them in a lottery. From an overview of sentences that courts give abused women who kill, this appears to be true. Partly to protect these women from the lottery, a partial-excuse defence based on diminished capacity and/or provocation seems appropriate with one caveat. CALS will support a partial defence only if it is limited to people whose diminished capacity results from unlawful conduct or a serious violation of human rights.

An additional defence may be apt in light of the Eadie decision. As the decision rightly pointed out, judges use non-pathological criminal incapacity to avoid convicting accuseds of murder in particularly sympathetic cases although the accuseds should not have met the requirements of the defence. This suggests that judges will find ways to bend the defences to meet justice as they see it. Providing a partial-excuse defence may fill the gap in South African criminal defence law, causing judges to distort the defences.

The following recommendation derives from the recommendation for this defence in Document 1 with minor changes for the South African context.

1. An accused's conduct may be partially excused if such conduct was the result of the accused's loss of self-control induced by the unlawful conduct or the severe violation of human rights by the deceased towards or affecting the accused. The same applies if the conduct of the deceased could have induced a reasonable person in the circumstances of the accused to have so far lost self-control.
2. For the purposes of determining whether the accused's conduct occurred under severe emotional stress, the court must apply this provision even 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 accused's conduct did not occur suddenly; or
  - (c) The act or omission causing death occurred with intent to take the life or inflict grievous bodily harm.
- (3) The loss of self-control may result from any emotion, including fear, so long as it in fact caused the accused to lose self-control.
- (4) In the context of domestic violence, the accused shall be permitted to introduce any or all of the following or any other relevant evidence establishing loss of self-control:
  - (a) Evidence that the accused is or has been the victim of acts of

physical, sexual or psychological harm or abuse at the hands of the victim;

(b) Evidence by expert testimony regarding abusive relationships; the nature and effects of physical, sexual or psychological abuse and response thereto; the relevant facts and circumstances that form the basis for such opinion; and any other expert testimony relevant to a claim diminished capacity.

#### **7.4 Sentencing**

Regardless of the adoption of a partial-excuse defence statute, CALS recommends the adoption of a statute that includes one's status as a victim of domestic violence. For CALS, this is a factor to be considered when determining whether substantial and compelling circumstances exist that justify a mitigation of sentence from the mandatory minimum. Although most courts consider this status when determining mitigation, women who kill their abusers using a hired killer never benefit from the mitigation.

Such a statute could read as follows:

For the purposes of determining whether an accused's circumstances qualify as substantial and compelling circumstances under section 51(3) of the Criminal Law Amendment Act 105 of 1997, courts must consider evidence regarding abusive relationships, the nature and effects of physical, sexual and/or psychological abuse and any response thereto.

#### **7.5 General Recommendation**

As recommended in the Document 1, CALS continues to support a defence that reads as follows:

All other instances that stand upon the same footing of reason and justice as those criminal defences enumerated shall be considered justifiable or excusable homicide.

### **Chapter 8: Final recommendations**

On 5 - 6 July 2003, the CSVR hosted a *Justice for Women Campaign* workshop at which Documents 1 and 2 were discussed. Much of the discussion focused on whether to endorse the preliminary recommendations from either of the documents or to make new reform suggestions. This chapter highlights the outcome of the discussion.

#### **8.1 A Multi-pronged approach**

The Justice for Women Alliance and other interested parties agreed to a multi-pronged approach to changing the criminal justice system and raising awareness of the issues when a woman kills her abuser.

### ***8.1.1 Litigation versus Legislative Reform***

The first issue raised when discussing the reform recommendations in both discussion documents was whether advocates for abused women who kill should be seeking reform of criminal law through legislation or through litigation. The workshop participants agreed it would be better initially to seek reform through development of case law rather than through legislation. The main reason for this was that legislation reform could be a long and arduous process, often resulting in too much compromise for there to be any real benefit to the legislation. Another reason was fear that the courts would not accept the legislation easily.

Instead, by going the route of reform through litigation, the participants felt that they would be better able to help the courts understand the issues involved and could better shape the reform efforts. Further, most participants agreed that criminal defence law as it exists is currently wide enough to be developed to include the experiences of abused women who kill.

### ***8.1.2 The Test Case***

Next, the participants agreed it was important to find the right test cases to challenge the treatment of these women by the criminal justice system. The group agreed to a few general principles for the test case but decided another meeting was necessary to establish more clearly the types of cases that should serve as test cases. The general principles that should govern the initial test cases are that the woman charged with murder must have killed the abuser herself, rather than having hired a third party to kill for her. The second requirement is that the killing should have occurred in a non-confrontational situation, meaning after a delay between the last act of abuse and the killing.

Participants generally agreed that currently the law would not accommodate a self-defence argument for an abused woman who killed using a third party that she paid. Instead, advocates for such women should focus on sentencing in these cases. Until a framework is developed in criminal law that extends the criminal defences to abused women who kill in non-confrontational killings generally, courts are likely to be unwilling to hear arguments on the application of criminal defences to hired killer cases.

### ***8.1.3 Locating the Test Cases***

One of the major obstacles confronting advocates for abused women is finding the cases early enough in prosecution to be able to intervene properly. Currently, the cases are coming to the attention of women's organisations only after a conviction. While this may allow the women's organisations to intervene during sentencing or on appeal, it does not allow advocates to challenge the limited access these women have to justice before a conviction. The main recommendation from this discussion was for women's organisations and projects to develop referral channels from the police, prosecutor's office and attorneys necessary to locate the cases during the initial stages of prosecution.

During the course of the discussion, participants from the Legal Aid Board agreed to work in collaboration with the women's organisations seeking a test case. They agreed to help locate the test case based on women seeking representation through the Board. A participant

from the Sexual Offences and Community Affairs section of the National Prosecuting Authority agreed to provide similar assistance in locating a test case.

#### **8.1.4 Locating Expert Witnesses**

Interviews with legal practitioners and the speeches of judges who participated in the workshop highlighted another major obstacle to running a test case – locating expert witnesses to explain why abused women kill, why they do not leave and the effects of abuse on battered women. Participants in the workshop agreed on the importance of locating expert witnesses with experience dealing with abused women. The group suggested trying to develop a greater base of expert witnesses who could testify to the effects of abuse on women.

#### **8.2 Training Advocates and Attorneys**

Another recommendation made by workshop participants was to begin training advocates and attorneys on how to identify a case in which abuse was a factor in murder and then on how to run the defence of such a case. The Legal Aid Board asked that CSV and other women's organisations to put together a training programme for Legal Aid attorneys explaining the issues involved in these matters, the type of evidence required and the arguments that could be made on behalf of abused women who kill.

#### **8.3 Training Judges**

Workshop participants also recommended training for judges on the different issues raised by the cases in which an abused woman kills her batterer, to train them on the effects of abuse on women and to train them about the gender bias in criminal law. This could go a long way towards judges' willingness to develop the common law to accommodate abused women's experience. Participants generally agreed that it might be most effective for judges to do the training.

#### **8.4 Raising Awareness**

A final recommendation intended to support all of the other recommendations is for advocates for abused women to help raise the awareness of lawyers, advocates, and the judiciary on the issues involved and the types of defences that could be used in cases where a woman killed her abuser. The drive for awareness should focus particularly on publishing in well-established South African legal journals and, where possible, gaining the interest of the media on the issues.

#### **Notes:**

<sup>1</sup> Judges from the Witwatersrand Local Division were the only ones to respond to the request.

<sup>2</sup> CALS was unable to interview prosecutors for this research. Another CALS project was seeking permission to conduct interviews for different purposes and was meeting strong resistance from the Director of Public Prosecutions. The researcher was concerned with interfering with another project and believed she was unlikely to receive permission for the

interviews. Fortunately, several of the advocates and one judge formerly were prosecutors and were able to provide at least some input from having served as prosecutors in South Africa.

<sup>3</sup> Human Rights Watch, *Violence Against Women and the Medico Legal System*, August 1997; S. Bollen, L. Artz, L. Vetten and A. Louw, *Violence Against Women In Metropolitan South Africa: A Study on Impact and Service Delivery*, Institute of Security Studies Monograph Series, No. 41, September 1999.

<sup>4</sup> Ibid.

<sup>5</sup> Jane Maslow Cohen *Self-Defense and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill* (1996) 57 U Pitt. L. Rev. 757, 785; Emily L. Miller *(Wo)manslaughter: Voluntary Manslaughter, Gender and the Model Penal Code* (2001) 50 Emory Law Journal 665, 685; Richard A Rosen *On Self-Defense, Imminence, and Women Who Kill their Batterers* (1993) 71 North Carolina Law Review 371, 395; The Canadian Association of Elizabeth Fry Societies *Response to the Department of Justice re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property* <http://www.elizabethfry.ca/response.htm> E13.

<sup>6</sup> One academic argues that the reason criminal law and its defences reflect male violence is because male violence is much more prevalent and that criminal law has been developed and enforced predominantly by men. Laurie J. Taylor *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense* (1986) 33 UCLA L. Rev. 1679, 1681. See also, Anne Coughlin *Excusing Women* (1994) 82 California Law Review 1, 92.

<sup>7</sup> Taylor supra note 6 at 1679-80.

<sup>8</sup> Op cit. at 1701.

<sup>9</sup> Op cit. at 1681.

<sup>10</sup> Op cit. at 1701.

<sup>11</sup> Social context evidence refers to the expert evidence describing the difficulties battered women encounter accessing social and legal services to protect them from domestic violence and the difficulties battered women face in trying to escape domestic violence, including the risk to their personal safety. The phrase is intended to incorporate all evidence that relates to the circumstances in which battered women commonly find themselves.

<sup>12</sup> Erica Beecher-Moas *Domestic Violence: Competing Conceptions of Equality in the Law of Evidence* (2001) 47 Loyola Law Review 81, 127.

<sup>13</sup> CR Snyman CRIMINAL LAW (4th Ed.) Butterworths 2002, 92.

<sup>14</sup> Op cit. at 95.

<sup>15</sup> Op cit. at 95.

<sup>16</sup> Constitution of the Republic of South Africa Act 108 of 1996.

<sup>17</sup> Snyman supra note 13 at 95. The principle of determining lawfulness based on the legal convictions of the community can be used as a basis for expanding the justification defences to include battered women who kill their abusers in non-confrontational situations and will be described in section 2.1.3 below.

<sup>18</sup> South Africa uses the term private defence to describe any action taken to defend the life and safety of an individual, including of a third person. JM Burchell *South African Criminal Law and Procedure Volume 1* (3rd Ed.) Juta 1997, 72.

<sup>19</sup> Snyman supra note 13 at 102.

<sup>20</sup> Op cit. at 102.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Op cit at 437 (accused convicted of the murder of his mother-in-law who had attacked him with a deadly weapon; his claim failed because at the point accused killed his mother-in-law he had already gained control of the weapon).

<sup>24</sup> Snyman supra note 13 at 102; *Dingaan v S* [2001] JOL 8949, 9 (Ck) (citing *R v Attwood*, 1946 AD 331); *R v Patel* 1959 (3) SA 121,123 (A) (Citing *R v Attwood*, 1946 AD 331).

<sup>25</sup> Snyman supra note 13 at 101; *Patel* 1959 (3) SA at 123-124.

<sup>26</sup> *Patel* 1959 (3) SA at 123.

<sup>27</sup> Ibid. (quoting *Union Government v Buur*, 1914 AD 273).

<sup>28</sup> Op cit. at 124.

<sup>29</sup> Burchell supra note 18 at 72; *Patel* 1959 (3) SA at 123 (Citing *R v Attwood*, 1946 AD 331).

<sup>30</sup> Snyman supra note 13 at 104.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Op cit at 308.

<sup>34</sup> *State v Gallegos*, (1986) 104 New Mexico 247, 250(Ct. Apps. NM).

<sup>35</sup> Snyman supra note 13 at 104.

<sup>36</sup> Ibid.; Burchell supra note 18 at 72.

<sup>37</sup> Burchell supra note 18 at 75. Burchell qualifies this statement by noting that one may defend these interests with proportionate force, which means violence may not be justified if there is a legal remedy. Ibid 75, 77.

<sup>38</sup> See Discussion Document Chapter 4.

<sup>39</sup> Burchell supra note 18 at 75.

<sup>40</sup> *Dingaan*, [2001] JOL 8949, 9 (citing *R v Attwood*, 1946 AD 331); *Patel* 1959 (3) SA at 123 (Citing *R v Attwood*, 1946 AD 331); *S v Jackson*, 1963 (2) SA 626, 628 (AD).

<sup>41</sup> As translated in Jonathan Burchell and John Milton, *Cases and Materials on Criminal Law* (2<sup>nd</sup> Ed) Juta 2000, 154.

<sup>42</sup> Burchell supra note 18 at 82.

<sup>43</sup> Op cit at 72.

<sup>44</sup> Snyman supra note 13 at 105.

<sup>45</sup> *S v Mokonto* 1971 (2) SA 319, 324 (AD) (refusing to find that the accused faced an imminent threat of death as a result of witchcraft; holding "A plea of self-defence is usually raised in the context of immediate danger, such as that posed by an upraised knife. That physical situation is absent here, the apprehended danger being that of supernatural death.")

<sup>46</sup> Burchell supra note 18 at 76.

<sup>47</sup> Snyman supra note 13 at 105; Burchell supra note 18 at 76.

<sup>48</sup> Burchell supra note 18 at 76.

<sup>49</sup> *S v Ngomane* 1970 (3) SA 859, 863 (AD).

<sup>50</sup> Ibid.

<sup>51</sup> *S v Van Wyk*, 1967 (1) SA 488 (A) translated in Burchell and Milton, supra note 40 at 158.

<sup>52</sup> Bollen supra note 3 at 10-11.

<sup>53</sup> *S v Ntuli*, 1975 (1) SA 429, 436 (AD); *Mokonto*, 1971 (2) SA at 323 (quoting *R v Attwood*, 1946 AD 331); *Patel* 1959 (3) SA at 123 (Citing *R v Attwood*, 1946 AD 331).

<sup>54</sup> Burchell describes this as an objective test. Burchell supra note 18 at 79. CALS disagrees with this categorization on the basis that once a court is asked to consider reasonableness based on her circumstances, it is required to consider her actions based on some degree of subjectivity, and therefore has both subjective and objective elements. *Dingaan v S* [2001] JOL 8949 agreed this is a mixed test, quoting Snyman that "[n]ormally, an act of self defence is judged objectively but there is always an element of subjectivity which (sic) relates to the persons and circumstances involved in the act." At 9.

<sup>55</sup> *Mokonto*, 1971 (2) SA at 323; *Patel* 1959 (3) SA at 123 (Citing *R v Attwood*, 1946 AD 331); Snyman supra note 13 at 111; Burchell supra note 18 at 78.

<sup>56</sup> Snyman supra note 13 at 111. Snyman concludes that unless the accused is aware she is acting lawfully, or believes she is acting lawfully, she cannot qualify for private defence. *Ibid.*

<sup>57</sup> Burchell supra note 18 at 79. See also, Snyman supra note 13 at 111-112.

<sup>58</sup> *Criminal Law and Procedure* Volume 2.

<sup>59</sup> *Patel* 1959 (3) SA at 123.

<sup>60</sup> *R v Mallot*, [1998] 1 SCR 123, ¶38.

<sup>61</sup> Snyman supra note 13 at 105-106.

<sup>62</sup> Burchell supra note 18 at 77.

<sup>63</sup> *S v Naidoo*, [1998] JOL 1958, 607 (Tk) ("The limits of the defence are that the force used in self-defence must be commensurate with the seriousness of the attack or the harm apprehended as a result of the attack and the force used must not, in the circumstances, be excessive and in particular, must be reasonably necessary to ward off the threatened attack.").

<sup>64</sup> Snyman supra note 13 at 106, 109.

<sup>65</sup> *Patel* 1959 (3) SA at 123.

<sup>66</sup> See Discussion Document sec. 2.1.5.



<sup>67</sup> Burchell supra note 18 at 78. Burchell concludes that courts must consider all relevant circumstances before determining proportionality, and not just whether the weapons were of equal power. Ibid.

<sup>68</sup> *Van Wyk*, 1967 (1) SA 488 translated in Burchell and Milton supra note 40 at 154.

<sup>69</sup> *S v Moyo* [1999] JOL 5048, 4 (T); Patel 1959 (3) SA at 123 (although requires "that the means used were the only or least dangerous means whereby he could have avoided the danger," the court warned against taking an armchair critic approach.)

<sup>70</sup> Snyman supra note 13 at 105.

<sup>71</sup> Ibid. at 106. See *Moyo* [1999] JOL 5048, 4 ("a person attacked is under no obligation to flee and even if there is such an obligation, there are so many exceptions that very few situations arise in practice where such obligation can be said to exist."); *R v K* 1956 (3) SA 353, 359 (AD) (concluding there is no duty to flee if person believes she is in immediate danger of death or serious bodily harm.); *R v Zikalala*, 1953 (2) SA 572, 572 (AD) (quoting Gardiner and Lansdown's *Criminal Law and Procedure* Volume 2, p 1413, "no one can be expected to take to flight to avoid an attack if flight does not afford him a safe way to escape.")

<sup>72</sup> Snyman supra note 13 at 106.

<sup>73</sup> Op cit. at 107.

<sup>74</sup> Ibid.

<sup>75</sup> Burchell supra note 18 at 77.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> *Kgafela v S*, Case No. 429/2002, 28 May 2003, ¶9.

<sup>79</sup> *S v Shapiro*, 1994 (1) SACR 112, 118 (A).

<sup>80</sup> Op cit. at 119.

<sup>81</sup> Please note that these recommendations were expressly formulated based on the comparative law and literature review and have not yet been tailored for the South African context.

<sup>82</sup> Andrew Paizes "Unreasonable Conduct and Fault in Criminal Law" [1996] SALJ 237.

<sup>83</sup> Snyman supra note 13 at 113.

<sup>84</sup> *S v Mandela*, 2001 (1) SACR 156, 161 (C); Snyman supra note 13 at 114; Burchell supra note 18 at 84.

<sup>85</sup> Burchell supra note 18 at 85.

<sup>86</sup> *S v Kibi*, 1978 (4) SA 173 (EC); Snyman supra note 13 at 113.

<sup>87</sup> *R v. Canestra*, 1951 (2) SA 317, 324 (AD).

<sup>88</sup> Snyman supra note 13 at 114.

<sup>89</sup> Op cit. at 118.

<sup>90</sup> At 180.

<sup>91</sup> Snyman supra note 13 at 117; Burchell supra note 18 at 87-88.

<sup>92</sup> Snyman supra note 13 at 117. See also, Burchell supra note 18 at 89.

<sup>93</sup> *Canestra*, 1951 (2) SA at 324.

<sup>94</sup> Snyman supra note 13 at 113. See also, *Mandela*, 2001 (1) SACR at 166.

<sup>95</sup> 1972 (3) SA 1 (A), translated in Burchell and Milton supra note 41 at 181.

<sup>96</sup> Snyman supra note 13 at 118; Burchell supra note 18 at 89-90.

<sup>97</sup> 1978 (4) SA 1 at 181.

<sup>98</sup> Ibid. ("Those assaults were no longer in progress and De Johgh and Nel were not themselves confronting the appellant with further assault whether imminent or more remotely prospective").

<sup>99</sup> *Mandela*, 2001 (1) SACR at 168.

<sup>100</sup> Burchell supra note 18 at, 93 ("In determining whether this element is present a court has to engage in the difficult task of balancing interests . . . . If the accused infringes an interest of lesser value (assessed on a normative scale) than the interest she protects then there can be little difficulty in regarding the conduct of the accused as justified.")

<sup>101</sup> Op cit. at 92.

<sup>102</sup> Ibid.

<sup>103</sup> Snyman supra note 13 at 112.

<sup>104</sup> Burchell supra note 18 at 76. This defence is referred to as putative self-defence when a person believed s/he was acting in his/her own defence and putative defence of others for all other circumstances.

<sup>105</sup> *Naidoo*, [1998] JOL 1958, 10.

<sup>106</sup> Snyman supra note 13 at 112.

<sup>107</sup> *Naidoo*, [1998] JOL 1958, 10.

<sup>108</sup> Burchell supra note 18 at 265.

<sup>109</sup> Snyman supra note 13 at 112.

<sup>110</sup> Burchell supra note 18 at 265-66.

<sup>111</sup> Op cit. at 265.

<sup>112</sup> At 437 (quoting *R v Krull*, 1959 (3) SA 392 (AD)).

<sup>113</sup> *Naidoo*, [1998] JOL 1958, 9; Burchell supra note 18 at 265.

<sup>114</sup> For example, in *Naidoo*, [1998] JOL 1958, a son heard noises at his back door late at night. He did not live in a safe neighbourhood and had been the victim of crime previously. Without checking who was at the door, the son shot through it, killing his father. The court found the accused guilty of culpable homicide, finding that he had an honest belief he was acting in self-defence but that a reasonable person would have checked who was at the door before shooting.

<sup>115</sup> The Supreme Court of Appeal decision in *Joshua v S*, [2002] 3 All SA 507 does not provide any guidance on the issue. In *Joshua*, the court wrote: "If an accused honestly believes his life or property to be in danger, but objectively viewed they are not" s/he could argue putative private defence. At 515.

<sup>116</sup> One advocate noted that this would be the appropriate defence for a battered woman who did not try formal channels to stop the abuse before killing her abuser.

<sup>117</sup> Burchell supra note 18 at 266.

<sup>118</sup> Ibid.

<sup>119</sup> Until 1970, South Africa treated provocation as a separate defence to murder that would reduce an accused's charges from murder to culpable homicide. Snyman supra note 13 at

235. Through the development of the common law, South African courts rejected the separate doctrine theory, adopting the present approach. *Ibid.* at 235-36. There is some suggestion that the shift away from provocation as a separate partial-excuse defence occurred as early as 1959 in *R v Krull*, 1959 (3) SA 392 (A).

<sup>120</sup> *S v Kensley*, 1995 (1) SACR 646, 658 (A).

<sup>121</sup> *Snyman supra* note 13 at 237.

<sup>122</sup> *Burchell supra* note 18 at 219 ("Our courts have acknowledged that emotional stress can serve as to exclude voluntariness of conduct and criminal capacity. As a matter of logic, if emotional stress can exclude these elements of liability then such stress could also exclude intention (including knowledge of unlawfulness)." *Sivakalay Pather, Provocation: Acquittals Provoke a Rethink*, [2002] 15 SACJ 337, 343; *S v Eadie: Road Rage, Incapacity and Legal Confusion*, [2001] 14 SACJ 206, 339 ("Provocation (or emotional stress) has now been recognised by our courts as a defence capable, in certain circumstances, of excluding the voluntariness of conduct, criminal capacity or mens rea."))

<sup>123</sup> *Eadie* [2002] JOL 9524, ¶61.

<sup>124</sup> *Ibid.*

<sup>125</sup> *S v Henry*, 1999, (1) SACR 13, 20 (SCA).

<sup>126</sup> *Snyman supra* note 13 at 237; *Burchell supra* note 18 at 264.

<sup>127</sup> *Snyman supra* note 13 at 237.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> *Eadie v S* [2002] JOL 9524, ¶64. But see *Snyman supra* note 13 at 38; *Burchell supra* note 18 at 263.

<sup>131</sup> *Snyman supra* note 13 at 240.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.* Interestingly, *Snyman* argues: "This is yet another objective criterion derived from English law, one which, in the light of the present subjective test for intention no longer has a place." *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> *Burchell supra* note 18 at 202.

<sup>136</sup> Snyman supra note 13 at 240. See also, *Kensley*, 1995 (1) SACR at 660-661 (noting that in cases where the court gave an accused a suspended sentence combined with community service or correctional supervision "there was a special relationship between the actor and victim.")

<sup>137</sup> Snyman supra note 13 at 239 and Burchell supra note 18 at 264, which describe the standard as fully subjective. Keep in mind that both of these books were written prior to the *Eadie* decision.

<sup>138</sup> Snyman supra note 13 at 238.

<sup>139</sup> *Mokonto*, 1971 (2) SA at 326. See also, *S v Grove-Mitchell*, 1975 (3) SA 417, 423 (A) ("it must be borne in mind that provocation, far from negating an intention to kill, might sometimes actually contribute to its formulation.")

<sup>140</sup> Snyman supra note 13 at 239; Jonathan Burchell, *Unraveling Compulsion Draws Provocation and Intoxication Into Focus*, [2001] 14 SACJ 363, 370 (hereinafter referred to as "Burchell Unravelling").

<sup>141</sup> Snyman supra note 13 at 239.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> Should this recommendation be adopted, reformers must consider the discussion in Chapter 8 of the Discussion Document to ensure that the reform does not accidentally exclude battered women who kill their abusers.

<sup>145</sup> Snyman supra note 13 at 116. Snyman later suggests that this excuse defence of necessity can be applied to situations other than compulsion. He states that if a person believes they are acting out of necessity, but in doing so chooses to infringe the greater interest, the accused may avoid liability if a reasonable person would have made the same choice. *Ibid.* at 241. This is similar to Paizes suggestion in section 2.1.7

<sup>146</sup> *Op cit.* at 116.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Op cit.* at 119.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Mandela*, 2001 (1) SACR at 167.

<sup>151</sup> *Op cit.* at 168.

<sup>152</sup> Ibid.

<sup>153</sup> Burchell *Unraveling* supra note 140 at 364.

<sup>154</sup> This situation could arise where the abuser threatens the woman that if she does not kill him first, he will kill her.

<sup>155</sup> *S v Laubscher*, 1988 (1) SA 163 (A) as translated in Burchell and Milton supra note 41 at 181.

<sup>156</sup> *Pederson v S*, [1998] 3 All SA 321, 323 (N). See also *S v Eadie: Road Rage* supra note 122.

<sup>157</sup> *Henry*, 1999 (1) SACR at 19; *Pederson* [1998] 3 All SA at 323 (N).

<sup>158</sup> Snyman supra note 13 at 163.

<sup>159</sup> *Eadie v S* [2002] JOL 9524, 21.

<sup>160</sup> Snyman supra note 13 at 166.

<sup>161</sup> Burchell supra note 18 at 185; *S v Kali*, [2002] 2 All SA 181, 202 (Ck).

<sup>162</sup> *Eadie v S* [2002] JOL 9524, ¶61.

<sup>163</sup> Op cit. at ¶70.

<sup>164</sup> Op cit. at ¶2.

<sup>165</sup> Op cit. at ¶2. See also, *Francis*, 1999 (1) SACR at 652; *S v McDonald*, 2000 (2) SACR 493, 500 (N); *Pederson*, [1998] 3 All SA at 328.

<sup>166</sup> *Eadie v S* [2002] JOL 9524, ¶2.

<sup>167</sup> This is sometimes referred to as the conative test. Pierre de Vos, *S v Moses*, 1996 (1) SACR 701 (C) *Criminal Capacity, Provocation and HIV*, [1996] 9 SACJ 356, 357.

<sup>168</sup> *Laubscher*, 1988 (1) SA 163 (disapproved of on separate grounds in *Eadie*); Burchell supra note 18 at 218. The second component is sometimes referred to as the cognitive test. De Vos supra note 167 at 357.

<sup>169</sup> *Eadie v S* [2002] JOL 9524, ¶59.

<sup>170</sup> Op cit. at ¶60.

<sup>171</sup> Ibid.

<sup>172</sup> Op cit. at ¶65.

<sup>173</sup> Burchell supra note 18 at 218.

<sup>174</sup> Pather supra note 122 at 343; *S v Eadie: Road Rage* supra note 122 at 207.

<sup>175</sup> *S v Eadie* (1) SACR 172 (C) as stated in *Eadie v S* [2002] JOL 9524, ¶39.

<sup>176</sup> *Eadie v S* [2002] JOL 9524, ¶64. See also, *Henry*, 1999 (1) SACR at 20; *Francis*, 1999 (1) SACR at 652.

<sup>177</sup> For example, in *Eadie*, the court concluded: "How can we believe him (accused) when he says his directed and planned behaviour was suddenly interrupted by a loss of control over his physical actions when those actions are consistent with the destructive path he set out when he was admittedly conscious." *Eadie v S* [2002] JOL 9524, ¶66. See also, *S v Kalogoropoulos*, 1993 (1) SACR 12, 18 (a).

<sup>178</sup> *S v Eadie: Road Rage* supra note 122 at 207; *McDonald*, 2000 (2) SACR at 500.

<sup>179</sup> *Kali*, [2000] 2 All SA at 204.

<sup>180</sup> *Henry*, 1999 (1) SACR at 23.

<sup>181</sup> *S v Nursingh*, 1995 (2) SACR 331, 336 (D) (disapproved of on different grounds in *Eadie*).

<sup>182</sup> *Pederson* [1998] 3 All SA at 335; *Nursingh*, 1995 (2) SACR at 338 (disapproved of on different grounds in *Eadie*).

<sup>183</sup> *Pederson*, [1998] 3 All SA at 327; *Henry*, 1999 (1) SACR at 20.

<sup>184</sup> *Snyman* supra note 13 at 166; PA Carstens, J Le Roux, *The Defence Of Non-Pathological Incapacity With Reference To The Battered Wife Who Kills Her Abusive Husband*, [2000] 14 SAJC 180, 188. Courts look to whether an accused remembers the unlawful event to help determine capacity. It is expected of a person acting as an automaton to have no recollection of what happened. *Pederson*, [1998] 3 All SA at 327.

<sup>185</sup> *Francis*, 1999 (1) SACR at 652.

<sup>186</sup> See *S v Els*, 1993 (1) SASV 723 (O)(court concluded the accused had changed directions too many times while retrieving the firearm for her actions to be automatic.).

<sup>187</sup> *McDonald*, 2000 (2) SACR at 503 ("Common sense dictates that a stimulus or trigger

which is required to provoke a person into an automatic state, unrelated to organic factors, has to be of an extreme or serious nature."); see also Henry, 1999 (1) SACR at 20.

<sup>188</sup> At 21.

<sup>189</sup> Burchell supra note 18 at 211 ("In principle, the origin of the stressful condition in which the individual is placed does not matter, but it may affect the intensity of the ultimate condition.")

<sup>190</sup> Snyman supra note 13 at 165. See also, Burchell supra note 18 at 201; see also *Pederson*, [1998] 3 All SA at 323.

<sup>191</sup> *Eadie v S* [2002] JOL 9524, ¶65.

<sup>192</sup> Snyman supra note 13 at 165("Such a condition may be the result of provocation by Y or somebody else, and the provocation may in turn be linked to physical or mental exhaustion resulting from insulting behaviour towards X over a long period, which increasingly strained his powers of self-control, until these powers eventually snapped – a condition which is sometimes present in an unhappy marriage.")

<sup>193</sup> Burchell supra note 18 at 211.

<sup>194</sup> *Eadie v S* [2002] JOL 9524, ¶65 ("Courts should bear in mind that the phenomenon of sane people temporarily closing cognitive control, due to a combination of emotional stress and provocation, resulting in automatic behaviour is rare."); Snyman supra note 13 at 165, 237.

<sup>195</sup> Snyman supra note 13 at 166. See also, Burchell supra note 18 at 211 ("[E]motional stress, which often involves an accumulation of events over a reasonable period of time, rather than an isolated event or events, can, and often is, caused equally by human beings or by surrounding circumstances.")

<sup>196</sup> *Henry*, 1999 (1) SACR at 20 ("Generally speaking expert evidence of a psychiatric nature will be of much assistance to the court in pointing to factors which may be consistent, or inconsistent as the case may be, with involuntary conduct which is non-pathological and emotion induced."); *Pederson*, [1998] 3 All SA at 329; *McDonald*, 2000 (2) SACR at 501 ("In my view, although the evidence of psychologists in cases of this sort might provide a useful indication regarding the state of mind of an accused, it must not be allowed to displace the court's ultimate function, ie to determine, after a consideration of all the evidence and probabilities, and having regard to the incidence of the onus, whether a sufficient basis has been made out for a finding that the accused, at the relevant time, lacked the necessary mental capacity."); *Kali*, [2000] 2 All SA at 202; *Kalogoropoulos*, 1993 (1) SACR at 21-22.

<sup>197</sup> *Henry*, 1999 (1) SACR at 20.

<sup>198</sup> *Nursingh*, 1995 (2) SACR at 334 (disapproved on for other reasons.) See also, *Francis*,



1999 (1) SACR at 652; *Pederson*, [1998] 3 All SA at 329 (N); *McDonald*, 2000 (2) SACR at 501.

<sup>199</sup> *S v Campher*, 1987 (1) SA 940 (A), as translated in Burchell and Milton supra note 41 at 307.

<sup>200</sup> *Re Anita Ferriera*, on file with CSV.

<sup>201</sup> *S v Ingram*, 1995 (1) SACR 1, 7 (A).

<sup>202</sup> *Ibid.*

<sup>203</sup> *Springer v Kentucky*, (1999) 998 SW2d 439, 452.

<sup>204</sup> Given the tightening of the defence by the Eadie decision, it is unclear whether reforms for this purpose remain necessary.

<sup>205</sup> Burchell *Unraveling* supra note 140 at 370; Burchell supra note 1 at 215.

<sup>206</sup> Burchell supra note 18 at 216.

<sup>207</sup> *Ibid.*

<sup>208</sup> *Op cit.* at 217.

<sup>209</sup> *Ibid.*

<sup>210</sup> *Op cit.* at 216.

<sup>211</sup> The test for insanity is located in section 78(1), which reads:

A person who commits an act which constitutes an offence and who at the time of such commission suffers from a mental illness or mental defect which makes him incapable

- (a) of appreciating the wrongfulness of his act; or
- (b) of acting in accordance with an appreciation of the wrongfulness of his act, shall not be criminally responsible for such act.

<sup>212</sup> *Snyman* supra note 13 at 169.

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*; Burchell supra note 18 at 216. 164.

<sup>215</sup> Snyman supra note 13 at 173.

<sup>216</sup> Carstens and Le Roux supra note 184 at 186.

<sup>217</sup> Burchell supra note 18 at 165 ("a malfunctioning of the mind which is caused by some external factor or stimulus is not an illness or disease of the mind, unless it in fact results in such a malady.")

<sup>218</sup> The Constitutional Court concluded that this statute does not violate the constitutional requirements of a fair trial or separation of powers between the legislature and the judiciary in *S v Dodo*, 2001 (SA) 382 (CC).

<sup>219</sup> *S v Malgas*, [2001] All SA 220 ¶8 (SCA). See also, Dirk Van Zyl Smit, *Mandatory Minimum Sentences and Departures from Them in Substantial and Compelling Circumstances*, [1999] 15 SAJHR 270, 273 ("The statutorily prescribed South African penalties appear to have been instituted as a short-term deterrent designed to deal in a crisis with offences that are usually very serious and deserving of heavy punishments.")

<sup>220</sup> Section 51(3) of the Criminal Law Amendment Act 105 of 1997 reads:

If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

<sup>221</sup> *S v Smith*, 1984 (1) SA 583, 591 (ct).

<sup>222</sup> *S v Maleka*, [2001] JOL 7707, 6-7 (A).

<sup>223</sup> *Kensley*, 1995 (1) SACR at 660-661.

<sup>224</sup> *Malgas*, [2001] All SA 220, ¶7.

<sup>225</sup> Op cit. at ¶9.

<sup>226</sup> Ibid.

<sup>227</sup> Op cit. at ¶31.

<sup>228</sup> Op cit. at ¶22.

<sup>229</sup> *Malgas*, [2001] All SA 220 ¶23.

<sup>230</sup> Op cit. at ¶18.

<sup>231</sup> Op cit. at ¶20.

<sup>232</sup> *Laubscher*, 1988 (1) SA at 317; Criminal Procedure Act, Section 78(7).

<sup>233</sup> de Vos supra note 164 at 358; Snyman supra note 13 at 239. See also, *S v Maleka*, [2001] JOL 7707 (A)("The appellant acted under extreme provocation having been severely assaulted by the deceased using a chair and steel rods and locking the appellant in his office immediately prior to the offence . . . . The appellant was plainly humiliated and insulted by the deceased shortly before the incident, the deceased even refused to permit him to use a cloth to wipe the blood off his face."); *Laubscher*, 1988 (1) SA 163; Smith, 1984 (1) SA 583 (reducing sentence from death penalty to 20 years of imprisonment on finding of provocation); *Van Vuuren*, 1961 (3) SA 305.

<sup>234</sup> Snyman supra note 13 at 239.

<sup>235</sup> See section 4.4 below.

<sup>236</sup> *Ingram*, 1995 (1) SACR at 8.

<sup>237</sup> LH Hoffmann and DT Zeffertt, *THE SOUTH AFRICAN LAW OF EVIDENCE* (4th Ed.) Butterworths 1998, 21 (quoting *R v Matthews*, 1960 (1) SA 752, 758 (A)).

<sup>238</sup> Op cit. (citing *S v Mavuso*, 1987 (s) SA 499, 505 (A)).

<sup>239</sup> Op cit. at 22-23.

<sup>240</sup> Op cit. at 24. Schwikkard, Skeen and Van Der Merwe, *Principles of Evidence*, Juta 1997, 45.

<sup>241</sup> Hoffmann and Zeffertt supra note 237 at 24. Schwikkard, Skeen and Van Der Merwe supra note 240 at 47.

<sup>242</sup> Schwikkard, Skeen and Van Der Merwe supra note 240 at 47.

<sup>243</sup> Ibid.

<sup>244</sup> Hoffmann and Zeffertt supra note 237 at 47.

<sup>245</sup> Schwikkard, Skeen and Van Der Merwe supra note 240 at 63.

<sup>246</sup> Op cit. at 63-64.

<sup>247</sup> Op cit. at 64.

<sup>248</sup> Op cit. at 63-64 (the treatise cited several cases in which defendants were able to allege

that the police habitually forced accuseds to confess.).

<sup>249</sup> Hoffmann and Zeffertt supra note 237 at 97.

<sup>250</sup> Op cit. at 100; Schwikkard, Skeen and Van Der Merwe supra note 240 at 86.

<sup>251</sup> Hoffmann and Zeffertt supra note 237 at 98 and 101; Schwikkard, Skeen and Van Der Merwe supra note 240 at 88.

<sup>252</sup> Hoffmann and Zeffertt supra note 237 at 100. See also, Schwikkard, Skeen and Van Der Merwe supra note 240 at 87.

<sup>253</sup> Hoffmann and Zeffertt supra note 237 at 98.

<sup>254</sup> Op cit. at 101; Schwikkard, Skeen and Van Der Merwe supra note 240 at 88.

<sup>255</sup> Pederson, 1998 (3) All SA 321 ("Such a finding, namely that the appellant's evidence was unreliable and false, immediately undermines the expert opinion sought to be expressed by Dr LG Pillay. The result is that there was no credible evidence to substantiate the conclusion that the appellant had acted involuntarily or that he was incapable of distinguishing between right and wrong when he stabbed the deceased or that he was incapable of modulating his actions according to his appreciation of what was wrong and what was right at the time.")

<sup>256</sup> Hoffmann and Zeffertt supra note 237 at 102 ("the witness' opinion is valueless unless there is proof of the assumed facts upon which it was based. It is therefore essential that the court should be told of the premises which the witness has assumed, and if one or more of these is finally rejected, the opinion too must be discarded."); Schwikkard, Skeen and Van Der Merwe supra note 240 at 90-91 ("The opinion of an expert must be ignored ... if it is ... entirely inconsistent with the facts found and proved. This is a frequent problem where a psychiatrist relies solely on an accused's version of the events in assessing his or her mental condition for determining criminal responsibility.")

<sup>257</sup> *Wiid*, 1990 (1) SACR 56.

<sup>258</sup> *R v Secretary*, (1996) 107 Northern Territory Reports 1, Page 3 of 8 of printout.

<sup>259</sup> *State v Janes*, (1993) 121 Wn2d 220, 241-242.

<sup>260</sup> See supra footnote 5.

<sup>261</sup> *Gallegos*, 104 New Mexico at 250.

<sup>262</sup> *Lavallee v Queen* (1990) 55 CCC3d 97, 115.

<sup>263</sup> Based on searches for published decisions, whether or not reported.

<sup>264</sup> *Nursingh*, 1995 (2) SACR 331; Wiid, 1990 (1) SACR 561; Re Suzan Kgoetus, on file with CSVr.

<sup>265</sup> on file with CSVr.

<sup>266</sup> See supra footnote 5.

<sup>267</sup> *Lavallee*, 55 CCC3d at 112.

<sup>268</sup> VF Nourse *Self Defense and Subjectivity* (2001) 68 Univ. Chi LR 1235, 1282-83.

<sup>269</sup> *S v Ngcwabe*, [1996] 3 All SA 535 (Tk) ("Accused no. 1 could have left the deceased and according to Accused no. 1's evidence it seems this would have been a welcome relief to the deceased."); *Kgafela*, Case No. 429/2002; *S v Potgieter*, 1994 (1) SACR 61, 85 (AD) (quoting the lower court decision with disapproval "I cannot close my eyes to the fact that you, to a certain extent, were the author of your own misfortune. In spite of the fact that the deceased abused you, you decided to stay with him.")

<sup>270</sup> Donald Alexander Downs *More than Victims, Battered Women, the Syndrome Society and the Law* (London 1996) 233.

<sup>271</sup> *Lavallee*, 55 CC3d at 126.

<sup>272</sup> *Mallot*, 1 SCR 123, ¶38.

<sup>273</sup> *Potgieter*, 1994 (1) SACR at 82. See also Elizabeth Boucher, on file with CSVr (accused could stand up for herself because she had stabbed her husband with a bread knife during an earlier incident of abuse.)

<sup>274</sup> *Commonwealth v Stonehouse*, (1989) 521 Pa. 41, 62-63 (Sup. Ct. Pa.); *Lavallee*, 55 CCC3d at 113; VF Nourse *Self Defense and Subjectivity* [2001] 68 Univ. Chicago LR 1235, 1288.

<sup>275</sup> *Lavallee*, 55 CCC3rd at 113. See also, *Osland v Queen* (1998) HCA 75.

<sup>276</sup> *Smith*, 1984 (1) SA at 603; Re Loretta Geyser, on file with CSVr; Re Elizabeth Boucher, on file with CSVr.

<sup>277</sup> *Kgafela*, Case No. 429/2002, ¶9 ("She was intelligent and well educated and capable of fending for herself.")

<sup>278</sup> *Stonehouse*, (1989) 521 Pa. at 69.

<sup>279</sup> *Potgieter*, 1994 (1) SACR at 88; *Ingram*, 1995 (1) SACR at 9; Re Elizabeth Grundling, on file with CSVr. See also, Re Suzan Kgoetus, on file with the CSVr.

<sup>280</sup> *Potgieter*, 1994 (1) SACR at 85; *S v Larsen*, 1994 (2) SACR 149, 157 (A).

<sup>281</sup> *Ingram*, 1995 (1) SACR at 9.

<sup>282</sup> *Re Rachel Jacobs*, on file with CSVr

<sup>283</sup> *Nape v State*, CC67/97, on file with CSVr.

<sup>284</sup> *Ngcwabe*, [1996] 3 All SA 535; *Kgafela*, Case No. 429/2002; *Re Johanna Poppy Smook*, on file with CSVr (25 years imprisonment); *Re Cecilia Leatitia van Loggerenberg*, on file with the CSVr (25 years imprisonment).

<sup>285</sup> *Kgafela*, Case No. 429/2002, ¶6.

<sup>286</sup> *op cit.* at ¶3.

<sup>287</sup> *op cit.* at ¶9.

<sup>288</sup> *Ibid.* (no discussion of abuse); *Gcabashe v S*, [1997] 2 All SA 263 (N)(no discussion of abuse); *Ngcwabe*, [1996] 3 All SA 535 (discussed abuse but did not treat it as mitigating factor).

<sup>289</sup> See e.g. *Re Anieta Ferriera*, on file with CSVr.

<sup>290</sup> *S v Mdingela*, 1977 (3) SA 322, 324 (O).

<sup>291</sup> *Pederson*, 1998 (3) All SA 321.

<sup>292</sup> *Op cit.* at 335.

<sup>293</sup> *Director of Public Prosecutions Transvaal v Roberts*, 2000 JOL 7534 (SCA)(overturned suspended sentence on appeal.)

<sup>294</sup> *S v Di Blasi*, 1996 (1) SACR 1, 9 (A).

<sup>295</sup> *Kensely*, 1995 (1) SACR 646.

<sup>296</sup> *S v Arnold*, 1985 (3) SA 251 (C) (acquitted for non-pathological criminal incapacity "From time to time the 'black' side would surface when she would wear no brassiere and would display her charms, much to the annoyance of the accused, particularly as the accused was intensely jealous and could not bear the men ogling her body and disapproved of stripping.")

<sup>297</sup> *Op cit.* at 259 ("The desertion by the deceased must have unsettled the accused considerably. He was deeply attracted to her and had sacrificed a great deal to keep her.

Here we may add that the accused is highly emotional and clearly experiences the most intense feelings, far more intense than is normal."(disapproved of in *Eadie*); *Van Vuuren*, 1983 (1) AD 12 ("So far as provocation is concerned I have no doubt that the deceased spoke to him in a contemptuous and derogatory way . . . . His former wife, the complainant, also treated him in a casual and at times sheerless manner . . . . These factors, the drink, the provocation and the emotional stress all serve to mitigate his moral turpitude."); *Kalogoropoulos*, 1993 (1) SACR 12 (upholding sentence in total of 8 years for murder although considered it lenient for a man who killed his business partner he thought was having an affair with his wife and a sentence of 2 years to run concurrently for trying to kill his wife.).

<sup>298</sup> *S v Malehane*, 1999 (1) SASV 279 (O)(reducing sentence to 5 years because found to be excusable human error).

<sup>299</sup> *Laubscher*, 1988 (1) SA 163 (finding diminished capacity); *Martin v S*, 1998 JOL 268 (W) (finding diminished capacity.)

<sup>300</sup> See supra notes 282 through 285.

<sup>301</sup> *S v Smith*, 1990 (1) SACR 130, 135 (A); see also, Re: Mpho Priscilla Sekwati, on file with CSVR (convicted of culpable homicide after killing her husband because of jealousy; received five years imprisonment as a sentence); In Re: Rosinah Mathabela, on file with CSVR (convicted of killing her husband out of jealousy; received a sentence of eight years imprisonment).

<sup>302</sup> Taylor, supra note 6 at 1679 and 1714; Alexander Reilly, *The Heart of the Matter: Emotion in Criminal Defences* (1997-1998) 96 Columbia Law Review 117, ¶60; Tim Quicley *Battered Women and the Defence of Provocation* (1991) Saskatchewan Law Review 223, page 6 of printout; The Women Who Kill In Self-Defence Campaign, *Submission to the Model Criminal Code Officer's Committee Fatal Offences Against the Person*, 21 August 1998 at <http://www.nwjc.org.au/mccode.htm> page 7 of printout.

<sup>303</sup> *Springer v Kentucky*, (1999) 998 SW2d 439, 455.

<sup>304</sup> See Section 13.1 of the Discussion Document for a more in-depth explanation.