

Battered Women Who Kill: Avenues for Legal/Political Recourse

by

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A. Introduction

1. I have been requested by my Consultant, the Centre for the Study of Violence and Reconciliation (CSVr), to provide an Opinion on recourse available to battered women who kill. In particular, I have been asked to apply my mind to a possible basis for setting aside, substituting or reducing the sentences this category of women have received and are currently serving.
2. I have been briefed with two Opinions: one focusing on the legal and political remedies for women in prison for killing their abusive partners and another focusing on a proposed panel to review the sentences of women who are imprisoned for killing their abusive partners.
3. I have been advised that my Opinion should be broad enough to focus on the legal ramifications and possible recourse for all battered women who have killed abusive partners (i.e. extending beyond those whose files my Consultant has been dealing with to date).
4. In line with the broader objectives of this Opinion, I will address the following issues:
 - The constitutional framework within which legal / political recourse must be sought;
 - Background and context within which battered women kill abusive partners;
 - Legal defences available to battered women who kill;
 - Sentencing options for battered women who kill;
 - Exhausting the judicial process;
 - The role of the Department of Correctional Services in providing recourse to battered women who have killed and are currently serving sentences;
 - Applications for clemency that can be made to the President and mechanisms to facilitate Presidential clemency powers.
5. However, I should state at the outset that the attention I accord to each of these areas has been informed by direction from my Consultant. In particular, the fact that research in respect of some of these areas has already been undertaken, coupled by recent indications from the Department of Correctional Services has necessitated a particular emphasis on certain areas.

B. Relevant Constitutional Rights

6. It is vital that the relevant rights in the Bill of Rights inform, at various levels both the legal and political response to battered women who kill. The far-reaching impact of the Bill of Rights is acknowledged in section 8(1) of the Constitution in noting that it applies to *all* law, and binds the legislature, the executive, the judiciary and all organs of State.
7. The Constitution specifically provides that when interpreting the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.¹ This duty was confirmed in the case of *Carmichele v Minister of Safety and Security*.²
8. Relevant constitutional rights should particularly inform and underpin the following aspects of legal / political recourse for battered women who kill:
 - Legal defences available;
 - Sentences that are imposed;
 - Criteria for conversion of sentences;
 - Pardon and clemency.
9. There are three key constitutional rights that are of particular relevance to the issue of battered women who kill:
 - The right to freedom and security of the person, including the right to be free from all forms of violence from public and private sources;³
 - The right to equality and the prohibition of unfair discrimination on a number of grounds including gender and sex;⁴ and
 - The right to a fair trial.⁵
10. Section 7(2) of the Constitution mandates the State to respect, protect, promote and fulfil the rights in the Bill of Rights.
11. When section 7(2) is read with section 12(1)(c), it not only requires that the State adopt measures to *prevent* violence against women, but that in instances where such violence does occur to minimise its impact on women who have been subjected to it. Clearly, this latter duty requires that regard be had to the *context* within which women respond to their abusers.
12. The intersection between domestic violence and equality was explicitly acknowledged by the Constitutional Court in noting: "To the extent that it is systemic, pervasive and overwhelmingly gender-specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form."⁶
13. In interpreting section 9 of the Constitution, the Constitutional Court has commented that we cannot achieve the goal of equality by insisting on identical treatment in all circumstances.⁷
14. In *The National Coalition for Gay and Lesbian Equality and Another v Minister*

of *Justice and Another*,⁸ Sachs J noted:

"Equality should not be confused with uniformity; in fact uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference."⁹

15. In acknowledging difference between groups, it is critical that regard be had to the gendered dimension of domestic violence as well as the context within which battered women kill. These are key elements in ensuring the accused's right to a fair trial.

16. As noted above, these constitutional provisions must underpin and inform the various legal / political avenues that battered women who have killed their abusers can pursue.

C. Background and Context Within Which Battered Women Kill

17. As noted, in order to formulate and / or utilise appropriate legal and political avenues for battered women who have killed, some insight into the context within which these killings take place is critical. Although this context is obviously not identical in all circumstances, there are certain common elements that are generally present in instances where battered women have killed. It is this unique context and its particular implications for battered women who have killed that warrants and indeed requires special measures for this category of women.

18. It should however first be noted that although legal writings on battered women who kill abound, there is a stark disparity between the extensive legal writing on the subject and the number of women who actually kill. The reality is that, in fact, women including women who have been abused *rarely* kill. Current statistics indicate that the number of women incarcerated for killing their abusive partners in South Africa is currently 165.¹⁰ This figure is particularly low when viewed against the overall prevalence of violence against women in South Africa. In addition, statistics from other countries support this contention.¹¹ The rarity of such killings is relevant for the purposes of this Opinion insofar as it indicates that in formulating / utilising legal or political avenues to provide recourse to this category of women, it would cover an extremely small sector of women (on current numbers this would constitute 165 in South Africa).

19. Typical spousal killings by battered women have been described as follows:

"Domestic homicides committed by women tend to be defensive and victim-precipitated. Typically, battered women who kill do so in response to an attack or following a threat from the abuser to harm another, usually a child. Some kill whilst the abuser sleeps after an attack, convinced that it will continue when he awakens. They kill because they feel there is simply no other way out. After previous failed attempts, they lose hope of escaping. The violence, tension and fear reach a point where death seems inevitable: a choice between suicide and homicide."¹²

20. Research further indicates, that the majority of these spousal killings take place

in instances where such women have been subjected to a long history of physical, sexual, emotional, verbal and financial abuse as opposed to isolated instances of abuse.

21. As will be discussed further in the context of self-defence, when battered women kill, their relative physical strength as compared with that of men also often precludes them from meeting their batterer "blow with blow or fists with fists". As a result, the fact that women are physically less well-equipped than men sometimes necessitates the extent of force that ultimately results in death of the abuser.
22. It should also be noted that the failures of the criminal justice system in providing adequate legal protection to abused women, is a further contributing factor to the state of desperation that some women are driven to in killing their batterers. Very often, battered women who kill have sought recourse through the criminal justice system. However, due to a multiplicity of factors (such as the inadequacy of the system, the lack of sufficient resources dedicated to addressing domestic violence and the relatively insignificant attention given to domestic violence), the system has failed them. The ineffectiveness of the criminal justice system and its impact on women who have been abused was acknowledged by the Constitutional Court in stating: "The ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victim. This also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. Patterns of systemic sexist behaviour are normalised rather than combated. Yet it is precisely the function of constitutional protection to convert misfortune to be endured into injustice to be remedied."¹³
23. A lack of an appreciation of the context within which battered women kill is also borne out by one of the frequent questions raised by the criminal justice system in respect of battered women who kill. The question is often asked: "Why don't these women simply leave their abusers?" Poor social security systems, limited economic opportunities, the fear of being pursued by their abuser, as well as the fear of losing their children are some of the most obvious reasons for not separating from their abusive partners. Research also indicates that women's own accounts reveals emotional ties that have been developed over a long period of time with their abusers which further renders separation difficult.¹⁴
24. Leading commentators in the area have also identified several common personality traits of battered women which contribute to difficulties in separating from their abusers. These include: low self-esteem, traditional beliefs about the home, the family and the female sex role, tremendous feelings of guilt that their marriages are failing and a tendency to accept responsibility for their batterers actions.¹⁵
25. The cyclical nature of battering behaviour is a further reason why battered women often remain in abusive relationships. The battering cycle often consists of three phases: tension building; acute battering; extreme contrition and loving behaviour by the batterer. It is often the third phase that reinforces hopes of reform of the batterer among women and keeps them in abusive relationships.¹⁶

26. In addition, research has indicated that some women may become so demoralised and degraded by the fact that they cannot predict or control the violence that they sink into a state of psychological paralysis and become unable to take any action at all to extricate themselves from such relationships. There is a tendency in battered women to believe in the omnipotence or strength of their battering husbands and thus to feel that any attempt to resist them is hopeless.¹⁷

27. The expectation that battered women should simply leave their abusers to escape the abuse also rests on the naïve assumption that leaving will end the violence. However, research indicates that a third of women who leave violent relationships suffer violence after separation.¹⁸ Women who kill are often aware of continued violence after separation, and as a result often do not view physical separation as rendering them immune from further abuse and violence at the hands of their abusers. These fears are often exacerbated by the well-known failures of the criminal justice system to provide adequate protection against domestic violence.

28. In addition, stereotypical views of women's response to domestic violence have fuelled a spate of ineffective and inadequate responses by the criminal justice system. The point has been aptly made as follows:

"[W]here women do appear before the criminal justice system, their behaviour is judged against the social and legal construct of Woman. Woman, by nature, is portrayed as inherently unlikely to commit offences. A woman who kills falls into one of the two categories of criminal women. She is either an 'evil' woman who accepts responsibility for her actions or an 'irresponsible' woman whose actions may be attributed to her individual pathology. As a consequence of women who kill being categorised into one of either of these two types, the reasons for their actions are not explored. The female killer is labelled either 'bad' or 'mad'. "¹⁹

29. The inadequacies of the criminal justice system to issues of domestic violence have resulted in a particular irony in respect of battered women who kill. It has been described as: "The most complete description of women's suffering of domestic violence to enter legal discourse is at the point at which violence against women finally results in harm to a man."²⁰

30. Furthermore, one of the fundamental flaws of legal policy and legislation has been its failure to respect the specificities of women's existence. This failure has resulted in a lack of appreciation for the context within which battered women kill. However, the challenges of a gendered legal policy have been stated as follows:

"The idea that the legal system can accommodate all of women's specificities is a major challenge. If women's experiences of abuse and disadvantage were to be taken seriously by the legal system, then not only the law of self-defence, but all other areas of law, would have to be reconceptualised, with new standards and norms, in order to achieve justice."²¹

31. In order for legal and political avenues to be truly responsive to the specificities of women, it is critical that this context within which battered women kill be

taken into account.²² It is in this context that distinguishes this category of women from other perpetrators, and accordingly necessitates special measures.

D. Legal Defences Available to Battered Women who Kill

32. Legal defences available to battered women who kill are generally quite limited. Most women admit to the killing and there is often little doubt that the killing was intentional.

33. Hence, the most common defences utilised by battered women who kill are the following:

- Mental illness;
- Temporary non pathological incapacity;
- Provocation;
- Self defence.

34. In this section I will examine the basic thrust of each of these defences for battered women who kill. I will also highlight shortcomings in respect of the formulation and criteria for pleading any of these defences for battered women who have killed. This is intended to provide an indication of how some of these defences need to be reconceptualised or reformed so as to take account of the unique context within which battered women kill and to be responsive to their needs and rights.

Mental illness

35. A battered woman may be acquitted if, at the time of the killing, she was, by reason of mental disease or mental defect, unable to know the nature and quality of her act or unable to realise that it was wrong. The result of a successful defence is that she lacks criminal capacity and is consequently not criminally liable for her actions.

36. The defence of mental illness in South Africa is regulated by section 78 of the Criminal Procedure Act (hereinafter referred to as CPA). Section 78(1) of the CPA reads as follows:

"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."

37. The first leg of the test is referred to as the psychiatric or biological leg of the test. It requires that the accused be suffering from a mental illness or mental defect, the presence of which must be determined with the aid of psychiatric evidence.

38. Although the mental illness may be temporary in nature, it must be present at the

time of the commission of the act.

39. The term "mental illness" or "mental defect" refers to a *pathological disturbance* of the mental faculties and not a mere temporary clouding of the mental faculties which cannot be ascribed to a mental disease but merely to external stimuli such as alcohol, drugs or provocation.²³
40. The second leg of the test refers to the absence of cognitive or conative functions (psychological element). Cognitive functions include the intellectual functions of the accused, which enable her to perceive, to think, to reason and to remember; they relate to insight and understanding. Conative functions relate to her ability to control her behaviour by voluntary exercise of will.²⁴
41. The burden of proving that an accused was mentally ill at the time of the commission of the offence rests on the accused, which must be discharged by proving on a preponderance of probabilities that she was mentally ill at the time of the commission of the offence.
42. If the defence of mental illness or mental defect is successful, the court must find the accused not guilty by reason of mental illness or mental defect. This verdict is accompanied by an order that the accused be detained in a mental hospital or prison.
43. Due to the requirements for this defence, the burden of proving it as well as the consequences of a successful defence, in practice this defence is seldomly raised by battered women who kill as it ultimately offers them limited recourse.
44. A key shortcoming of this defence for battered women who kill is that though they might be emotionally distraught or on the verge of mental illness at the point at which they do so, they are generally well aware of what they were doing when they killed their spouse and are able to appreciate the legal wrongfulness of such killing. As far as many battered women who kill are concerned, they do so for a rational reason: namely, to protect themselves from further physical or mental suffering.
45. In addition, international experience has indicated that this defence is rarely successful in practice due to gender stereotyping. Schneider and Ewing have observed that there is a general mistrust of psychiatric defences, in respect of which a different standard is often applied to women. They further explain that there is an expectation that women who assert an impaired mental state defence to sound truly insane. A woman who sounds too angry or too calm may not fulfil stereotypical expectations in respect of her conduct.²⁵
46. Even if successfully raised, the fact that the verdict in respect of this defence is generally accompanied by an order for institutionalisation further minimises its value for battered women who kill.
47. As a result of the aforesaid factors, the defence of mental illness provides very limited recourse to battered women who kill.

Temporary non pathological incapacity

48. Criminal capacity may be excluded or diminished by mental illness, youth, intoxication and provocation *or by any other factor affecting the accused's mental ability* at the time of the commission of the act, which made it impossible to appreciate the wrongfulness of the conduct or to act in accordance with such appreciation.
49. In *S v Adams*,²⁶ it was held that "there can logically be no reason why a distinction should be drawn between the lack of criminal capacity because of insanity and such lack due to any other cause."²⁷
50. Unlike mental illness, non-pathological criminal incapacity can potentially provide substantially greater recourse to battered women who kill. Support for this contention, (though it did not ultimately result in acquittal of the accused in this matter) can be found in the case of *S v Campher*.²⁸ In this case, the accused had killed her husband who had abused her over a long period of time. The majority of the court accepted that a lack of criminal capacity may be a complete defence even though it is unconnected to mental illness in terms of section 78 of the Criminal Procedure Act.
51. Temporary non-pathological incapacity was again raised in *S v Wiid*.²⁹ The accused was convicted of murder in that she had shot and killed her husband with a pistol. The court on appeal found that the onus rests on the State to rebut the defence of temporary non-pathological incapacity, but that a foundation should be laid in evidence for the raising of the defence. The appeal was upheld and it was found that there was at least a doubt as to whether the appellant at the time of the shooting had the necessary criminal capacity and should therefore ought to have been given the benefit of the doubt.³⁰
52. When used in the context of battered women who kill, of vital importance is that the accused lays a sufficient basis in evidence in raising this defence. The role of expert evidence in this regard could be an important strategy through which abused women are granted recourse. This defence can accordingly be developed and ultimately utilised in a way that takes account of the specific circumstances in which battered women kill.

Provocation

53. The defence of provocation may also be used to provide recourse to battered women who kill if the killing was *immediately preceded* by insulting or provocative conduct on the part of the deceased which angered the accused and led to her aggressive conduct.
54. The effect of provocation in present South African law is as follows:
- It may exclude criminal capacity;
 - It may exclude intention;
 - It may operate as a ground for mitigation of punishment.

55. In *S v Mokonto*,³¹ the court made it clear that the test is not how an ordinary

reasonable person would have reacted to the provocation, but how the particular accused, given her personal characteristics, in fact reacted and what her state of mind was at the crucial time.

56. The issue of whether the accused attacked the deceased immediately after the provocation, and whether there was a "cooling off" period between the provocation and the attack, are not questions asked to determine in mechanical fashion whether a crime is murder or culpable homicide, but are merely factors which, together with others such as the proportionality of the accused's reaction to the provocation must be considered when a court is trying to determine whether the accused had the intention to murder.³²

57. The particular subjective emphasis on the accused in pleading provocation can be used by battered women to provide evidence of their frame of mind at the time of the killing, the history of abuse as well as its impact on the accused. However, issues of timing between the provocation and attack coupled by the element of proportionality, nevertheless still make this defence a difficult one in respect of battered women who have killed. Due to factors such as relative strength of the parties, many of these killings take place when the accused is asleep. As a result, the act that provoked the accused often does not immediately precede the attack, and for the same reason, the element of proportionality is also often lacking.

Self Defence

58. The doctrine of self-defence permits the use of reasonable force against another person when one reasonably believes that person is threatening her with imminent and unlawful bodily harm and that such force is necessary to prevent the threatened harm.

59. A person may act in defence if she defends herself or somebody else against an unlawful attack upon life, limb, property or dignity.

60. A person acting in self-defence acts lawfully, provided her conduct complies with the requirements of private defence and does not exceed its limits.

61. The requirements of self-defence are better understood if they are divided into: requirements for an attack and requirements for defence.³³

62. The requirements for an attack are as follows:

- It must consist of a positive act or an omission to act;
- The attack must be unlawful;
- The attack must be threatening/imminent but not yet completed;
- The attack need not be directed at the defender.

63. The requirements for the defence are as follows:

- It must be directed against the attacker;
- The defensive act must be necessary in order to protect the interest threatened in the sense that it must not be possible for the person threatened to ward off the attack in another, less harmful way;

- The act of defence may not be more harmful than is necessary in order to ward off the attack;
- The attacked person must be aware of the fact that she is acting in self-defence.

64. There are certain major barriers to battered women raising successful defences based on self-defence. These include:

- The requirement of threatened / imminent danger of death or serious bodily injury;
- The requirement of necessity to resort to deadly force to avert that danger;
- The fact that the defence is based on a single confrontational encounter and fails to have adequate regard to instances of prolonged histories of domestic violence and abuse.

65. The doctrine requires that a reasonable person, faced with the same circumstances, would have believed that death or serious bodily injury was imminent. This requirement poses numerous difficulties for battered women, given the very circumstances under which battered women kill. These circumstances generally do not result in the women being objectively threatened, except to the extent that the presence of the batterer might be perceived as an imminent threat. This requirement is accordingly difficult to meet in instances where battered women kill their batterers after arguments or incidents of acute battering or while they are asleep. In these instances, the elements of threat or imminence are lacking.

66. Furthermore, the degree of force used in self-defence must be reasonable. This requirement makes a claim of self-defence in respect of a battered woman extremely difficult to sustain because it does not necessarily explain why she found it necessary to use deadly force to protect herself. In addition, this requirement presupposes equality of physical strength between the deceased and the accused.

67. The law relating to self defence fails to take account of the following context within which abused women kill:

- There are stark physical differences between men and women which often results in women not striking back immediately;
- The reasonable person test is implicitly male and fails to have regard for the context within which battered women respond to their abusers;
- There is a diversity and complexity of possible emotional responses from abused women;
- There are profound psychological and emotional effects on women living under the constant threat of abuse;
- There is an unrealistic appreciation of the options available to battered women.³⁴

68. The traditional male paradigm within which the law relating to self-defence has been framed makes it patently inadequate in the context of battered women who kill.

E. Sentencing Options for Battered Women Who Kill

69. Section 276 of the Criminal Procedure Act stipulates the sentences that might be passed upon a person convicted of an offence. The sentences listed in the section include imprisonment, fines and correctional supervision. The court is accorded an extremely wide discretion in imposing sentence.

70. An appeal court is generally very reluctant to overturn a sentence on appeal unless there has been a misdirection by the lower court.

71. An excursus of South African case-law indicates that there are some cases in respect of which the sentencing option of correctional supervision has been imposed on battered women who have killed. The context within which these killings have taken place have been used in mitigation of sentence.³⁵

72. In *S v Potgieter*,³⁶ the accused was convicted of murder and was sentenced to seven years imprisonment. The accused had been subjected to extensive abuse at the hands of the deceased for a period of six years preceding her death. She had been subjected to assaults, humiliation and psychological abuse. In considering sentence, the following issues were of relevance:

- The accused was 37 years of age and a first time offender;
- The accused was the mother of four children;
- The accused had been assaulted by the deceased on the day of the murder and that the deceased was lying in bed on the day of the murder.

Based on the aforesaid factors, the Supreme Court of Appeal set aside the sentence of the trial court of seven years imprisonment and remitted the case for reconsideration of sentence in respect of correctional supervision.

73. Similarly, in *S v Larsen*,³⁷ the appellant was sentenced to 5 years imprisonment, half of which was suspended for shooting and killing her husband. In considering an appeal in respect of sentence, the Supreme Court of Appeal had regard to the following factors:

- The appellant was 38 years old at the time of the conviction;
- She had no relevant previous convictions;
- She was in full-time employment;
- She had three children;
- There had been a long history of abuse of the accused by the deceased. The accused had been regularly assaulted and abused by the deceased over a period of many years and their marriage was under severe strain at the time of the killing.

The court concluded that on the basis of the above factors, the appellant did not fall into the category of persons who ought to be removed from society by a sentence of imprisonment. It was accordingly held that the matter should be remitted to the trial court for consideration of a sentence of correctional supervision.

74. In *S v Ingram*,³⁸ the accused was convicted of murder and sentenced to eight

years imprisonment. His defence was that of non pathological criminal incapacity. His evidence indicated that the deceased had frequently been abusive towards the appellant and their children, had had an alcohol problem and had been unfaithful on many occasions. The appellant and the deceased were intoxicated during the time of the shooting. It was held that in cases of this kind the imposition of suitable conditions of correctional services can render the sentence sufficiently severe and the sentence of eight years imprisonment was accordingly set aside. It was further held that deterrence was not relevant in the present context.

75. The cases referred to above accordingly indicate that where there have been instances of abuse, correctional supervision as opposed to imprisonment has sometimes been considered to be the appropriate sentence.
76. The cases referred to above further indicate that there have been instances where the particular context within which battered women kill have been taken account of in the imposition of sentence and have influenced such sentences positively.
77. However, it should be noted that section 51 of the Criminal Law Amendment Act,³⁹ has to some extent constrained judicial discretion in respect of sentencing by requiring mandatory sentences in respect of certain offences.
78. In terms of section 51 (1) of the Act, a High Court is obliged, if it has convicted a person of an offence referred to in Part 1 of Schedule 2, to sentence the person to imprisonment for life. These offences include murder under certain circumstances and rape under certain circumstances.
79. In particular, it states that where a murder was planned or premeditated an obligatory life sentence is to be imposed. This provision obviously has severe consequences for battered women who kill, given that there is often an element of premeditation.
80. However, it should be noted in terms of section 51(3)(a), a court which has found someone guilty of an offence referred to in Part 1 or Part 2 of Schedule 2 shall if it is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the mandatory minimum sentences, enter those circumstances on the record of proceedings and may thereupon impose such lesser sentence.
81. Although the legislature has not defined substantial and compelling circumstances, the case law seems to indicate that it includes:
- circumstances that are material to the offence;
 - the interests of society;
 - personal circumstances of the accused person.

82. In view of the absence of a legislative definition of what constitutes substantial and compelling circumstances, there is clearly room for it to be developed to take account of the particular circumstances within which abused women kill. The context within which these killings take place (as already discussed) coupled by the fact that the element of deterrence has no particular relevance to these matters should specifically inform the definition of "substantial and compelling" circumstances.

F. Exhausting the Judicial Process

83. Before the non-judicial options referred to below can be exercised, the judicial process (i.e. appeal and review options) must be exhausted.

84. Despite certain fundamental differences between appeal and review proceedings, both are inherently aimed at setting aside a conviction or sentence.

85. In instances where the *correctness* of a conviction and/or sentence is challenged, an accused can appeal against such conviction and/or sentence.

86. In instances where there is an *irregularity* in arriving at a conviction, redress is sought by means of review. An irregularity in proceedings has been referred to in *Ellis v Morgan*; *Ellis v Dessai*⁴⁰ as follows:

"[It] does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined."⁴¹

87. Unlike appeal proceedings, there are no specific timeframes in respect of review proceedings, provided that they are instituted within a reasonable time.

88. Although the exact content and requirements in respect of each of these proceedings will not be discussed in this section,⁴² it should be noted that appeal and review options must be exhausted before non-judicial options can be pursued.

G. Correctional Supervision

89. Vast powers in respect of parole and placement under correctional supervision have been accorded to the Department of Correction Services in terms of the Correctional Services Act.⁴³

90. As correctional supervision (as opposed to long-term imprisonment), is a means of providing recourse to battered women who kill and are currently serving sentences of imprisonment, the relevant provisions of the Act will be discussed in some detail.

91. Section 1 of the Correctional Services Act defines "community corrections" as "all non custodial measures and forms of supervision applicable to persons who are subject to such measures and supervision in the community and who are under the control of the Department."

92. Community service is defined in the Act as: "Compulsory work for a community organisation or other compulsory work of value to the community, performed without payment."

93. In terms of section 2 of the Correctional Services Act, it is noted that the purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by:

- Enforcing sentences of the courts in a manner prescribed by the Act;
- Detaining all prisoners in safe custody whilst ensuring their human dignity; and
- Promoting the social responsibility and human development of all prisoners and persons subject to community corrections.

94. I will deal with the following three mechanisms through which battered women who have killed might be accorded recourse in terms of the Act:

- Individual applications to correctional supervision and parole boards;
- General measures to reduce prison population;
- Policy development by the National Council.

Individual applications to correctional supervision and parole boards

95. Chapter VII, entitled, *Release from Prison and Placement under Correctional Supervision and on Day Parole and on Parole* details the relevant process to be followed.

96. Section 73(4) provides as follows:

"In accordance with the provisions of this chapter a prisoner may be placed under correctional supervision or on day parole or on parole before the expiration of his or her terms of imprisonment."

97. However, the Act makes it mandatory that a particular portion of the sentence imposed is served before a person is considered for placement under correctional supervision or parole. It requires in terms of section 73 (7)(c) that if a person has been sentenced to imprisonment under certain sections of the Criminal Procedure Act (such as imprisonment for a definite period of time), "such person shall serve at least a quarter of the effective sentences imposed or the non parole period, if any, whichever is the longer before being considered for placement under correctional supervision, unless the court has directed otherwise." This requirement poses a particular barrier to the early release of women who kill.

98. The basis for such a provision quite conceivably lies in the fact that there should be some degree of stringent adherence to judicially imposed sentences in order to ensure that the powers of the Department of Correctional Services do not completely supersede the powers exercised by the judiciary.

99. However, it is arguable that the fact that that provision allows absolutely no deviation (except in instances where a court directs otherwise) despite the circumstances of the individual concerned makes its rigid application somewhat unreasonable. Significantly, the provision draws no distinction in respect of the

crimes for which sentences are being served. In so doing, it seeks to apply an identical, uniform standard in respect of all prisoners serving particular sentences.

100. In light of the specific circumstances of abused women who have killed, as well as the Constitutional Court's endorsement of a substantive conception of equality, I am of the view that efforts should be made to lobby for an amendment in respect of the aforesaid mandatory period. It might be advisable that the amendment directs that regard be had for the specific circumstances of the individual concerned, and if the specific circumstances so warrant, there should not be a mandatory minimum period or the mandatory minimum period should be reduced. The particular context of battered women who have killed coupled by the constitutional rights at stake should constitute the basis for such an amendment.

101. Section 75 of the Act stipulates the Powers, Functions and Duties of the Correctional Supervision and Parole Boards. Section 75 (1)(a) provides as follows:

- A Correctional Supervision and Parole Board, having considered the report on any prisoner serving a determinate sentence exceeding 12 months submitted to it by the Case Management Committee in terms of section 42 and in light of any other information or argument, may—

(a) subject to the provisions of paragraphs (b) and (c), place a prisoner under correctional supervision or day parole or grant parole and, subject to the provisions of section 52, set the conditions of community corrections imposed on the prisoner.

102. Paragraph (b) of the Act refers to prisoners who have been declared dangerous criminals in terms of section 286 A of the Criminal Procedure Act. As it is unlikely that battered women who have killed abusive partners would have been sentenced in terms of this provision, its content will accordingly not be discussed for the present purposes.

103. Paragraph (c) refers to prisoners serving sentences of life imprisonment. In such instances, the section mandates that Correctional Supervision and Parole Boards make recommendations to the court on the granting of day parole or parole, and, subject to the provisions of section 52, the conditions of community corrections to be imposed to the prisoner.

104. Section 42 of the Correctional Services Act makes provision for the establishment of a Case Management Committee. The Case Management Committee is mandated, amongst other things to submit a report together with relevant documents to the Correctional Supervision and Parole Board. The information in the report and documents should include:

- the offence/s for which the sentenced prisoner is serving a term of imprisonment together with the judgment on merits and any remarks made by the court at the time of the imposition of the sentence;
- the previous criminal record of such prisoner;
- the conduct, disciplinary record, adaptation, training, aptitude, industry,

- physical and mental state of such prisoner;
- the likelihood of relapse into crime, the risk posed to the community and the manner in which this risk can be reduced;
- the possible re-placement of such prisoner under correctional supervision in certain circumstances;
- any other matters that the Correctional Supervision and Parole Board may request.

105. A prisoner must be informed of the contents of the report submitted by the Case Management Committee and must be given the opportunity to submit written representations to the Correctional Supervision and Parole Board.

106. Section 75(8) provides that a decision of the Board is final except that the Minister or the Commissioner may refer the matter to the Correctional Supervision and Parole Review Board (hereinafter referred to as the Review Board) for reconsideration.

107. In terms of section 77 of the Act, the Review Board may either confirm or substitute a decision.

108. On the basis of the above, it is clear that the Correctional Supervision and Parole Board / Review Board may, on the basis of the individual circumstances as reflected in the report submitted by the Case Management Committee convert an individual prisoner's sentence of imprisonment to one of correctional services.

109. Chapter VII of the Correctional Services Act may accordingly provide some recourse to battered women who kill. However, the extent to which this mechanism can in actual fact provide recourse to battered women who have killed and are serving sentences is largely dependent on the following two issues (in addition to the comments already made regarding the mandatory minimum period that must served):

- The extent to which the report of the Case Management Committee refers to the circumstances and context within which the prisoner committed the crime in question, with particular reference to the history of abuse and violence. It should however be noted that if the report submitted by the Case Management Committee does not adequately address these issues, they should be addressed by the detained person herself in exercising her right to make written representations. Detained persons should accordingly receive written and effective notice regarding this right and its implications for early release.
- Even if the relevant issues are before the Correctional Supervision and Parole Boards, the extent to which these factors are taken account of in the exercise of their discretion and the weight that it will ultimately attach to these factors.

110. In attempting to secure optimal use of this mechanism, it is critical that abused women who have killed are assisted in making written submissions to the Correctional Supervision and Parole Boards, in terms of which the background and context within which their crimes were committed is explained. Members of the Board should also be trained in respect of the particular issues pertaining to this category of detained persons.

Special measures for the reduction of prison population

111. The Act also makes provision for special measures for the reduction of prison population.⁴⁴

112. Although this provision may be used to provide recourse to battered women who have killed, it provides little recognition for the plight of battered women, the context within which some of them have killed and the specific constitutional rights which warrant special consideration for this category of women.

Policy development by the national council

113. In addition to the above measures, the National Council may be used as an appropriate mechanism through which specific policies in respect of battered women who kill may be advanced.

114. The functions of the National Council include the following:

- The primary function of the National Council is to advise, at the request of the Minister or on its own accord, in developing policy in regard to the correctional system and the sentencing process.
- The Minister must refer draft legislation and major proposed policy developments regarding the correctional system to the National Council for its comments and advice.
- The National Council may examine any aspect of the correctional system and refer any appropriate matter to the Inspecting Judge.

115. Lobbying and advocacy to the National Council in respect of the adoption of particular policies for battered women who have killed can provide a further avenue through which recourse is sought.

H. Clemency

Nature of clemency powers

116. Clemency is a discretionary executive power that is both legal and political in nature. It is legal because the authority comes from the Constitution and political because an executive can consider factors that judges and juries cannot.⁴⁵

117. Clemency is an instrument of equity designed to promote the general welfare by preventing injustice. There are several forms of clemency including, amnesty, commutations, pardons, remissions of fines and forfeitures and reprieves. Amnesty is an act of forgiveness given by the government to a class of persons guilty of political offences. A commutation reduces the original sentence to a

lesser degree of punishment. Pardons can be either absolute or conditional, and will either completely forgive the offender of the crime and all the consequences of conviction or there may be requirements that the grantee must fulfil before or after pardon is granted. The remission of fines and forfeitures releases a person from indebtedness.⁴⁶

118. The reasons for clemency are manifold. Innocence is not the sole reason for granting clemency. Other reasons may include doubt as to guilt, changes in the political climate and laws that reflect societal enlightenment concerning the nature of certain offences.⁴⁷

119. In South Africa powers in respect of clemency are vested in the President. In terms of the Constitution the President is responsible for pardoning or relieving offenders and remitting any fines, penalties or forfeitures.⁴⁸

120. Specific powers in respect of the granting of amnesty was recognised by the Constitutional Court in *Azanian People's Organisation (AZAPO) v President of the Republic of South Africa*.⁴⁹ The Promotion of National Unity and Reconciliation Act (No. 34 of 1995), and in particular the provisions relating to the granting of amnesty was challenged in this matter. The court held that the amnesty granted therein was not a blanket amnesty and that it was specifically authorised for the purposes of effecting a constructive transition towards a democratic order. It also noted that it was available only in certain specific circumstances and by having regard to careful criteria listed in section 20(3) of the Act.⁵⁰ It accordingly held that the provisions pertaining to the granting of amnesty in the aforesaid Act were consonant with the relevant provisions of the Constitution.

121. It should be noted that a significant distinction between the *AZAPO* case and the present matter is that amnesty in respect of reparation was specifically authorised by the Constitution in the *AZAPO* case. The court accordingly noted as follows:

"The epilogue required that a law be adopted by Parliament which would provide for "amnesty" and it appreciated the "need for reparation", but it left it to Parliament to decide upon the ambit of the amnesty, the permissible form and extent of such reparations and the procedures to be followed in the determination thereof, by taking into account all relevant circumstances to which I have made reference."⁵¹

122. Although there is no such express constitutional authorisation in respect of battered women who have killed, the general Presidential powers of pardon as provided for in section 82(4)(j) of the Constitution, is nevertheless applicable to battered women who kill. A similar precedent in this regard was created in the case of *President of the Republic of South Africa v Hugo*⁵² (hereinafter referred to as *Hugo*).

123. In *Hugo*, the Constitutional Court observed that the powers of pardon as exercised by the President are subject to the rights in the Bill of Rights.

124. The Constitutional Court has acknowledged that in exercising a general power

of pardon, there will be certain categories of people who will benefit and others who will not. In this regard, it has observed as follows:

"Where the power of pardon or reprieve is used in general terms and there is an 'amnesty' accorded to a category or categories of prisoners, discrimination is inherent. The line has to be drawn somewhere, and there will always be people on one side of the line who do not benefit and whose positions are not significantly different to those of persons on the other side of the line who do benefit."⁵³

125. The aforesaid acknowledgement by the Constitutional Court would accordingly support pardon in respect of battered women who have killed constituting the category of beneficiaries.

126. This pardon power may be exercised on an individual basis or in general terms in respect of a particular group of persons.

127. In *President of the Republic of South Africa v Hugo*, the purpose of the President's power to pardon was explained as follows:

"There are at least two situations in which the power to pardon may be important. First, it may be used to correct mistaken convictions or reduce excessive sentences and second, it may be used to confer mercy upon individuals or groups of convicted prisoners when the President thinks it will be in the public benefit for that to happen. In the first situation, it has been recognised in many courts that it can play an important role in enhancing justice within the legal system. As Cooke P said in *Burt v Governor-General*:

'It must be right to exclude any lingering thought that the prerogative of mercy is no more than an arbitrary monarchical right of grace and favour. As developed it has become an integral element in the criminal justice system, a constitutional safeguard against mistakes.'

The pardoning power in the interim constitution should provide such a safeguard."⁵⁴

128. In view of the purpose of the presidential power to pardon, it is critical that the following relevant information be included in applications for pardon:

- The constitutional and legal basis on which pardon is sought in view of its purpose of correcting judicial mistakes and reducing excessive sentences;
- The personal circumstances of the accused, particularly insofar as they relate to the context within which the crime in question was committed and the impact of the current sentence on the detained person as well as her dependants. These personal circumstances should include sufficient detail so as to warrant a basis on which the President may confer mercy.

129. Key considerations in exercising his pardon powers in respect of the category of women referred to in the *Hugo* case included:

- the fact that it would serve the interests of children, given that mothers are generally responsible for child care;
- the fact that the female prisoners in question constituted a very small portion of the prison population;
- the early release of the category of women in question would not bring the administration of justice into disrepute.

130. These considerations are likely to be of relevance in the context of battered women who have killed. In addition, international experience in respect of the latter has indicated that the following factors can be of relevance to clemency applications for battered women who have killed:

- ineffective assistance of counsel;
- prosecutorial misconduct;
- prejudicial pre-trial publicity;
- dissents and inferences of court opinions in the case;
- physical illness;
- prior records of arrests of the batterer in conjunction with battering;
- geographic disparity of sentencing;
- innocence;
- race or cultural differences;
- institutional record;
- religious affiliation;
- likelihood of rehabilitation and
- risk of harm to the community.⁵⁵

A mechanism for exercising clemency powers

131. International experience has also indicated that executive clemency may be exercised with the assistance of an Executive Clemency Advisory Board. The Board is responsible for screening persons seeking clemency, and making recommendations to the Executive tasked with the actual power to grant clemency.

132. The establishment of a similar Advisory Board/Panel of Experts to the President in South Africa is likely to fulfil a valuable role.

133. The Board would be responsible for considering and making recommendations in respect of the granting of pardon for battered women who have killed.

134. The details of the Board, its functioning and operation will have to be carefully worked out if accepted as an option. In order to inform this process, it should be noted that there is a wealth of international precedent in respect of the establishment and operation of Executive Clemency Advisory Boards particularly from the US, which can provide some useful insight and guidance for South Africa.

135. I highlight below some of the pertinent aspects that need to be considered in establishing a Panel/Advisory Board. In order to prevent duplication, I draw heavily from research undertaken by the CSVR in this regard, which in turn, has purportedly relied on the US and Canadian experiences.⁵⁶ My recommendations

do however, in some instances deviate from those proposed by the CSVR for reasons I state thereunder.

Composition of the Panel

136. Although the Canadian Review was undertaken by a single individual, the establishment of a Board or Panel is likely to constitute a preferable option for South Africa. In particular, a Board or Panel, if properly constituted, will provide a greater degree of expertise as well as accountability.
137. The composition of the Board should include individuals who are knowledgeable in the area of domestic violence and particularly its impact on abused women. Panel members should accordingly have a working knowledge of domestic violence, its psychological impact on abused women as well as its impact upon defences available to abused women in the criminal courts.
138. These representatives might include a legal practitioner or a judicial officer, a representative of the Department of Justice, a representative from the Department of Correctional Services, a representative of the violence against women sector, a psychologist with expertise in the area and a representative of the Commission on Gender Equality. While a representative of the NDP may not necessarily sit on the panel, it is recommended that they be provided with the opportunity to respond to each application.
139. It is advisable that the composition of the Board not reflect a disproportionate bias for persons with a legal background. As already stated, the motivation for clemency (which will underpin the functions of the Board) is not limited to the innocence of the accused or in fact dependent on such innocence. As such, considerations pertaining to mercy, and consequent psychological and personal circumstances of the accused are central to the recommendations of the Board. A representative Board will accordingly guard against a 'legal retrial' of the issues, and accordingly facilitate a process in which due regard is had for the personal circumstance of the accused.

Scope of the panel

3.2. Scope of the panel

140. The panel should only consider those cases in which women have killed abusive partners.
141. The panel should also consider only those cases where all legal remedies have been exhausted. Where the option of an appeal is still open, individual women should be encouraged to pursue this route. However, women's limited resources should be taken into account in considering whether or not they have exhausted all their legal options. In situations where individual women cannot afford legal counsel and the Legal Aid Board declines to fund their appeals, women will be considered to have exhausted all legal options. Where the time periods for filing notices of appeal have already prescribed, women will also be considered to have exhausted all options.
142. On reviewing each case, the panel shall have the power to recommend the following options to the President's office: the conversion of custodial sentences

to terms of correctional supervision, to reduce sentences - including the reduction to time already served, or to consider the length of sentence already served as sufficient, or to leave the sentence as is.

Procedure to be followed in applying for a review of sentence

143.3.3. *Procedure to be followed in applying for a review of sentence* All inmates should be informed of the fact that Presidential pardon does exist as an option. Staff at each women's prison should be asked to inform inmates of the review process.

144. Written guidelines on how to compile an application should be made available to each woman who wishes to have her matter considered by the panel. A full and detailed motivation setting out arguments for a reconsideration of sentence should be completed by each applicant and submitted to the panel. Applications should be accompanied by the trial transcripts, expert testimony and any other information which may support the applications. Women who are illiterate or semi-literate should be offered the opportunity of tape-recording their applications which will later be transcribed. Where women so choose, a representative of an organisation dealing with domestic violence will be made available to assist in the completion of applications. Such representatives may also be required to assist women in the gathering of corroboratory affidavits.

145. The significance of including all relevant information on the written application forms should be emphasised to prospective applicants, particularly in view of the decision in *Smith v Minister of Justice and Another*.⁵⁷ This application concerned the right of a convicted prisoner to be released before the expiry of the term of sentence under the provisions of the Prisons Act 8 of 1959. The matter was referred to the Advisory Release Board in terms of the Act. However, the Board refused to hear oral representations from the prisoner's legal representatives. The court ultimately held that the maxim *audi alteram partem* was not applicable. In addition, it held that even if it did apply and the Applicant is entitled to be heard, an oral hearing is not necessary and written submissions would suffice.⁵⁸

146. The significance of comprehensive and relevant written submissions should accordingly also underpin the Correctional Services process referred to above.

Guidelines for evaluating applications

147. Though by no means exhaustive, in addition to the factors referred to in paragraphs 129 and 130 above, the following constitute additional criteria by which applications may be judged:

- Reference to the abuse during the trial and/or sentencing;
- Whether or not the circumstances of each matter would fit an expanded definition of either provocation or self-defence (this could be guided by the recommendations around both defences contained in the document appended to the Scholtz application);
- Corroboration of the abuse;
- Consistency between the trial transcripts, the individual applications and the corroborating affidavits.

148. There is ample precedent for the adoption of certain guidelines to inform decisions by the Executive of a similar nature. For instance, as was discussed in *Rapholo v State President and Others*,⁵⁹ the Indemnity Act 35 of 1990 empowered the State President to grant indemnity against civil and criminal proceedings.

149. Significantly, section 2 of the Act read as follows:

"(1) The State President may, by notice in the Gazette, grant indemnity to any person or categories of persons, either unconditionally or on conditions he may deem fit, in respect of any event or category of events specified in the notice.

(2) No proceedings, either civil or criminal, shall be instituted or continued in any court of law against any person who has been granted indemnity in terms of ss (1), in respect of the events specified in the said notice, and such person shall not be detained in terms of any law in respect of those events."

150. Subsequently Government Notice 2625 was published in Government Gazette 12834 which dealt with the following four areas:

- Guidelines for defining political offences in South Africa;
- Process of granting pardon or indemnity;
- Temporary immunity;
- Entry in the Republic.

151. The Notice set out the factors, which must be considered when making a recommendation for the grant of pardon or indemnity in appropriate cases. These included:

- The motive of the offender;
- The context in which the offence was committed;
- The nature of the political objective;
- The legal and factual nature of the offence, including its gravity;
- The object and/or objectives of the offence;
- The relationship between the offence and the political objective being pursued;
- The question of whether the act was committed in the execution of an order or with the approval of an organisation, institution or body concerned.

152. Annexed to the Government Notice were forms to be completed by prospective applicants for pardon or indemnity.

153. These applications were considered by an Indemnity Committee, the functions of which was to investigate and report on a matter relating to the exercise of the State President's powers under that Act. The Committee was responsible for considering the Applicant's representations and report thereon with recommendations to the State President.

154. In addition, in *Mweuhanga v Cabinet of Interim Government of SWA and Others*,⁶⁰ the court confirmed the relevance of applying the requisite criteria in respect of indemnity in connection with the combating of terrorism. The criteria for the granting of indemnity in that context was as follows:

- that the act was done in good faith;
- that it was done for the purposes of or in connection with the prevention or suppression of terrorism; and
- that it is in the national interest that proceedings shall not be continued.

155. The court ultimately held that the said criteria were in fact not applied to the circumstances of that case.

156. There is accordingly sufficient precedent for the development of appropriate and relevant criteria and guidelines for the evaluation of applications.

Funding and personnel required for the panel's establishment and work

157. It is proposed that panel members do not receive remuneration for their participation on the panel which should be considered a component of their daily work. Panel members should, however, be reimbursed for their travel costs and a small budget also be made available to cover the catering requirements of meetings.

158. A small secretariat of one person should be established within the Department of Justice to provide administrative support to the panel. This shall include setting up meetings, ensuring that reports and paperwork are made available timeously to panel members, taking and distributing minutes of panel meetings, and assisting with follow up of matters where necessary. The budget allocated to the functioning of the secretariat should also cover telephone, fax and photocopying costs associated with the panel.

159. The Panel should be funded by the Department of Justice, given that its very basis is as a result of the constitutional rights of the perpetrators and the reciprocal obligations of the State. A state-funded initiative will also ensure that the lifespan of the panel is not dependent on external funding.

160. The Department of Justice should not necessarily provide legal assistance to all applicants. Instead, the National Network on Violence Against Women through its member organisations will assist applicants. Organisations will be asked to volunteer their members to act as supports to the applicants. Those organisations volunteering to take part in the panel's work will receive training around statement-taking and ongoing support and supervision through organisations such as the Women's Legal Centre, the Centre for Criminal Justice and the Legal Resources Centre (this will obviously need to be negotiated with the organisations concerned, as well as any other legal bodies able to offer such services).

Suggested procedure for establishing the panel

161. It is recommended that the panel be established as soon as possible. Should the Department of Justice approve this proposal, it could call for nominations (with

an accompanying motivation) from each of the proposed sectors to be represented on the panel.

162. The work of the panel should be ongoing. However, whether this necessitates a permanent structure or an ad hoc body is questionable. The need for the work of the panel to be ongoing (even following law reform) is premised on the different objectives of pardon as compared to a judicial process. In other words, although an individual might have received a fair judicial process and is nevertheless serving a prison sentence, she could still be entitled to Presidential pardon which is based on mercy (as opposed to necessary innocence).

163. An ideal opportunity for proposal for a Panel in accordance with the detail specified above is the *Pardon Investigation Procedure Bill*. It is recommended that this Bill be carefully tracked and that submissions in respect of a Panel be made in respect thereof.

164. A serious limitation of the aforesaid Bill also relates to its failure to provide criteria / sufficient guidance in respect of which applications for pardon are considered. Submissions advocating such guidelines would also be an important strategy to be pursued.

I. Conclusions and Recommendations

165. On the basis of the aforesaid, I am of the view that there are number of concrete strategies that can be followed by the Justice for Women Campaign in order to ensure recourse to battered women who have killed.

166. In view of the constitutional imperative of developing the common law so as to give effect to the spirit, purport and object of the Bill of Rights, a test case may be brought on a sound set of facts which can develop specific defences for women who have killed. This is a particularly important strategy given the male paradigm within which existing defences are currently framed. Possible statutory reform might also be considered in this regard.

167. Individual cases should be examined to ensure that appeal and review possibilities have been exhausted in respect of both conviction and sentence.

168. The role of the Department of Correctional Services in respect of women who have already been convicted and are currently serving sentences should be examined, particularly in respect of:

- Individual applications to correctional supervision and parole boards;
- General measures to reduce prison population;
- Policy development by the National Council.

169. Finally, applications for pardon may be made to the President. In order to facilitate the process, the possibility of establishing an Advisory Board should be examined.

170. The Justice for Women Campaign should provide assistance to battered women who have killed in firstly assessing the particular avenue that should be followed in each of the individual cases and secondly, in following the appropriate

procedure in exercising specific options.

171. Finally, it should be noted that it is proposed that each of these options are pursued in parallel depending on the factual circumstances of the individual applicant concerned. As noted, access to a fair judicial process is by no means a substitute for potential recourse through presidential pardon or Correctional Services. In terms of the current constitutional and legislative framework, both the latter options exist in any event, and as such, should remain as options despite law reform initiatives.

Notes:

¹ Section 39(2).

² 2001 (4) SA 938 (CC).

³ Section 12(1)(c).

⁴ Section 9.

⁵ Section 35(3).

⁶ *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 at para 12.

⁷ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at para 41.

⁸ 1999(1) SA 6 (CC).

⁹ At para 32.

¹⁰ Quoted in Submission to Portfolio Committee on Correctional Services, 'Women Convicted for Killing their Abusive Partners', presented by Lisa Vetten, 14 April 2003.

¹¹ For example, statistics for England and Wales indicate that in 1994, 34 women were indicted for murder or manslaughter. See: Allen H, 'Rendering them harmless: The professional portrayal of women charged with serious violence crimes' in Bridgeman J and Millns S *Feminist Perspectives on Law: Laws Engagement with the Female Body* 1998 at page 624.

¹² Radford L, 'Pleading for time: Justice for battered women who kill' in Bridgeman J and Millns S *Feminist Perspectives on Law: Laws Engagement with the Female Body* 1998 at page 630.

¹³ *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 at para 12.

¹⁴ O'Donovan K, 'Defences for battered women who kill'(1991) 18 *Journal of Law and Society* 219 at page 235.

¹⁵ Walker L, *The Battered Woman* 1979 at page 35 – 36.

¹⁶ Walker L, *The Battered Woman* 1979.

¹⁷ Walker L, *The Battered Woman* 1979 at page 75.

¹⁸ Radford L, 'Pleading for time: Justice for battered women who kill' in Bridgeman J and Millns S *Feminist Perspectives on Law: Laws Engagement with the Female Body* 1998 at page 630.

¹⁹ Bridgeman J and Millns S *Feminist Perspectives on Law: Laws Engagement with the Female Body* 1998 at page 630.

²⁰ Fox M, 'Legal responses to battered women who kill' in Bridgeman J and Millns S (eds) *Law and Body Politics: Regulating the female body* 1995 at page 172.

²¹ Lahey K 'On silences, screams and scholarship: An introduction to feminist legal theory' in Devlin R (eds) *Feminist Legal Theory* 1991 at page 55.

²² See: Jones A, *Women who kill* 1996 for useful insight into the context in which battered women kill.

²³ *S v Stellmacher* 1983 (2) SA 181 at 187/8.

²⁴ Snyman, *Criminal Law* 1991 at page 161.

²⁵ Ewing C, "Battered women who kill: Psychological self defence as a legal justification" in Canavan M (eds) *Woman's Law* 2000 at page 479.

²⁶ 1986 (4) SA 882 (A).

²⁷ At 900 I – J.

²⁸ 1987 (1) SA 940 (A).

²⁹ 1990 (1) SACR 560 (A).

³⁰ This reasoning was confirmed in *S v Kalogoropoulous* 1993 (1) SACR 12 (A).

³¹ 1971 (2) SA 319 (A).

³² Snyman, *Criminal Law* 1991 at page 192.

³³ *Ibid* at page 97.

³⁴ Fox M, 'Legal responses to battered women who kill' in Bridgeman J and Millns S (eds) *Law and Body Politics: Regulating the female body* 1995.

³⁵ As discussed later, this discretion is curtailed to some extent in respect of certain mandatory minimum sentences.

³⁶ 1994 (1) SACR 61 (A).

³⁷ 1994 (2) SACR 149 (A).

³⁸ 1995 (1) SACR 1 (A).

³⁹ Act 105 of 1997.

⁴⁰ 1909 TS 576.

⁴¹ Ibid at 581.

⁴² Du Toit et al *Commentary on the Criminal Procedure Act*, chapter 30.

⁴³ Act No. 111 of 1998.

⁴⁴ Section 81.

⁴⁵ Ammons L, 'Discretionary Justice: A Legal and Political Analysis of a Governor's use of the Clemency Power in the case of incarcerated battered women' *Journal of Law and Policy* 1994.

⁴⁶ Ammons L, 'Discretionary Justice: A Legal and Political Analysis of a Governor's use of the Clemency Power in the case of incarcerated battered women' *Journal of Law and Policy* 1994.

⁴⁷ Ammons L, 'Discretionary Justice: A Legal and Political Analysis of a Governor's use of the Clemency Power in the case of incarcerated battered women' *Journal of Law and Policy* 1994.

⁴⁸ Section 84 (2)(j).

⁴⁹ 1996 (4) SA 671 CC.

⁵⁰ At paragraph 32.

⁵¹ At paragraph 47.

⁵² 1997 (6) BCLR 708 (CC).

⁵³ Para 31.

⁵⁴ At para 45, references omitted.

⁵⁵ Ammons L, 'Discretionary Justice: A Legal and Political Analysis of a Governor's use of the Clemency Power in the case of incarcerated battered women' *Journal of Law and Policy* 1994.

⁵⁶ CSVR, *Proposal to establish a national panel to review the sentences of women imprisoned for killing abusive partners*, Second Draft, September 2001.

⁵⁷ 1991 (3) SA 336.

⁵⁸ At 340 G-I.

⁵⁹ 1993 (1) SA 680.

⁶⁰ 1989 (1) SA 976.