

Joint national inquiry into the reporting, victim support, investigation and pre-trial functioning of the criminal justice system response to Gender-Based Violence and Femicide (GBVF) In South Africa

Joint submission by the Legal Resources Centre (LRC) and the Centre for Applied Legal Studies (CALS)

Legal Resources Centre	Centre for Applied Legal Studies
Ms Sheniece Linderboom and Ms Sipesihle Mguga	Dr Sheena Swemmer
sheniece@lrc.org.za and sipesihle@lrc.org.za	Sheena.Swemmer@wits.ac.za

To:

Mr. Tsietsi Shuping- Head of Legal Department
Commission for Gender Equality
Email: Tsietsi@cge.org.za

Adv. Afika Nqeto - Acting Senior Legal Officer
South African Human Rights Commission
Email: ANqeto@sahrc.org.za

Adv. Sphezulu Zulu
Manager: Investigation & Conflict Resolution Unit
CRL Rights Commission
Email: Sphezulu@crlcommission.org.za

Contents

1. INTRODUCTION	4
2. WOMEN UNFAIRLY CRIMINALISED FOR KILLING THEIR ABUSIVE PARTNERS.....	4
2.1. Issue	5
2.2. Relevance to the Joint National Inquiry	5
2.3. Understanding Murder and the relevance of BWS in the Murder Inquiry	6
2.4. Development of BWS	7
2.5. BWS as evidence, not a standalone defence	8
2.6. Contemporary criticism	8
2.7. South African Legal Framework.....	9
2.7.1. The Constitution	9
2.7.2 Criminal Procedure Act 51 of 1977	9
2.7.3. Domestic Violence Act 116 of 1998	10
2.8. Battered Woman Syndrome from a Global Perspective	10
2.8.1. United States of America	11
2.8.2. Europe	12
2.8.3. Philippines	13
2.8.4. South Africa.....	13
2.8.5. Human Rights Framework	14
2.9. Centre for Applied Legal Studies: institutional experience	14
2.9.1 MN.....	14
2.10. Centre for the Study of Violence and Reconciliation: Typology.....	16
2.10.1. Self-defence, putative self-defence and Engelbrecht	16
2.10.2. Summary of reported judgments 1994 – 2021.....	18
3. THE 5 PRIORITY REFORMS	22
4. SEXUAL CORRUPTION: A BARRIER TO REPORTING, ACCESS TO JUSTICE AND PRE- TRIAL ACCOUNTABILITY	23
4.1. Issue: sexual corruption as a barrier to reporting and accountability	23
4.2. The Current Legal Framework	26
4.2.1. Criminal Law (Sexual Offences and Related Matters) Amendment Act	27
4.2.2 Prevention and Combatting of Corrupt Activities Act	27
4.2.3 The Effect on the Detection of Sexual Corruption	30
4.3. Relevance to the Joint National Inquiry	31

4.4. Sexual Corruption in the Public and Private Sectors	32
4.6. Recommendations.....	33
4.6.1. Recognise sexual corruption as a distinct issue within the criminal justice response to GBVF	33
4.6.2 Address barriers to reporting and ensure that survivors can report sexual corruption safely	34
4.6.3. Improve data collection and institutional accountability	34
CONCLUSION	35

1. INTRODUCTION

This submission is made jointly by the Centre for Applied Legal Studies (CALS) and the Legal Resources Centre (LRC).

The Centre for Applied Legal Studies (CALS) is a human rights organisation based at the University of the Witwatersrand, focused on research, advocacy, and litigation to promote social justice and human rights in South Africa. The Centre works to empower disempowered communities through legal research, policy advocacy, public interest litigation, and education.

Similarly, the Legal Resources Centre is an independent, non-profit public interest law centre with offices in Johannesburg, Durban, and Cape Town, and Makhanda. The LRC empowers individuals and communities through the law, promoting social justice, championing equality, and realizing the human rights enshrined in the South African Constitution.

2. WOMEN UNFAIRLY CRIMINALISED FOR KILLING THEIR ABUSIVE PARTNERS

This submission is based on institutional experience, legal research and expert legal analysis concerning women who have experienced prolonged intimate partner violence and are subsequently criminalised for killing or inflicting violence upon their abusive partners.

The submission relates primarily to:

- survivor experience
- institutional experience
- research and expert legal analysis;
- barriers affecting access to justice and the criminal justice system's response to intimate partner violence
- recommendations for reform.

2.1. Issue

Various criminal courts nationwide are grappling with the question of criminal liability in cases involving women accused of killing or inflicting serious violence upon their intimate partners. If the woman has allegedly killed or inflicted violence against her partner after experiencing intimate partner violence, her legal representative usually relies on private defence so that the accused can circumvent the legal liability of murder.

This submission does not ask for accused women to be treated preferentially in the criminal context. Instead, the submission questions whether South African criminal jurisprudence and evidentiary rules allow psychological frameworks like Battered Woman Syndrome (hereinafter referred to as “BWS”) to operate fairly and effectively within the elements of liability. The central concern is not whether abused women should be subject to a different legal standard, but whether the existing legal framework can apply the ordinary principles of criminal liability fairly when the circumstances preceding the alleged offence involve sustained abuse, coercion and violence.

2.2. Relevance to the Joint National Inquiry

This issue falls within the scope of the Joint National Inquiry because the criminal justice system's response to Gender-Based Violence and Femicide (GBVF) cannot be assessed solely by reference to survivors who enter the system as complainants or witnesses. In certain circumstances, women who have experienced prolonged and serious intimate partner violence subsequently enter the criminal justice system as accused persons after using violence against their abusive partners. Their position as accused persons does not erase their histories of victimisation or remove the underlying violence from the broader context of GBVF.

The Inquiry's mandate is concerned with the way the criminal justice system responds to GBVF, including reporting processes, survivor experiences, access to protective measures, investigation, pre-trial functioning, institutional accountability and coordination. These processes may be directly relevant in cases involving women

accused of killing abusive intimate partners. A history of intimate partner violence may include previous reports to the police, applications for protection orders, disclosures to healthcare providers or family members, unsuccessful attempts to obtain assistance, and other encounters with State institutions. Whether these experiences were appropriately documented, investigated and responded to may affect both the woman's safety while she remained in the abusive relationship and the evidentiary record subsequently available when her criminal liability is determined.

Accordingly, this submission raises an important question concerning the continuum of the criminal justice system's response to GBVF - whether a system that fails adequately to recognise, document or respond to prolonged intimate partner violence during a woman's experience as a survivor is subsequently capable of fairly evaluating the significance of that same history when she appears before a court as an accused person.

This submission therefore does not seek to transform the Inquiry into an examination of criminal defences in the abstract. Rather, it demonstrates that substantive criminal law, evidentiary rules and pre-trial institutional practices intersect in cases involving prolonged intimate partner violence. The fairness of the ultimate criminal process may depend, in part, upon whether the criminal justice system has been capable of recognising the cumulative nature of the violence that preceded the alleged offence.

The Commissions are therefore respectfully invited to consider this issue as part of their examination of systemic barriers, institutional accountability and the broader criminal justice response to GBVF.

2.3. Understanding Murder and the relevance of BWS in the Murder Inquiry

Murder is the unlawful and intentional killing of another human being. The State must therefore prove the elements of conduct, causation, the death of another human being, unlawfulness and intention (*dolus*). If any of these elements is absent, the offence of murder is not established. Private defence operates primarily at the level of unlawfulness. Thus, a woman who kills her abuser may have intentionally caused his death, and the requirements of conduct, causation and death may be satisfied.

However, if the killing occurred in lawful private defence, the conduct is justified and therefore not unlawful; the killing does not constitute murder.

BWS is relevant to this inquiry not as a defence, but as evidence that may assist the court in understanding the accused's perception of the threat posed by her abuser and why she may have believed that the use of force was necessary to protect herself. Evidence of the psychological effects of prolonged abuse may assist the court in assessing whether the accused genuinely perceived herself to be under threat and whether her response can be understood within the circumstances in which she found herself. The relevance of BWS may therefore lie principally in supporting a claim of private defence, by providing psychological context for the accused's perception of danger and the necessity of her response. This differs from relying on BWS to establish criminal incapacity, where the accused accepts that the killing was unlawful but argues that, because of a mental condition or psychological impairment, she lacked the capacity required for criminal responsibility. The present argument is concerned primarily with the former: BWS as evidence relevant to the requirements of private defence, rather than as an independent basis for excluding criminal capacity.

2.4. Development of BWS

BWS is a psychological framework developed in the late 1970s by Lenore E Walker to explain the emotional and behavioural effects of prolonged intimate partner violence.¹ It is commonly described as a sub-category of post-traumatic stress disorder (PTSD), characterised by chronic fear, hypervigilance, diminished self-efficacy, and a perceived inability to escape abuse. Walker's theory incorporates the "cycle of violence" — consisting of a tension-building phase, an acute battering incident, and a reconciliation or "honeymoon" phase — which helps explain why victims may remain in abusive relationships.² The concept also draws on Martin Seligman's theory of learned helplessness, suggesting that repeated exposure to uncontrollable violence can condition victims to believe that resistance or escape is futile.³

¹ L E Walker *The Battered Woman* (1979, Harper & Row, New York).

² L E Walker *The Battered Woman* (1979, Harper & Row, New York).

³ M E P Seligman *Helplessness: On Depression, Development, and Death* (1975, W H Freeman, San Francisco).

2.5. BWS as evidence, not a standalone defence

In criminal law, BWS is not generally recognised as a standalone defence. Instead, it is used as a form of expert evidence to contextualise an accused person's state of mind. Its primary relevance arises in cases where abused women use force against their abusers, particularly in circumstances that may not fit traditional models of self-defence.⁴ Classical self-defence doctrine often requires an imminent threat and a reasonable belief in the necessity of force. Evidence of BWS may assist courts in understanding why a defendant perceived danger as immediate, even if the threat was not temporally instantaneous.⁵ It can also illuminate why a defendant did not leave the relationship or seek external assistance, countering assumptions that such options were realistically available. In *S v Engelbrecht*⁶ the court recognised that BWS evidence is admissible and relevant when a battered woman raises private defence. It expanded the scope of "attack," relaxed "imminence" to include inevitable harm, and required courts to evaluate reasonableness through a constitutionally informed, gender-sensitive lens.

2.6. Contemporary criticism

Although influential, BWS has been criticised for pathologising victims and reinforcing gender stereotypes. Contemporary scholarship increasingly prefers broader trauma-informed approaches.⁷ Nonetheless, BWS remains a significant concept in explaining how cumulative abuse shapes perception, agency, and culpability within criminal law.

⁴ *S v M* (Centre for Applied Legal Studies as Amicus Curiae) 2006 (2) SACR 341 (T).

⁵ Evidence of BWS may assist courts in understanding why a defendant perceived danger as immediate, even if the threat was not temporally instantaneous.

⁶ 2005 (2) SACR 42 (W)

⁷ J L Edelson "Battered Woman Syndrome: Beyond the controversy" 1999 *Psychology, Public Policy, and Law* 5(2) 250.

2.7. South African Legal Framework

2.7.1. The Constitution

The Constitution of the Republic of South Africa, 1996 is the supreme law, and all rules of criminal law including common law defences must be compatible with the Bill of Rights. Notable provisions in the context of Battered Woman Syndrome include:

- Right to Life (**Section 11**): While absolute in some contexts, it is balanced against the right to use force to protect oneself or others.
- Freedom and Security of the Person (**Section 12(1)**): This includes the right to be free from all forms of violence from either public or private sources.
- Right to Bodily and Psychological Integrity (**Section 12(2)**).
- Limitation Clause (**Section 36**): Rights in the Bill of Rights may be limited by a law of general application, provided the limitation is reasonable and justifiable in an open and democratic society.

2.7.2 Criminal Procedure Act 51 of 1977

The insanity defence is governed by sections 77⁸, 78⁹, and 79¹⁰ of the Criminal Procedure Act¹¹. (CPA) The procedural requirements for the defence are contained in sections 77, 78 and 79 of the CPA. Section 77 deals with fitness to stand trial (capacity to understand proceedings and make a proper defence). Section 78 addresses criminal responsibility at the time of the offence. Section 79 provides for referral for psychiatric observation (30-day panel assessment) when mental illness is raised or apparent. Accordingly, the CPA is relevant to BWS in the context of proving criminal incapacity.

⁸ This provision governs the capacity of an accused person to understand trial proceedings so they can make a proper defense.

⁹ This provision governs mental illness, mental defects, and criminal responsibility (the legal insanity defense).

¹⁰ This provision sets out the legal rules and procedures for appointing mental health experts to evaluate an accused person's mental health or criminal capacity.

¹¹ 51 of 1977.

2.7.3. Domestic Violence Act 116 of 1998

This Act provides a specialised legal framework for victims of domestic abuse to seek protection, often as a pre-emptive measure to avoid the need for physical self-defence. The Act's purpose is to afford victims the maximum protection from domestic abuse that the law can provide.¹² Below relevant aspects of the Act are detailed:

- **Section 3:** Allows peace officers to arrest a respondent without a warrant if they are suspected of an act of domestic violence involving violence against a complainant.
- **Section 4A:** Allows a court to issue a safety monitoring notice, which permits the SAPS to enter a joint residence (using force if necessary) to communicate in private with a complainant if they are being prevented from doing so.
- **Section 8:** Regulates the warrant of arrest that is issued simultaneously with a protection order, which the SAPS must execute if the respondent breaches the order and the complainant is at risk of harm.
- **Section 9:** Requires the court to order the seizure of weapons in the respondent's possession if they have threatened to kill or injure themselves or others.
- **Section 18:** Restricts the ability of prosecutors to refuse to prosecute or withdraw charges in domestic violence cases involving grievous bodily harm or weapons without high-level authorisation.

2.8. Battered Woman Syndrome from a Global Perspective

Most jurisdictions do not accommodate a freestanding “BWS” defence but instead recognise BWS as contextual or expert evidence that has bearing on reasonableness, imminence, and necessity. Most notably, the Philippines has legislated BWS and explicitly tied it to human rights instruments.

Arguments related to BWS are anchored in international commitments that address women’s rights to equality and each states obligation to protect vulnerable persons.

¹² *Ibid* s 3 (1)-(2)

The Convention on the Elimination of all forms of Discrimination against Women came into force on the 3 September 1979 and within the preamble acknowledges that women continue to face pervasive levels of discrimination.¹³ Scholars such as Uhrig recorded that BWS can be traced to Lenore Walkers development of the concept which and in her work included a structured explanation for survivor behaviour and that of the perceived threat.¹⁴

2.8.1. United States of America

In early American comparative jurisprudence and commentaries, BWS recognition appears as a species of evidence rather than as a standalone defence. In 1986, Faigman criticised self-defence in its traditional sense as failing to reflect ongoing domestic abuse dynamics which in turn support the relevance of context and expert explanation.¹⁵ Similarly, authors such as Mather emphasise the value of expert testimony where courts or jurors cannot relate to the psychological and social realities of abusive relationships and go further to insist that legal analysis must recognise heightened risk and limited options that survivors of domestic violence must face.¹⁶ By 1992, this evidentiary approach became more pronounced. In her seminal work on the topic, Walker framed BWS as a lens which courts use along with expert evidence to interpret legal requirements in self-defence cases where woman who were abused have killed their partners.¹⁷ From this, Williams shows how BWS as expert evidence works in practice. BWS evidence is integrated as a part of a self-defence strategy to explain perceptions and conduct instead of itself creating a standalone defence.¹⁸

Later US academic works show that BWS related evidence is most contested in cases of duress. Musick argues that BWS evidence should support duress,¹⁹ and Bunce similarly agrees that expert evidence in this regard could counter, “why didn’t she

¹³ LRC BWS research page 58.

¹⁴ Dylan Uhrig, Why didn’t you leave: Resolving the Circuit Split on Admitting Battered Woman Syndrome Testimony for Duress Defenses, 2024, 431.

¹⁵ Faigman, the battered woman syndrome and self-defence: a legal and Empirical dissent, 1986, page 621.

¹⁶ Mather, The Skeleton in the Closet: The Battered Woman Syndrome, Self Defenses, and Expert Testimony, 1988, 587

¹⁷ Lenore Wakler, Battered Woman Syndrome and Self Defenses, 1992, 321-322.

¹⁸ Kent Williams, Using battered woman syndrome evidence with a self-defence strategy in Minnesota, 1992, 122.

¹⁹ Samantha Musick, Explaining the Whys: Allowing Battered Woman Syndrome in Aid of Duress Defense, 2021, page 87.

leave". Bunce believes that expert evidence would go far in bringing jurors' attention to coercive relationship dynamics.²⁰ Stephey frames the problem as one of the objective standards of reasonableness governing when BWS (subjective) evidence is relevant to duress.²¹ Uhrig then consolidates the debate by describing American courts as split on the admissibility of BWS testimony in duress and the tension between preserving an objective standard.²²

Commonwealth focused articles, such as Robertson consolidate the abovementioned view and argue that BWS should be treated carefully as expert evidence instead of its own rigid unique defence. Robertson goes further and supports the structured use of expert evidence in BWS classification whilst cautioning against narrow psychological framings and promotes alternate pathways in which prolonged abuse is relevant (self-defence, provocation, duress/coercion).²³ Burke in his work, challenges courts inconsistent treatment of BWS evidence, especially the courts comfort attempts to locate it within self-defence instead of duress. In short, Burke favours a rational person-centred model of BWS instead of framing it as a medical syndrome as this affords consideration to women actions as necessary rather than due to diminished capacity.²⁴

2.8.2. Europe

From a European perspective, domestic violence is reinforced as a human rights issue which adds to the argument that criminal law interprets defences and evidence in a gender responsive way. The Council of Europe framed gender equality as an essential aim of human rights democracies and placed gender-based violence within human

²⁰ Bunce, Psychologically bound: Why expert evidence regarding battered woman syndrome should be admissible, 2022, 872-873

²¹ Stephey: Reasonable for whom? A consideration of the appropriate reasonableness standard where battered woman syndrome evidence is relevant to a duress defense, 2023, 533.

²² Dylan Uhrig, Why didn't you leave: Resolving the Circuit Split on Admitting Battered Woman Syndrome Testimony for Duress Defenses, 2024, 433.

²³ Bruce Robertson battered woman syndrome: expert evidence in action, 292, 283, 300.

²⁴ Alafair Burke, Rational Actors Self defense, and Duress: making sense, not syndromes out of battered women, 2002, 211.

rights commitments.²⁵ However, authors like Doyle are critical of reasoning that could risk reinforcing stereotypes and urges solutions where reasonableness is central rather than pathologising survivors.²⁶

2.8.3. Philippines

The position in the Philippines sits in stark contrast to the above – **BWS is fully legislated.** According to independent reports, the Republic Act 6362 expressly provides BWS as a defence and states that survivors found to suffer from BWS do not incur criminal or civil liability even where traditional self-defence elements are absent.²⁷ Most notably, this statute explicitly grounds its domestic violence framework in international instruments including the UDHR, CEDAW, and the CRC.²⁸ Overall, the approach here is the best indication of BWS being both legislated and explicitly connected to covenant-based commitments.

2.8.4. South Africa

From a South African scholarly perspective imminence and the need for it to be interpreted considering prolonged abuse is heavily emphasised. Raju has provided an account of BWS as a criminal-defence framework and links it to the realities of gender-based violence and legal barriers.²⁹ Goosen engages comparative law through the case of *R v Lavallee*³⁰ and argues that rigid imminence requirements can make self-defence practically unavailable to battered women and that reasonableness include contextual constraints. Therefore, South African legal academia supports the broader comparative conclusion: recognition best occurs through the interpretation of existing defences guided by expert evidence and context.

Across the above articles, BWS is most often recognised not as an independent defence but as expert or contextual evidence that informs core doctrines such as

²⁵ Gender matters, Manual on addressing gender-based violence affecting young people, chapter 1: Gender based violence and Human Rights, 2.

²⁶ Meredith Doyle, Gender Inequality in the Law: Deficiencies of Battered Woman Syndrome and a New Solution to Closing the Gender Gap in Self-Defense, 2011, 49.

²⁷ LRC report page 42.

²⁸ LRC report page 43.

²⁹ Raju, Gender-Based Violence: examining battered woman syndrome as a criminal defence, 2023, 2, 4, 23. Goosen, Battered Women and the Requirement of Imminence in self-defence, 2013, 78

³⁰ [1990] 1 SCR 852

reasonableness, imminence, and necessity in self-defence. Early US and Commonwealth works establish the evidentiary model, while later writings critiques syndromes framing. Comparative jurisdictions diverge most sharply where legislatures act: the Philippines provides the clearest example of explicit BWS codification and directly ties it to international human rights instruments.

2.8.5. Human Rights Framework

The covenant framework is most featured through CEDAW and related human rights approaches that treat domestic violence as systemic discrimination that demands effective legal remedies. Contemporary debates focus on admissibility, where duress is concerned, and courts continue to negotiate how BES evidence can be used without foregoing the objective standards. Overall, international human rights commitments strengthen the case for gender responsive interpretation and evidence rules, while comparative law shows a dominant preference for contextual recognition rather than a universal legislated defence.

2.9. Centre for Applied Legal Studies: institutional experience

2.9.1 MN

The Centre for Applied Legal Studies currently represents MN, a woman who was found guilty of murdering her abusive partner.³¹ The facts are set out below, to illustrate what an average female accused person might experience within the current criminal justice system.

Before the Palmridge Magistrates' Court, MN testified that her relationship with her partner had consisted of about eighteen months of him physically, verbally, financially and sexually abusing her. She went on to recount that on one occasion his abuse was so extreme that she even had a miscarriage.³²

³¹ *S v MN* RC2/87/19. Note: requests for access to court papers can be done by request to Sheena.Swemmer@wits.ac.za.

³² *State v MN (unreported record) Palm Ridge Magistrates' Court*, case no RC 2/87/2019, Charge Sheet 4; Pre-Sentence Report 119, para 3 ('Appeal Bundle')

She said that, on the evening of Sunday, 4 November 2018, her partner arrived at her home and threatened to kill her, her children and himself if she did not accompany him to his own home. After she arrived with him at his one-roomed home, he locked her inside, refusing to let her leave. MN then described her partner pushing her to the floor and raping her before he fell asleep.³³

Concerned about returning to her children, she testified that she searched for the keys and, when she could not find them, she tried to force the door open with a knife. She recalled that her partner tried to take the knife from her, leading to what she described as a 'scuffle'.³⁴

MN said that she only realised that her partner had been injured when she felt his blood pouring onto her head. She shouted for help. Once the door was opened, she placed a blanket on her partner and tried to stop the bleeding. She unsuccessfully attempted to stop a passing ambulance and then went to her landlord for assistance.³⁵ Her partner died later from a fatal sharp force injury to his neck.

In 2022, MN was convicted of the murder of her partner and sentenced to 10 years' imprisonment under section 51(2) of the Criminal Law Amendment Act, which is 5 years below the prescribed minimum of 15 years for a first offence of murder.³⁶ Although evidence of the intimate-partner violence she had experienced was placed before the court, her pending appeal contends that the magistrate failed to properly evaluate its pattern and cumulative effects, both when rejecting her defence and when determining her sentence.³⁷

³³ *Appeal Bundle*, Dr Giada Del Fabbro 140, para 22–25.

³⁴ *Appeal Bundle*, Dr Giada Del Fabbro 140, paras 22–30; Defence Heads of Argument 124–125

³⁵ *Appeal Bundle*, Heads of Argument 100–101.

³⁶ Criminal Law Amendment Act 105 of 1997.

³⁷ *MN v State* Notice of Appeal (4 April 2025) paras 7–26 and 32.

2.10. Centre for the Study of Violence and Reconciliation: Typology

In the Centre for the Study of Violence and Reconciliation's (CSVR) report on women criminalised for killing their abusive partner, Hallie Ludsin develops a useful typology for categorising these cases. The report identifies four broad situations in which such killings occur, structured largely around two recurring factual questions that often arise when women seek to rely on private defence: the immediacy of the threat and whether the woman perceived any safe alternative to using lethal force.³⁸

Ludsin distinguishes between (1) objective imminence cases, where the woman kills during an ongoing attack; (2) putative imminence cases, where she believes another attack is about to occur although this is objectively uncertain; (3) objective no-access-to-an-alternative cases, where the threat of serious future violence is objectively inescapable although no attack is occurring at that moment; and (4) putative no-access-to-an-alternative cases, where the woman believes she has no viable alternative to killing the abuser, although an alternative may objectively exist.

2.10.1. Self-defence, putative self-defence and Engelbrecht

Currently, in South African criminal law, Ludsin's four typologies can potentially be accommodated through **private defence or putative private defence**, depending principally on whether the threat relied upon is objectively established or exists only in the accused's perception. The most important South African authority in this regard is *S v Engelbrecht*, which considered the application of private defence in the context of prolonged domestic violence.³⁹

In *Engelbrecht*, the accused had experienced years of physical, sexual, psychological and other forms of abuse by her husband. The evidence demonstrated a sustained pattern of coercion and violence, repeated threats to her life, unsuccessful efforts to obtain assistance from the police and protection orders and attempts to leave the

³⁸ H. Ludsin *South African Criminal Law and Battered Women who kill: Discussion document 1*, Centre for the Study of Violence and Reconciliation, 2003. Available at <https://csvr.org.za/south-african-criminal-law-and-battered-women-who-kill-discussion-document-1/>.

³⁹ *S v Engelbrecht* 2005 (2) SACR 41 (W).

relationship. On the night of the killing, further abuse occurred, including abuse directed towards their daughter. The accused subsequently killed her husband while he was asleep.

The importance of *Engelbrecht* lies particularly in the Court's treatment of the requirement that an attack be imminent. Although there was no attack taking place at the precise moment of the killing, the Court rejected an exclusively temporal understanding of imminence. Drawing on the history and cyclical nature of the violence, Satchwell J recognised that an attack may be regarded as **imminent where further violence is inevitable, even though the abuser is temporarily unable to carry it out.**

The Court found the requirement satisfied because the history of almost daily abuse established the continuing and foreseeable nature of the threat.

Importantly, however, this did not result in an acquittal. The decisive disagreement concerned the separate requirements of reasonableness and necessity. The two assessors considered that Engelbrecht had not sufficiently afforded the institutions of the state an opportunity to protect her and therefore concluded that her conduct was neither reasonable nor necessary.

Satchwell J correctly disagreed, finding that her conduct was reasonable and necessary when assessed against the history of abuse and her repeated, unsuccessful attempts to obtain assistance. She was consequently convicted of murder, although the extraordinary circumstances were reflected in the sentence of detention only until the rising of the Court.

This makes *Engelbrecht* particularly significant for Ludsin's third category. A woman need not necessarily be experiencing an assault at the exact instant she acts for the threat to qualify objectively for private defence. In a relationship characterised by cyclical violence, the inquiry can extend to whether another attack is objectively inevitable.

2.10.2. Summary of reported judgments 1994 – 2021

Twenty years later, despite the progressive *ratio* in *Engelbrecht*, women who have experienced prolonged intimate partner violence continue to be criminalised by South Africa's criminal justice system.

Unfortunately, the extent of this criminalisation is difficult to determine. Statistics on women prosecuted, convicted and sentenced for killing abusive partners are not systematically collected or publicly reported, making it difficult to establish the prevalence of these cases or to identify broader patterns in charging, conviction and sentencing.

This difficulty is compounded by the limited accessibility of the relevant case law. Many of these matters are prosecuted in the Regional Courts, yet Regional Court judgments are seldom published and are generally not available on public or subscription-based legal databases such as SAFLII, Juta or LexisNexis. This makes it difficult to determine the true number of women prosecuted for killing abusive partners, the circumstances in which these offences occur, the defences raised, and the sentences ultimately imposed.

Furthermore, crime statistics, including those produced by the South African Police Service (SAPS), do not disaggregate murder cases in a manner that identifies women who have killed abusive intimate partners. Murder statistics therefore do not reveal the relationship between the accused and deceased, whether there was a history of intimate partner violence, or whether the killing occurred in circumstances connected to prolonged abuse. This further limits the ability to determine the prevalence and characteristics of these cases.

Nevertheless, the available case law suggests a recurring pattern of women being prosecuted, convicted and imprisoned for offences committed in the context of prolonged intimate partner violence.

Shaff's review of reported South African judgments from 1993 – 2021, illustrates that these cases arise across a spectrum, from killings during or immediately following an attack, to killings occurring during a temporary lull in violence, and finally to planned

killings undertaken after prolonged abuse where the woman considered herself unable to escape the abusive circumstances.⁴⁰

Women criminalised for killing abusive partners

Reported South African cases involving women who killed abusive partners (1993–2021)

BASED ON SHAFF'S REVIEW OF REPORTED JUDGMENTS

*Survivors.
Not criminals.*

Year	Case	Charge	Imminence / perceived alternatives	Conviction	Sentence
1993	<i>S v Potgieter</i> (355/92) [1993] ZASCA 186; [1994] 3 All SA 432 (A)	Murder	Regular severe abuse; she had tried to leave and sought police help. The shooting followed another episode of abuse that evening. The defence was sane automatism rather than private defence.	Yes, murder	7 years' imprisonment initially; sentence set aside and remitted, with correctional supervision contemplated.
1994	<i>S v Larsen</i> (78/92) [1994] ZASCA 61; [1994] 4 All SA 380 (A)	Murder	History of physical abuse. She said the shots were discharged during a scuffle over the firearm, so on her version the danger was immediate.	Yes, murder	5 years' imprisonment, partly suspended; sentence remitted for reconsideration.
2004	<i>S v Ferreira and Others</i> (245/03) [2004] ZASCA 29; [2004] 4 All SA 373 (SCA)	Premeditated murder	Prolonged extreme abuse; she had tried to leave and obtain help. She later enlisted others to kill him, so no attack was occurring at the moment of the killing.	Yes, murder	Life imprisonment reduced to 6 years, 3 years suspended.
2005	<i>S v Engelbrecht</i> (2005) JOL 13771 (W)	Premeditated murder	Years of abuse, repeated threats and failed attempts to obtain help. He was asleep when killed. The Court extended imminence to include an inevitable attack.	Yes, murder	Detention until the rising of the Court, approximately 5 minutes.
2005	<i>S v Hoare</i> (A1959/04) [2005] ZAGPHC 206	Murder	Mother allegedly subjected to prolonged abuse. The killing was arranged through another person, so there was no immediate attack.	Yes, murder	Life imprisonment.
2008	<i>S v Van Dalen and Others</i> (SS57/2008) [2008] ZAWCHC 82; [2008] ZAWCHC 84	Murder	Evidence pointed to ongoing abuse as motive, but little detail was developed. The killing was planned rather than in response to an immediate attack.	Yes, murder	5 to 7 years' imprisonment, depending on the accused.
2009	<i>Manyapa v S</i> (CA 40/2009) [2009] ZANWHC 22	Murder	Long-term emotional, financial, physical and sexual abuse. She arranged hitmen to kill him at work. There was no immediate attack at the time.	Yes, murder	30 years, reduced to 20 years' imprisonment.
2009	<i>Steyn v S</i> (105/09) [2009] ZASCA 152; 2010 (1) SACR 411 (SCA)	Murder proceedings; trial court convicted of culpable homicide	On the night of the killing he assaulted her; she escaped, obtained a firearm, and said he then charged toward her threatening to kill her. This is the strongest example of an immediate attack.	Initially culpable homicide; acquitted on appeal	Original sentence 3 years wholly suspended; fell away after acquittal.
2010	<i>S v Marais</i> (CCT 54/10) [2010] ZACC 16; 2010 (2) SACR 606 (CC); 2011 (1) SA 502 (CC)	Murder	Evidence of repeated abuse. She engaged others to give him a 'hiding'; the intervention was planned rather than in response to an immediate attack.	Yes, murder	Life imprisonment initially.
2011	<i>Noorman v S</i> (A532/10) [2011] ZAWCHC 120	Murder	The deceased broke into the house and assaulted her. She later armed herself and stabbed him while he was lying on a bed. The attack had just occurred but was not ongoing at the exact moment.	Yes, murder	13 years, reduced to 4 years' imprisonment.
2011	<i>Khumalo v S</i> 2013 (1) SACR 96 (KZP); [2011] ZAKZPHC 62	Murder	She hired another person to shoot her husband. The plea referred to abuse, financial neglect, depression and desperation. There is little detail on immediacy or alternatives.	Yes, murder	Life imprisonment reduced to 20 years' imprisonment.
2011	<i>S v Pledt and Anders</i> (A393/10) [2011] ZAWCHC 502	Murder	This concerned the same underlying killing as Marais. The appeal court recognised the abuse more fully and rejected criticism that she should simply have left.	Yes, murder	Marais's life sentence reduced to 20 years' imprisonment.
2012	<i>S v Mapeyi and Others</i> (SS07/2011) [2012] ZAWCHC 256	Murder; also attempted murder allegation	Evidence suggested abuse and assault by the deceased, but Shaff notes very little investigation of the abuse. There is no clear evidence of an immediate attack.	Yes, murder	Sentence not located. The reported judgment is the conviction judgment and no separate publicly reported sentencing judgment has been identified.
2015	<i>Kisten v S</i> (AR686/13) [2015] ZAKZDHC 5	Murder	Alleged complicity with her mother in the killing; allegations of sexual abuse arose but were not properly investigated. There is insufficient material to assess imminence.	Initially yes; appeal ordered trial de novo; later reportedly reconvicted	Original sentence 10 years' imprisonment. Final sentence after retrial not located.
2017	<i>Botha v S</i> (901/2016) [2017] ZASCA 148	Murder	Severe abuse occurred on the day of death. She did not rely on private defence; her case was that he had killed himself.	Yes, murder	12 years' imprisonment initially; sentence set aside and remitted.
2019	<i>S v Shandu</i> 2019 JDR 0006 (KZD)	Murder	She pleaded private defence. There was long-term abuse and repeated firearm threats. Only the sentencing judgment is available, so the exact immediacy on the day is unclear.	Yes, murder	5 years' correctional supervision.
2021	<i>Solomons v S</i> (CA & R 21/2020) [2021] ZANWHC 4	Murder	Ongoing abuse. On the day of the killing there had been an argument, but it had largely subsided when she acted.	Yes, murder	8 years' imprisonment, 3 years suspended.

 Context matters. So do women's lives.

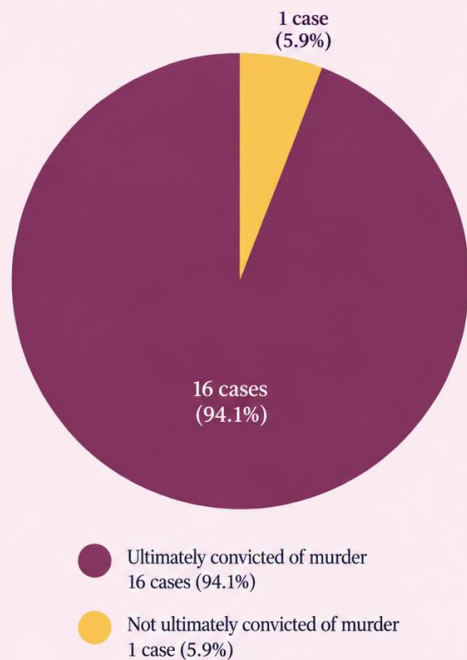
EQUALITY • DIGNITY • SAFETY • JUSTICE

Although it is acknowledged that Shaff's dataset is limited by the availability of publicly reported judgments and cannot be regarded as representative of all women prosecuted for killing abusive partners in South Africa, it nevertheless provides a useful indication of how the criminal justice system has responded in the cases that are publicly accessible. Most strikingly, of the 17 cases identified in the dataset, 16 ultimately resulted in a conviction for murder, while only one, *Steyn v S*, ultimately resulted in an acquittal after private defence was accepted on appeal. The figure on the left below illustrates this distribution.

⁴⁰ M, Shaff *Defending Women Who Kill*, Faculty of Law, Department of Public Law, University of Cape Town, 2022. Available at <http://hdl.handle.net/11427/37813>.

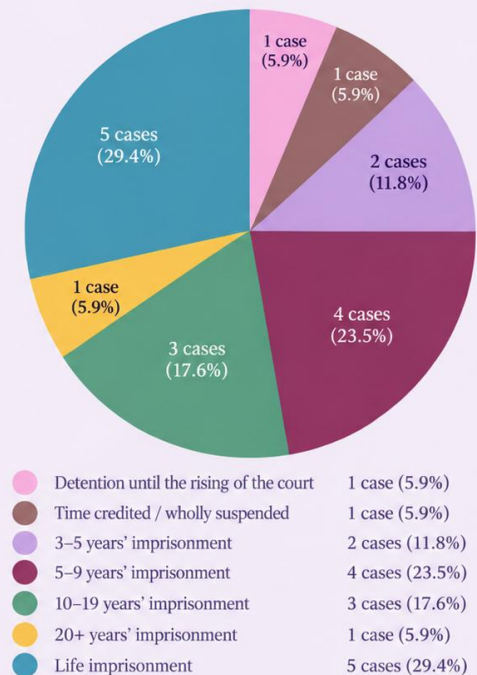
Shaff dataset: key outcome patterns

A Murder convictions among cases charged with murder (n = 17)



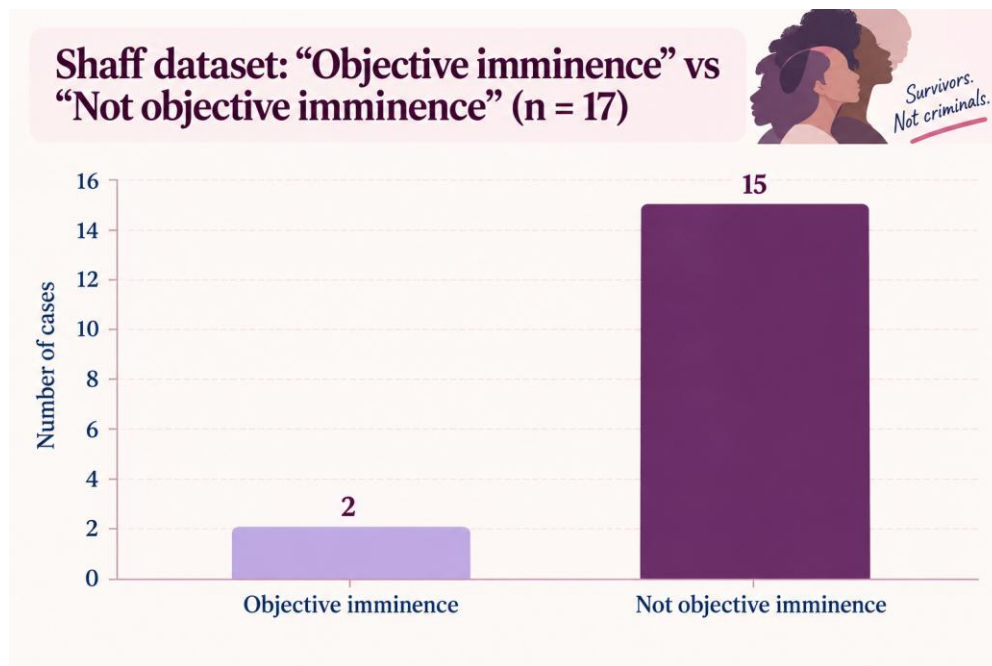
B Initial sentence categories (n = 17)

Numbers and percentages are out of 17 total cases.



Shaff's dataset (above right) also shows that severe custodial sentences were common at first instance. A substantial proportion of the cases attracted life imprisonment or lengthy terms of imprisonment, although a smaller number resulted in suspended, correctional or very short sentences. The variation in initial sentences is striking and suggests a highly uneven sentencing response to killings occurring in the context of prolonged intimate partner violence.

Another striking feature of Shaff's dataset is that most of the cases did not involve objective imminence in the strict sense of an attack actually being underway when lethal force was used. Only 2 of the 17 cases appear to fall within this category, while 15 do not. This suggests that a narrow focus on "immediacy" may sit uneasily with the circumstances in which women experiencing prolonged intimate partner violence may ultimately use defensive force. This distribution is illustrated in the graph below.



Taken together, the cases considered above suggest that the difficulty is not simply one of isolated judicial error. Rather, they reveal a recurring mismatch between the circumstances in which women experiencing prolonged intimate partner violence may use lethal force and the way in which the criminal justice system evaluates those circumstances. The case law shows repeated tension around imminence, necessity, proportionality, the significance of prior abuse, and the weight given to perceived alternatives. It also shows considerable inconsistency in sentencing, with abuse sometimes receiving greater recognition at the sentencing stage than in the determination of criminal liability itself.

At the same time, the available data is incomplete. The absence of systematic reporting on women prosecuted for killing abusive partners means that the true scale of the problem cannot be established, while the limited publication of lower-court judgments makes it difficult to identify broader patterns in charging, conviction and sentencing. These gaps make it necessary to think beyond individual cases and towards a more coherent systemic response.

The reforms proposed below therefore address both substantive criminal law and institutional practice. They are aimed at improving the application of private defence, creating appropriate diversion pathways, strengthening judicial and prosecutorial

guidance, reconsidering sentencing responses, and improving the collection and publication of data on these cases.

3. THE 5 PRIORITY REFORMS

Taken together, the cases considered above suggest that the problem is not confined to isolated judicial decisions. They reveal recurring difficulties in the application of private defence, the treatment of prolonged intimate partner violence in prosecutorial and sentencing decisions, and the availability of reliable data on these cases. These difficulties require a coordinated response across substantive criminal law and institutional practice.

The five priority reforms set out below identify practical interventions directed at private defence, diversion, the implementation of *Engelbrecht*, sentencing and data collection.

Women criminalised for killing abusive partners

Five priority reforms for a fairer, more responsive criminal justice system

CONTEXT • RECOGNITION • REFORM • JUSTICE



1  Strengthen the application of private defence SELF-DEFENCE	THE PROBLEM Courts continue to struggle with private defence in cases involving prolonged intimate-partner violence. A narrow focus on whether an attack was occurring at the precise moment of the killing may fail to account for the cumulative and cyclical nature of abuse, coercive control, and the accused woman's perception of danger.	THE REFORM Develop judicial guidance and training on private defence and putative private defence in the context of prolonged intimate-partner violence. Guidance should emphasise a contextual assessment, including the history and pattern of abuse, coercive control, and practical realities, and should clarify that there is no duty to retreat or to exhaust all alternatives.	RESPONSIBLE INSTITUTIONS  - Department of Justice and Constitutional Development (DoJ&CD) - Office of the Chief Justice (OCJ) - Magistrates' Commission (MC) - South African Judicial Education Institute (SAJEI)
2  Create a diversion pathway for appropriate cases DIVERSION	THE PROBLEM In February 2025, the SALRC published Discussion Paper 164 proposing a statutory framework for adult pre-trial diversion. The proposed Bill excludes murder categorically. This prevents consideration of whether a killing arose from prolonged intimate-partner violence, coercive control, or systemic failures of state protection, and risks treating survival-based offending in the same way as other murders.	THE REFORM Amend the proposed Adult Diversion in Criminal Matters Bill to create a narrow exception allowing diversion in appropriate cases where a serious offence, including murder, arose in the context of prolonged or severe intimate-partner violence. Prosecutors should consider the nature, duration, and effects of the abuse; the causal link to the offence; perceived danger; coercive control; access to protection; state failures; and the interests of justice and public safety.	RESPONSIBLE INSTITUTIONS  - National Prosecuting Authority (NPA) - South African Law Reform Commission (SALRC) - Minister of Justice and Constitutional Development (Minister of J&CD)
3  Give practical effect to <i>S v Engelbrecht</i> ENGELBRECHT	THE PROBLEM <i>S v Engelbrecht</i> remains the leading South African authority recognising that, in the context of cyclical intimate-partner violence, imminence may extend beyond a strictly temporal enquiry to the inevitability of an attack. Despite this progressive development, later cases suggest that its contextual approach has not been applied consistently, particularly in relation to necessity and reasonableness.	THE REFORM Introduce dedicated judicial education on <i>Engelbrecht</i> and its application to cases involving prolonged intimate-partner violence. Training should emphasise inevitability, rather than strict temporal imminence, contextual assessments of necessity and reasonableness, and make clear that there is no duty to retreat, leave, seek further assistance, or exhaust other options.	RESPONSIBLE INSTITUTIONS  - South African Judicial Education Institute (SAJEI) - Magistrates' Commission (MC) - Minister of Justice and Constitutional Development (Minister of J&CD)
4  Reform sentencing responses SENTENCING	THE PROBLEM Women convicted of killing abusive partners may receive lengthy custodial sentences, including life imprisonment, despite evidence of prolonged abuse. This concern is heightened by South Africa's mandatory minimum sentencing regime under the Criminal Law Amendment Act 105 of 1997, which prescribes lengthy minimum sentences for murder unless substantial and compelling circumstances justify departure.	THE REFORM Review the application of the mandatory minimum sentencing regime in these cases. Legislation or sentencing guidance should require courts to give express and substantial weight to prolonged intimate-partner violence, coercive control, perceived danger, efforts to obtain protection, state failures, and the relationship between the abuse and the offence. Consider expressly recognising such violence as a factor explicable of constituting substantial and compelling circumstances.	RESPONSIBLE INSTITUTIONS  - Department of Justice and Constitutional Development (DoJ&CD) - South African Law Reform Commission (SALRC) - Parliament - South African Judicial Education Institute (SAJEI)
5  Count and report these cases REPORTING / STATISTICS	THE PROBLEM There is inadequate disaggregated data on women who kill abusive intimate partners and their progression through the criminal justice system. This makes it difficult to determine the scale of the problem, identify systemic patterns, or assess whether criminal justice responses appropriately account for histories of intimate-partner violence.	THE REFORM Include women who kill abusive partners as a specific category within NSP-GBVF monitoring and reporting. Develop coordinated, disaggregated data collection across SAPS, the NPA, and the courts, recording relevant factors such as relationship to the deceased, history of intimate-partner violence, defence raised, diversion decisions, prosecution outcome, and sentence, with periodic public reporting.	RESPONSIBLE INSTITUTIONS  - National Council on GBVF - Department of Women, Youth and Persons with Disabilities (DWYPD) - South African Police Service (SAPS) - National Prosecuting Authority (NPA) - Department of Justice and Constitutional Development (DoJ&CD) - Statistics South Africa (Stats SA)

Context matters. So do women's lives.

EQUALITY • DIGNITY • SAFETY • JUSTICE

4. SEXUAL CORRUPTION: A BARRIER TO REPORTING, ACCESS TO JUSTICE AND PRE-TRIAL ACCOUNTABILITY

This submission is based on the LRC's institutional experience, legal research and advocacy concerning sexual corruption and barriers to access to justice.

The submission relates primarily to:

- institutional experience;
- research and expert legal analysis;
- barriers affecting access to justice;
- service delivery and criminal justice system challenges; and
- recommendations for reform.

4.1. Issue: sexual corruption as a barrier to reporting and accountability

Sextortion⁴¹ is a term that was coined by the International Association of Women Judges (IAWJ) in 2008.⁴² Sexual corruption entails individuals in positions of power compelling other individuals, predominantly vulnerable women, to provide sexual favours in exchange for services, benefits or opportunities to which they are legally entitled.

In situations where public officials demand sexual favours in exchange for access to goods and services, officials effectively condition delivery of basic services such as housing allocations or utility connections on the performance of sexual acts. These cases involve abuse of public power. This underscores the importance of acknowledging the abuse of authority in access-to-services contexts.

In a 2015 study examining corruption risks faced by women in Johannesburg's water-service sector revealed that sexual corruption frequently arises in contexts where women depend on officials for access to essential services or public resources.⁴³ The research highlighted that sexual-favour coercion is not confined to isolated interactions

⁴¹ Also referred to as sexual corruption.

⁴² K Hagglund and F Khan "THE GENDERED IMPACT OF CORRUPTION: WOMEN AS VICTIMS OF SEXTORTION IN SOUTH AFRICA" 2023 *Journal of Anti-Corruption Law* 7 at 6.

⁴³ UNDP-SIWI Water Governance Facility (2017) *Women and Corruption in the Water Sector: Theories and Experiences from Johannesburg and Bogotá* WGF Report No. 8 Stockholm: SIWI 16.

but occurs across a spectrum of service-delivery encounters.⁴⁴ One participant explained her experience by noting that in the absence of money to offer as a bribe, officials may exploit the one asset already within their control, the woman's bodily autonomy.⁴⁵ This was captured in her testimony that when financial bribery is not possible, sexual abuse is sometimes substituted as a currency of coercive corruption, summarising the power imbalance embedded in these interactions.⁴⁶ The victim expressed that sexual compliance is demanded not by choice, but because it becomes "the only valuable thing left to give" when officials threaten abuse or service denial.⁴⁷

Sexual corruption effectively straddles two different issues. First, it involves the attempted or actual sexual assault or rape of victims of sexual corruption whose "*consent*" was improperly obtained through coercion and a public official's abuse of their position of power. Second, it also involves the public official's abuse of their power for personal gratification.

The sexual offences aspect of sexual corruption is already well-catered for within our law. Depending on the circumstances, sexual corruption would constitute rape, attempted rape, sexual assault or attempted sexual assault and attract criminal liability under sections 3 and 5 read with section 55(a) of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* ("SORMA") respectively.⁴⁸

However, imposing criminal liability for the act of corruption that underpins sexual corruption is more complicated within South Africa's current anti-corruption legislative framework. The *Prevention and Combating of Corrupt Activities Act 12 of 2004* ("PRECCA") is the primary legal instrument used to prosecute corruption. Sections 3

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ While sections 3 and 5 criminalise rape and sexual assault, section 55(a) criminalises, amongst other things, the attempt to commit rape or sexual assault. An offer or indication from a public official that a victim would have to perform sexual acts to receive goods or services to which they are otherwise entitled to amounts to an attempt by that official to abuse their power and coerce the victim into performing a sexual act. This clearly amounts to an attempt to improperly obtain consent through coercion, constituting attempted rape or sexual assault. Such offers, regardless of if the victim acquiesces or not, demonstrates an official's intention to sexually assault a victim by leveraging their control over essential resources.

and 4 of PRECCA criminalise the acceptance of any gratification from any other person to act in a manner that, amongst other things, amounts to an abuse of a position of authority or a violation of a legal duty, both generally and in respect of public officials specifically.

However, PRECCA is structurally unsuited to the unsuitable for the prosecution of sexual corruption because of its exclusive focus on the acceptance of *an offer* of personal gratification. Significantly, the Act does not explicitly make mention of or criminalise an official's expectation of personal gratification to perform their duties. Even more concerning, the Act imposes criminal liability of both parties to a corrupt transaction, criminalising both the giver and the receiver of "gratification". The legislation in its current form fails to account for power imbalances between officials and victims and risks the prosecution of victims who are coerced into providing sexual favours.

Sexual corruption occurs where a person in a position of authority demands sexual favours as a condition for access to jobs, grades, social benefits, housing, grants or healthcare.⁴⁹ Unlike transactional sex between consenting adults, sexual corruption is characterised by coercion embedded in institutional power structures.

Reports, such as the 2024 Sexual Corruption in South Africa Report, increasingly document public officials demanding sex in exchange for routine public services. Victims are typically women aged 18-34 in precarious socio-economic circumstances seeking access to entitlements such as housing or education opportunities. Hlongwane noted that situations such as these which involve public officials make it difficult for women to access basic services because they are subjected to sexual abuse.⁵⁰

Unlike other forms of sexual abuse, the harm lies not only in the coerced sexual conduct but in the abuse of public power, but also in the violation of constitutional obligations, and denial of lawful entitlements.

⁴⁹ P Hlongwane "Sextortion in South African Public Sector Institutions An Ethical and Moral Dilemma" (2017) 25 *Administratio Publica* 2 at 8.

⁵⁰ *Ibid.*

The central concern is that the existing legal framework does not comprehensively recognise sexual corruption as a distinct form of abuse involving both sexual harm and the abuse of entrusted power. This uncertainty has consequences at the earliest stages of the criminal justice process. Importantly, the LRC does not submit that survivors of sexual corruption are routinely prosecuted under the Prevention and Combating of Corrupt Activities Act 12 of 2004 (“PRECCA”). The available information does not establish such a pattern.

The concern is instead that the structure of the existing legal framework may create legal uncertainty and a theoretical risk of criminalisation, particularly where sexual gratification is understood as “gratification” within the framework of corruption law. A survivor may consequently be uncertain about how their own conduct will be understood by the criminal justice system. This uncertainty is significant because it may discourage reporting.

Sexual corruption therefore presents a problem before it becomes a prosecution problem. If a survivor is uncertain whether reporting an incident may expose their own conduct to scrutiny or potential criminal consequences, they may be reluctant to approach the police or another institution in the first place. Where the detection of sexual corruption depends substantially upon survivors coming forward, barriers to reporting may directly undermine investigation and accountability.

4.2. The Current Legal Framework

Because of the multi-faceted nature of sexual corruption, it should be dealt with as both a sexual offence under SORMA and as a corrupt activity under PRECCA. This dual-charging approach reflects the reality that sexual corruption by public officials is both a sexual offence and an abuse of public power.

4.2.1. Criminal Law (Sexual Offences and Related Matters) Amendment Act

As discussed above, the charges of rape, attempted rape, sexual assault and attempted sexual assault included in SORMA are currently sufficient to deal with the sexual offence aspect of sexual corruption. However, the Act in its present form is not fit for purpose for the criminalising of sexual corruption. Although SORMA criminalises a range of sexual offences, it does not criminalise sexual corruption specifically as a stand-alone offence in a manner that acknowledges the act of corruption embedded in the practice.

Admittedly, the Act does recognise and criminalise sexual exploitation. However, sexual corruption is defined in section 17 to only include instances where a person engages the services of a child or a person with a mental disability for sexual acts in exchange for any reward, favour, or compensation, with or without the victim's consent. It is thus not applicable to other acts of sexual coercion not involving a child or person with a mental disability. It does not speak more broadly to the demand or expectation of sexual favours or access to public goods or services, nor the abuse of public power.

Consequently, SORMA does not and cannot deal with corruption-related element of sexual corruption, although it can deal with the sexual offences-related element thereof.

4.2.2 Prevention and Combatting of Corrupt Activities Act

PRECCA defines corruption broadly and creates a general offence of corruption and other more specific offences of corruption, dependant on the identity of the parties involved. The general offence in section 3 criminalises both the offering or giving gratification and the acceptance or receipt of gratification to induce or influence improper performance of duties. PRECCA is thus the only possible legal route for prosecuting sexual corruption by public officials.

Section 4 creates a specific offence for corrupt activities relating to public officers which also criminalises both the offering or giving gratification and the acceptance or receipt gratification, to induce or influence improper performance of duties.

Evidently, PRECCA criminalises both parties, “giver” and “receiver” in a corrupt transaction, even where the giver is a coerced victim. PRECCA is inadequate for addressing sexual corruption because it assumes that both parties have equal or comparable power and equal blameworthiness on both parties, which is rarely the case in instances of sexual corruption.

Women who are compelled to provide sexual favours to access entitlements do so under immense pressure, often facing economic hardship or threats of service denial. They are not voluntary participants, rather the victims of an official’s abuse of their power and authority. However, PRECCA in its current form treats them as potential perpetrators.

The effect of this is significant. Any victim who wishes to report sexual corruption would in doing so open themselves up to being charged under sections 3 or 5 of PRECCA. Not only does this impose criminal liability on the victim’s non-blameworthy actions, but it also would actively discourage a victim from reporting sexual corruption. If a victim is unwilling to report sexual corruption, it also prevents pursuing criminal liability against the official under SORMA as an alternative to PRECCA. Succeeding with a charge under either necessitates prior reporting.

The above notwithstanding, the actual chances of the prosecution of victims of sexual corruption may be low. The National Prosecuting Authority retains discretion to decide which prosecutions to pursue and may elect not to prosecute the victims of sexual corruption. Prosecutors retain broad discretion under the *National Prosecuting Authority Act* 32 of 1998, which affirms that prosecution may proceed only where there is both a reasonable prospect of conviction and where prosecution is in the public interest.⁵¹ Prosecutors are required to avoid secondary victimisation and to protect vulnerable complainants whose “agreement” is extracted through abuse of authority.

⁵¹ Section 1 and 22(7) of the National Prosecuting Authority Amendment Act 10 of 2024.

However, while the National Prosecuting Authority of South Africa Policy Manual makes it clear that these and other contextual considerations must be taken into account when deciding whether or not to prosecute sexual offences, it's unclear what role these factors would play in the decision to prosecute other offences which relate to sexual misconduct but are not sexual offences, such as sexual corruption under PRECCA.

Moreover, the victim is ordinarily the key witness for the State, which makes prosecution neither practical nor in the public interest. In practice, courts have recognised that coerced complainants are rarely, if ever, prosecuted, as illustrated by *Phillips v S*,⁵² where the person who paid the bribe was not charged despite being technically liable under PRECCA.

Nevertheless, PRECCA's symmetrical structure means that victims remain theoretically exposed to liability, underscoring the doctrinal inadequacy of the current framework and the need for a distinct sexual-corruption offence that expressly immunises victims. We cannot rely on prosecutorial discretion to mitigate bad or inadequate law. Moreover, the mere risk of exposure to criminal prosecution remains likely to encourage victims not to report instances of sexual corruption.

In instances where a victim refuses to comply with a demand for sexual gratification, PRECCA is technically adequate for the purposes of prosecuting the relevant official under section 21(c) of the Act. Section 21(c) criminalises, amongst other things, the incitement, inducement, instruction, counselling or commanding of another person to commit an offence in terms of the Act. By demanding sexual favours in exchange for access to services, officials would be inciting victims to offer such gratification and commit an offence under sections 3(b) or 4(1)(b) of the Act. Consequently, their conduct falls within the scope of conduct criminalised under section 21(c) of the Act.

An alternative approach could also see section 21(c) of the Act used to criminalise sexual corruption even in instances where victims do acquiesce as the demand or expectation for sexual favours from an official would still ultimately be responsible for inducing an offer of personal gratification from the victim. However, this approach still

⁵² [2016] JOL 37010 (SCA).

leaves the victim vulnerable to prosecution under sections 3(b) and 4(1)(b) of the Act and thus fails to mitigate the risks outlined above. It also would see sexual corruption characterised as an incitement to commit an act of corruption, instead of acknowledging that such an expectation or demand is itself an act of corruption.

The abuse of power for sexual purposes violates rights to dignity, bodily integrity, equality and access to public services,⁵³ yet PRECCA does not address these rights-based violations directly. The state's failure to ensure that PRECCA protects victims and combat corruption places them in breach of their obligations under section 7(2) of the Constitution to respect, protect, promote and fulfil the rights contained in the Bill of Rights.

- From a corruption perspective, our courts have accepted that the obligations flowing from section 7(2) of the Constitution require the state to adopt efficient anti-corruption mechanisms.⁵⁴
- Within the context of gender-based violence, our courts have also accepted that the state's obligations flowing from section 7(2) read with sections 9, 10, and 12 of the Constitution require the state to adopt measures to protect victims.⁵⁵

4.2.3 The Effect on the Detection of Sexual Corruption

The potential effect on reporting is particularly significant because sexual corruption may be difficult to detect independently. Unlike financially based forms of corruption, sexual corruption does not necessarily leave a financial trail. It cannot ordinarily be identified through mechanisms such as suspicious banking transactions or other financial indicators that may reveal that an official has benefited from corrupt activities. Detecting sexual corruption may therefore depend substantially on one of the parties reporting what occurred.

In most instances, the victim will be the person best placed to report the conduct. A failure to report may therefore prevent the relevant authorities from becoming aware of the conduct. If sexual corruption is not reported, it may not be investigated. If it is

⁵³ Hagglund and Khan 2023 *Journal of Anti-Corruption Law* 8.

⁵⁴ *Glenister v President of the Republic of South Africa* 2011 (3) SA (CC) paras 176 – 177.

⁵⁵ *Van Eeden v Minister of Safety and Security* [2002] ZASCA 132; *S v Baloyi* [1999] 19.

not investigated, the possibility of holding the perpetrator criminally accountable is substantially reduced. The effect of legal uncertainty may therefore extend beyond the individual victim.

It may affect the ability of the criminal justice system to detect, investigate and prosecute sexual corruption. We accordingly submit that the legal framework applicable to sexual corruption has implications at the reporting stage of the criminal justice process.

4.3. Relevance to the Joint National Inquiry

The Joint National Inquiry examines survivor testimony and lived experiences, as well as pre-trial functioning and accountability within the criminal justice system.

The Inquiry specifically seeks to examine the following

- experiences when reporting GBVF matters
- barriers experienced by survivors when accessing justice institutions
- experiences of secondary victimisation
- reporting processes and police responses
- investigation quality
- prosecutorial decision-making; and
- coordination between institutions.

Sexual corruption is relevant in these issues. The current legal framework may create uncertainty concerning the appropriate way an allegation of sexual corruption should be reported and investigated. Sexual corruption may involve conduct falling within the scope of sexual-offences legislation while simultaneously involving the abuse of authority ordinarily associated with corruption. The legal framework does not comprehensively address the intersection between these two forms of conduct.

This may create uncertainty regarding the following:

- the appropriate institution to which the matter should be reported;
- the appropriate legal characterisation of the conduct;
- the way the matter should be investigated; and
- the appropriate basis upon which the perpetrator should be prosecuted.

The victim should not be required to determine these questions before reporting what occurred. A victim should be able to report the facts and circumstances of the conduct, including the sexual demand, the position of authority held by the alleged perpetrator, and the benefit or service involved. It should then be the responsibility of the relevant criminal justice institutions to determine the appropriate legal and institutional response.

4.4. Sexual Corruption in the Public and Private Sectors

Sexual corruption is not limited to the public sector. In the public sector, it may occur where public officials abuse their positions of authority to demand sexual gratification in exchange for goods and services to which victims may otherwise be legally entitled. The conduct may include instances where access to housing, water, permits or other public services is conditioned on the provision of sexual gratification.

Similar conduct may occur in the private sector whereby service providers, employers, prospective employers and other persons in positions of power may demand sexual gratification in exchange for employment, promotion or other employment benefits, access to services, academic merit or opportunities, or other benefits or opportunities.

The existing provisions of PRECCA do not comprehensively address all these circumstances. For example, certain provisions concerning corrupt activities within employment relationships may apply to existing employment relationships but may not adequately address circumstances in which sexual gratification is demanded by a prospective employer in exchange for employment. These limitations further demonstrate the difficulty of addressing sexual corruption comprehensively through the existing legal framework.

4.5. Comparative Legal Perspectives: Tanzania

Comparatively, the Tanzanian Prevention and Combating of Corruption Act 11 of 2007 expressly recognises sexual corruption (sextortion) as a distinct corruption modality.⁵⁶ Section 25A, titled “Sexual Corruption”, which criminalises a person in a position of authority who requests, demands, coerces, intimidates or threatens any person into providing sexual acts, or threatens to withhold a right or service if the demand is refused.⁵⁷

Crucially, liability under section 25A is unilateral, resting solely on the official who solicits or demands the sexual gratification.⁵⁸ The Act de-links consent from liability and makes it clear that an offence is complete upon solicitation or demand, irrespective of whether the victim complies or refuses.⁵⁹ This structure directly shields victims from prosecution as “givers” of gratification which is absent in South Africa’s PRECCA model.

4.6. Recommendations

4.6.1. Recognise sexual corruption as a distinct issue within the criminal justice response to GBVF

Sexual corruption should not be understood merely as ordinary workplace misconduct or an isolated sexual interaction. It involves the abuse of a position of authority to obtain a sexual benefit. Its consequences may extend beyond the immediate sexual demand. A survivor may lose access to employment, educational opportunities, housing, public services or other benefits after refusing the person exercising power.

The Commissions should therefore consider recommending that relevant State institutions expressly recognise sexual corruption as an issue requiring attention within their respective GBVF, anti-corruption and institutional accountability frameworks.

⁵⁶ Section 25 of the Tanzanian Prevention and Combating of Corruption Act 11 of 2007 as amended by Act 1 of 2018.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

Such recognition would assist in ensuring that survivors are not required to navigate separate and disconnected systems depending upon whether their experience is characterised as corruption, sexual harassment, sexual exploitation or another form of gender-based violence. A coordinated approach is particularly important because sexual corruption exists at the intersection of these categories.

4.6.2 Address barriers to reporting and ensure that survivors can report sexual corruption safely

The information considered by the LRC indicates that survivors of sexual corruption may face significant barriers to reporting. These include fear of retaliation, stigma, uncertainty regarding the applicable law and concern about the consequences of reporting a person who exercises power over access to an essential benefit or service.

These barriers are particularly serious where the alleged perpetrator controls, influences or participates in decisions affecting the survivor's employment, education, housing, access to public services or other opportunities. Reporting the abuse may itself place the survivor at risk of losing the very benefit or service that created the relationship of dependency.

The Commissions should therefore recommend that institutions establish or strengthen safe, accessible and confidential reporting mechanisms for allegations of sexual corruption. Such mechanisms should include appropriate protections against retaliation. A survivor should not be disadvantaged, denied a service, excluded from an opportunity or otherwise prejudiced because they have refused a sexual demand or reported sexual corruption.

The Commissions should consider whether current reporting mechanisms are sufficiently accessible to survivors who are economically vulnerable or dependent upon the institution or official against whom the allegation is made.

4.6.3. Improve data collection and institutional accountability

The LRC's research identifies a significant concern regarding the prevalence of sexual corruption, particularly among young women. However, the ability to assess the full

scale and institutional distribution of sexual corruption is limited where cases are not consistently identified, recorded or reported.

The Commissions should therefore recommend that relevant institutions develop appropriate systems for the collection and monitoring of anonymised data concerning allegations of sexual corruption.

Subject to confidentiality and privacy safeguards, such information could assist institutions in identifying systemic patterns, including the sectors in which allegations arise, barriers to reporting, investigation outcomes and gaps in institutional responses.

Data collection should not compromise the confidentiality or safety of survivors. Its purpose should be to strengthen institutional accountability and enable the development of evidence-based responses.

CONCLUSION

This submission identifies two areas in which the criminal justice system's response to GBVF requires further attention - the treatment of women who are criminalised for killing their abusive intimate partners and sexual corruption. Both issues demonstrate the importance of a criminal justice system that can recognise the effects of gendered violence, coercion and unequal power.

In the context of women who kill abusive partners, the submission highlights the need for prolonged intimate partner violence to be properly recognised and evaluated when applying ordinary principles of criminal liability, including private defence. BWS and other appropriate trauma-informed expert evidence may assist in contextualising the cumulative effects of abuse without operating as a standalone defence or pathologising survivors.

The available case law reveals recurring difficulties concerning imminence, necessity, reasonableness, the significance of prior abuse and the extent to which alternative avenues of protection were realistically available to the accused. These difficulties are compounded by inconsistent sentencing practices and the absence of reliable data on the number and circumstances of women prosecuted, convicted and sentenced in this context.

Sexual Corruption exposes a significant gap at the intersection of GBVF and corruption. It occurs when entrusted public or institutional power is abused to obtain sexual favours – frequently in circumstances where the survivor requires access to a job, bursary, housing, a permit or another essential opportunity or service. The harm cannot be understood solely as an individual act of sexual misconduct. Sexual corruption is fundamentally concerned with the abuse of power. It occurs where need meets power, and where a person who controls access to a benefit or opportunity exploits another person’s vulnerability for sexual purposes.

The absence of express legal recognition creates significant challenges for reporting, investigation and prosecution. Survivors may be uncertain about where to report allegations of sexual corruption. Institutions may be uncertain about how to characterise the conduct. Issues may fall between corruption and sexual offences framework. In the absence of clear legal and institutional responses, perpetrators may benefit from uncertainty whilst survivors face silence, stigma and risk of retaliation.

The Commissions are accordingly invited to consider these issues as part of their examination of survivor experiences, barriers to access to justice, investigation and pre-trial functioning, institutional accountability and coordination.

The recommendations and reforms advanced in this submission are directed towards ensuring that South Africa’s criminal justice response to GBVF is survivor-centred, gender-responsive and capable of addressing the realities of violence and abuse of power at every stage of the justice process.

END
