

**Response to the Department of Justice re:  
*Reforming Criminal Code Defences: Provocation,  
Self-Defence and Defence of Property***

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# The Response of the Canadian Association of Elizabeth Fry Societies to *Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*

## **I. Background**

The Canadian Association of Elizabeth Fry Societies (CAEFS) is a federation of 24 autonomous local societies. The mandate of CAEFS is to work with and on behalf of women and girls in the justice system, particularly those who have come into conflict with the law.

CAEFS has a long history of urging the Department of Justice to reform the defence of self-defence to reflect the realities experienced by battered women who defend themselves and others with lethal force. After the Supreme Court of Canada handed down the Lavallee decision in 1990, CAEFS and other equality-seeking women's groups requested a review of the cases of women who had been jailed for killing their abusers.

These efforts resulted in the establishment of the Self-Defence Review (Ratushny, 1997). The purpose of the Review was essentially to examine the cases of women jailed as a result of their involvement in the deaths of their abusers and recommend how they might achieve some measure of justice for women who had been convicted in Canada of homicide in circumstances where self-defence should have been considered.

CAEFS has also been involved in national consultations with women's groups on violence against women, and has articulated the link between women's experience of male violence and their subsequent convictions and imprisonment. In this regard, CAEFS participated in 1995, along with other women's groups, in responding to the White Paper proposals (Standing Committee on Justice, 1993) on reform of the law of self-defence (Sheehy, 1995).

In 1998, the federal government released its latest consultation document on the reform of self-defence, *Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property* (Department of Justice, 1998), which included proposed reforms to the defence of provocation and defence of property as well. In the summer of 1999, CAEFS convened a national consultation with equality-seeking women's groups to discuss the relationship between self-defence, the defence of provocation, and the mandatory minimum sentence of life imprisonment for murder. This brief is the product of that consultation process.

## II. Summary of CAEFS' Recommendations in Response to *Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*

1. Abolish the mandatory minimum sentence of life imprisonment for first and second degree murder, and all other mandatory minimum sentences.
2. Abandon the parole ineligibility rules for murder.
3. Permit extension of the period of parole ineligibility for murder only upon a clear burden of proof, where a jury so recommends to a judge, and where reasons are provided in writing for the decision.
4. Make appellate review of parole ineligibility decisions and judicial review of parole decisions available automatically in the case of alleged *Charter* violations.
5. Initiate or fund quantitative and qualitative research into the current operation of self-defence and provocation in the context of intimate homicide and femicide, as well as other hate-inspired killings.
6. Initiate or fund research into the use of the defence of property at the level of charging and prosecutorial and trial decisions, including an equality-based analysis of its relevance and significance in Aboriginal land disputes where possession is asserted.
7. Convene and fund a national consultation on provocation and self-defence with women's groups who work on violence issues, and ensure an ongoing process of consultation with women's groups that work on violence against women.
8. Convene and fund a national consultation on the defence of property with women's and Aboriginal groups who have expertise in criminal defence work on behalf of Aboriginal protesters.
9. Demonstrate federal leadership and co-ordination regarding provincial and territorial prosecutorial consultation and guidelines for the prosecution of intimate homicide and femicide and other hate-inspired killings.
10. Identify the promotion of equality and justice and the reduction of inequality as experienced on the basis of sex, race, disability, and/or sexual orientation as the impetus for reforming all criminal law, including the defences of self-defence and provocation. In particular, the criminal law must ensure that everyone has the same duty of self-control, and must strive to accord to all, on an equal basis, the rights to self-worth and to self-preservation.

11. Create and develop data to identify the different paradigms in which self-defensive violence is invoked and employ policy analysts to undertake a feminist, anti-racist, gay and lesbian-positive analysis of the systemic factors that should be considered in developing self-defence doctrine.
12. Enact a duty to retreat, where it is safe to do so, for those who initiate or threaten violence or abuse.
13. Exclude from the ordinary law of self-defence those who were exercising lawful authority and create a specific defence of self-defence for those in lawful authority that has more stringent criteria for self-defence.
14. Draft a defence that does not differentiate between those who intend and those who do not intend to kill or seriously injure when defending themselves or another.
15. Draft a defence that is open-ended in terms of protection of other persons, regardless of the legal relationship between the accused and the person protected.
16. Require that an accused must actually and reasonably, consistent with a s. 15 equality analysis, believe in the need to use defensive violence and in the need to use the degree of violence invoked.
17. Enact a self-defence law that requires the accused to believe that the use of force is necessary, but requires only that the degree of violence used by the accused be reasonable, not objectively necessary or proportionate.
18. Enact a statutory list of considerations going to “reasonableness” in cases where the accused or the person protected was subjected to a pattern of coercive control, violence, threats and or abuse. This list must include both systemic issues, as highlighted in *Malott*, and consideration of the particular features of the accused’s experience, as set out above.
19. Require that the reasonableness of the accused’s belief regarding the need to use force and the degree of violence that is needed be assessed from the standpoint of the ordinary, sober person.
20. Draft a self-defence law that disqualifies an accused’s belief in the need to invoke defensive violence or the degree of force used as unreasonable only where it constitutes a marked departure from the beliefs or force used by the reasonable person, consistent with s. 15 of the *Charter*.
21. Abolish the “excessive force” limitation and instead rely on a thorough determination of “reasonableness”, as discussed in Recommendation #18.
22. Draft a defence that can be used to defend against violence or threats of violence and that is available with respect to the commission of all offences involving violence.

23. Qualify the defence by reference to assaults that are "unavoidable in the sense that the accused could not otherwise guarantee her or another's safety, rendering defensive violence necessary".
24. Undertake a study of the use of model self-defence instructions by trial judges in Canada.
25. Amend the *Criminal Code* so as to require trial judges to relate the law of self-defence to the evidence presented, to relate the theories of both sides, and to remind jurors that the factual findings are their domain.
26. Engage in an equality analysis of the defence of property, focussing particularly on women, Aboriginal, and otherwise racialized people.
27. Amend the defence of property to make it available only where the threat to property also poses a threat to human physical security or safety.
28. Review and revise other *Criminal Code* provisions, including sentencing provisions, to ensure that they reflect the value of protection of human safety and life over property.
29. Create a specific rule for the use of force by Aboriginal peoples in defence of land.
30. Develop specific rules according to the values to be protected through the defence of property.
31. Create a defence of property rule that is broad enough to include the range of economic interests of equality-seeking groups and that is tied to human security and safety.
32. Define the defence so as to include defence against a range of infringements of "property" interests.
33. Hinge the defence of property on "colour of right" in combination with a risk to human life or security.
34. Adopt the mixed subjective-objective test for the defence of property with respect to the accused's belief that force is needed and that the degree of force used was necessary.
35. Require that the defence of property through violence be "reasonable", but not also "necessary" and "proportionate".
36. Require that the defence of property be dependant on defence of the person or Aboriginal lands, such that the use of deadly force could only be justified in such circumstances.
37. Engage in an equality-based analysis of the defence of provocation that examines the broader implications of the defence beyond the results in reported cases.

38. Abolish provocation at the same time that the mandatory minimum sentence of life imprisonment for murder is abolished.
39. Remove “victim provocation” as a factor in mitigation of sentence.
40. Delete the phrase "in the heat of passion" and substitute language that identifies a temporal link between the alleged provocation and the accused’s response.
41. Replace the phrase “wrongful act or insult” with “unlawful act”, employing an equality-based understanding of insults that encompasses the implicit threat posed by racist insults and other taunting.
42. Retain the "ordinary person" test for provocation.
43. Retain the “suddenness” requirement for the accused’s reaction to the alleged provocation.
44. Do not create a formal bar on the provocation defence for "spouses", but enact one instead for male violence against women and children and for killings inspired by alleged gay advances or “homosexual panic”.
45. Qualify the ordinary person test such that the person is one who adheres to *Charter*, specifically equality values.
46. Do not restrict provocation to those who fail self-defence only by reason of their use of excessive force.
47. Create a legal mechanism that would repudiate discriminatory sentencing patterns and practices, and that would create the potential for public accountability and legal challenge of such sentences.

### III. Recommendations in Response to *Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*

#### A. **Abolish Mandatory Minimum Sentence of Life Imprisonment**

CAEFS' primary and most critical response to the Department of Justice paper, *Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property* (Department of Justice, 1998) is to urge the abolition of the mandatory minimum sentence of life imprisonment. CAEFS has, since 1979, formally opposed all mandatory minimum sentences, as have many other government commissions such as the Sentencing Commission of Canada (Canadian Sentencing Commission, 1986). Given the extremely serious repercussions of the mandatory minimum sentence of life imprisonment for individual women convicted of murder and for the conditions in women's prisons, CAEFS calls for abolition of this and all other mandatory prison sentences.

#### **1. Systemic Discrimination: Unequal Treatment**

First and foremost, abolition of mandatory minimum sentences is necessary if we are to address systemic discrimination in the criminalization and imprisonment of women, members of racialized communities, people with disabilities, the poor, and lesbians and gays. While some people seem to believe that mandatory minimum sentencing amounts to "equal treatment", this assumption is falsely simplistic.

Mandatory sentencing could only be said to be "equal treatment" if everyone had an equal chance at receiving a mandatory sentence. Everyone does not have an equal chance at receiving a mandatory prison sentence for a number of reasons. Disparity is partly created by the choice of offences that are targeted for mandatory minimums -- usually the offences disparately committed by the socio-economic underclass of a particular society (Morgan, 1999 at 276-77). Further, as has been demonstrated over and over again by activists, researchers, and advocates, Aboriginal people, other racialized people, and poor people face a criminal justice system in which discretion is exercised to their disadvantage at every turn, from the investigatory and charge stage by police, to the prosecutorial decisions made by Crown attorneys, to the trial and sentence decisions by judges, to the penal practices, including discipline of prison authorities, through to the parole determinations made by the parole board.

There are several dramatic examples that suggest that prosecutorial discretion with respect to the laying of murder charges displays evidence of systemic racism, which in turn will dictate which prisoners face mandatory life sentences. One such example occurred in Prince Albert, Saskatchewan in 1991 when the police and Crown settled on a manslaughter charge, instead of a murder charge, with respect to the shooting death of an Aboriginal man, Leo LaChance, by Carney Nerland, an avowed white supremacist and a police informant. Although this unusual decision was remarked upon by the judge who heard Nerland's bail application, no change in the prosecutorial decision ensued. Nerland, a prominent member of the Aryan Nation, had boasted after the homicide that "If I am convicted of shooting that Indian, I should get a medal and you should pin it on me". The evidence that suggested that Nerland had fired the shot at close range, inside of his gun store, also could have supported a murder charge (Abell and Sheehy, 1996 at 121-23).

Another example of the significant, albeit hidden role that prosecutorial discretion plays in murder cases is provided by Yvonne Johnson's case. The result in her prosecution demonstrates the flip side of systemic racism whereby accused who are not the most significant actors in a crime can be accorded the lion's share of legal and punitive responsibility for a crime. Yvonne Johnson's account in *Stolen Life* (Johnson and Wiebe, 1998) illustrates how the Aboriginal woman accused of murder can be denied the benefit of Crown discretion in the prosecution in terms of plea bargaining, even where it is extended to the other perpetrators. She ended up as the only one of four to be convicted of first degree murder and therefore the one who is serving the longest sentence of imprisonment, by far.

There are also significant numbers of people with cognitive and psychiatric disabilities who are caught up in the criminal justice system, and for whom stereotypes and discriminatory practices play a role in their conviction and exposure to mandatory sentences of incarceration. For example, the legal treatment of wrongfully convicted Guy Paul Morin was worsened in part by his mental illness, which was used by prosecutors to suggest to jurors that he was the sort of person to commit such an act of violence and to thereby suggest that he was guilty of murder (Makin, 1997). We need to study how negative social and legal constructions of disability interact with the criminal justice system and produce mandatory life sentences, contrary to the equality interests of persons with disabilities.

CAEFS is aware of evidence that indicates a Crown preference for first degree murder charges against women who kill their mates, when either no charges or a manslaughter charge would be warranted on all the evidence (see the cases discussed below of Kim Kondejewski and Lilian Getkate, among others). Given the reality that most women who use lethal force to prevent an attack by an abusive partner are also the first to notify police of the death and their involvement, their own actions are frequently used by Crown prosecutors as the basis for laying first degree murder charges. It is neither logical nor just to allow the gendered context that gives rise to the decision to lay first degree murder charges against such women to dictate a minimum sentence of life imprisonment.

In addition to these specific examples, we have statistics on charging decisions by police and other prosecutorial decisions by Crowns, such as the decision to choose the indictable route of prosecution over the summary conviction process, which substantiate that systemic biases against groups such as African-Canadians shape the exercise of discretion with respect to many criminal offences (*Final Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, 1995). We also have statistics that illustrate racism in Canadian sentencing patterns (Renner and Warner, 1981), over-use of more punitive measures against Aboriginal and African-Canadian accused (*Bridging the Cultural Divide*, 1996; *Final Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, 1995), including discriminatory patterns of commutation of the death penalty (Strange, 1996) and over-representation of Aboriginal women among the women's population in federal prisons (LaPrairie, 1993).

Even among federal prisoners who are serving mandatory life sentences for murder, Aboriginal and other racialized offenders are disadvantaged by systemic racism with respect to the conditions under which they serve their sentences, such as security classification and prison discipline, which in turn affect their chances of release on parole and thus the ultimate length of their life sentences. Given what we know about systemic racism in prison discipline in provincial institutions (*Racism Behind Bars*, 1994) and in light of Madam Justice Arbour's comments about the federal prison culture and disregard for the law in her Inquiry into Events at the Prison for Women (Arbour, 1996), we know that racism is carried over from the decisions of police, prosecutors, and judges to those who administer sentences of imprisonment and the terms of parole in federal institutions as well. Cognitive and psychiatric disabilities also generally weigh against an accused in the prison classification process and correctional programming, not to mention the availability of parole.

Not surprisingly, in jurisdictions that have attempted to gauge the impact of mandatory sentencing laws, the results indicate consistently that minority groups are the ones targeted by these laws.

In Australia, emerging evidence is documenting what we already know. Mandatory sentences are invoked disproportionately for Aboriginal peoples, with crushing results (Thomson, 1999-2000). In the Northern Territories, since 1997 when mandatory sentencing laws were introduced, judicial use of non-custodial dispositions has declined dramatically and a corresponding increase in the imprisonment of Aboriginal adults and youths has been documented (Howse, 1999 at 227-28). In Western Australia, as of 1999, 50 children between 11 and 17 years of age have been sentenced to mandatory sentences of one year in prison (Bayes, 1999 at 287).

Australian analysts note that Aboriginal people are disparately affected by the mandatory sentencing laws in part because police enjoy a very high --90 %-- "charge clearance" rate in Aboriginal communities. Police have an easy time here because many Aboriginal people will tell police who was responsible, and will also readily make statements to police that are used to charge them (Howse, 1999 at 226), much like battered women who have killed their violent partners.

It is also clear that Aboriginal and other disempowered groups will be disparately affected by mandatory sentencing laws because they will not have the resources to influence the police charging decisions, nor will they have much to bargain with regarding a possible sentence deal with the prosecutor. It is therefore quite predictable that young people from Aboriginal communities appear to be the hardest hit in the two Australian jurisdictions using mandatory sentencing, since they have neither the resources nor the information with which to strike a deal. Recent research in Western Australia indicates that "Aboriginal children constituted a staggering 80 per cent of the three strikes cases in the Children's Court of Western Australia from February 1997 to May 1998" (Morgan, 1999 at 277). The implications for these communities resonate with the practices of colonization: "Another generation of indigenous young people are being taken away from their families, from their communities and from their land" (Goldflam and Hunyor, 1999 at 215). These authors continue:

The unacceptable level of property crime [i]n some Aboriginal communities is a product of specific social, historical and economic conditions. Mandatory sentencing can only serve to perpetuate the underlying causes of the high levels of property crime in those communities. With young men being removed for lengthy stretches of time, the disruption to the ceremonial life of a community is just one way in which the fabric of such communities will continue to be undermined. (Goldflam and Hunyor, 1999 at 215).

Similarly, all of the available evidence from the United States suggests that the harshest impact of mandatory minimum sentencing is felt by African-Americans, and particularly African-American women. For example, the data indicates that African-American women have eight times the chance of European American women of being charged, convicted, and sentenced under mandatory sentencing laws. There is also an enormous disparate impact upon Hispanic-American women, although its magnitude is about half that experienced by African-American women (National Law Journal, 1998). Statistics from 1985-95 indicate that the incarceration rates for drug offences leapt by 707 % for African-Americans, while for European Americans it rose by 306 % (National Law Journal, 1998).

Much like the Australian experience, racially discriminatory patterns in mandatory minimum sentencing in the U.S. are created by practices of charging and negotiating plea bargains. Those actors who are accidentally or peripherally involved in offences have little or nothing to bargain with in terms of aiding the prosecution, and therefore not infrequently, these persons end up with lengthier sentences than the major players who can bargain their way out of a charge that carries a mandatory sentence. The U.S. experience indicates that “[w]hites tend to plead guilty and receive motions for reductions of sentence for cooperation more frequently than blacks do” although it is unclear whether this difference is due to the behaviour of prosecutors, the availability of legal counsel, or the different circumstances of accused persons who belong to different racial groups (Vincent and Hofer, 1994 at 23). For example, in the Canadian context, Yvonne Johnson refused to give evidence against her co-accused. She may have thereby lost the opportunity for a “deal” that might have taken her out of the mandatory sentence of life imprisonment (Johnson and Wiebe, 1998 at 303-314). The imposition of mandatory minimum sentences is also influenced by the barriers to access to justice experienced by racialized women, who require access to legal services in order to make legal arguments on their behalf.

## **2. Systemic Discrimination: Unequal Impact**

Second, abolition of mandatory minimum sentences is needed because they do not have an equal impact on all, even if it were true that everyone received “equal treatment” in the enforcement of criminal law. Mandatory minimum sentences have a predictably harsher impact upon those who already experience systemic disadvantage or disempowerment. According to both CAEFS and Judge Ratushny in her *Self-Defence Review* (Ratushny, 1997), due to systemic reasons, most women charged with homicide of allegedly violent mates are prepared to forego the defence of self-defence and plead guilty to manslaughter in order to avert the threat of a lifetime of incarceration should their defence fail for any reason and they be convicted of first or second degree murder.

Women who allege that they killed violent mates face widespread disbelief and misogynist denial, an enormous lack of legal, social, and economic support for their defence, and the prospect of loss of their children for decades. Added to this is the loss of self-worth, confidence, and clarity engendered by male control and violence. Thus, women are systemically disadvantaged when charged with first degree murder in their ability to fight the charge based on self-defence, as a direct consequence of the mandatory life sentence that is tied to a murder conviction. The overwhelming trend in such cases is for the woman to agree to plead guilty to manslaughter in order to open up the possibility of judicial as opposed to mandatory sentencing.

Mandatory sentencing also produces unequal results, even if it could be called equal treatment, because it forces a judge to impose a set sentence regardless of mitigating circumstances. For women and other disempowered groups, this results in ignoring systemic oppressions that assist in creating “criminals”, and it even overrides individual responsibility. For example, some women who killed violent mates and plead guilty to manslaughter had, after *Lavallee* (1990) received suspended sentences and/or community sentences on the basis that they had been battered and that the battering was relevant to their moral culpability (Sheehy, 1994, 1995; Shaffer, 1997).

However, new legislation passed in 1995, Bill C- 68, requires a judge to impose a minimum sentence of incarceration in a federal institution for at least four years for offenders convicted of specific offences of violence against the person if a firearm was used. This mandatory sentence of at least four years of imprisonment will be imposed even where there are compelling mitigating circumstances such as long-term abuse of the woman who kills her mate. The legal recognition of the significance of such factors, which was achieved only after lengthy feminist struggle, has been obliterated by this new mandatory minimum sentence.

As one academic points out, the new firearms law will also impose the mandatory sentence regardless of the degree of moral fault of the offender (Dumont, 1997), such that a woman who fires a gun at her mate, in an action that is deemed not to amount to self-defence, may receive a longer sentence than the man who beats his wife to death over a period of hours. Furthermore, the mandatory minimum will apply indiscriminately to women who use firearms even though women are very rarely gun owners or collectors. In other words, in a case where a woman uses one of her husband’s guns, the fact that her husband had amassed an arsenal of weaponry and had threatened to kill her and her children could not be considered to entitle her to a suspended sentence since she must now be sentenced to at least four years imprisonment.

For offenders with cognitive and psychiatric disabilities, mandatory sentences require that judges ignore their reduced capacities, unless their condition amounts to a mental disorder that deprived them entirely of their ability to distinguish right from wrong, pursuant to s. 16 of the *Criminal Code*. Again this means that for some categories of offenders, mandatory sentences deliver “equality” with a vengeance.

This disparate impact results additionally because long prison terms may have more devastating effects upon prisoners who are racialized or who experience cognitive or psychiatric disabilities, whose prospects of employment will be further crushed by a record of imprisonment. In the case of women, they are more likely to be the primary, often sole parent of children and therefore more likely to experience the loss of their children and the anxiety related to concerns about their well-being. Further, the conditions of women's imprisonment have often been condemned for their failure to provide appropriate services for women. Finally, the isolation of women's prisons from the larger community will also differentially affect racialized women, particularly Aboriginal women. It should be emphasized here that the s. 15 violation of women's equality rights posed by the imprisonment of Aboriginal women in the Kingston Prison for Women was recognized by the Saskatchewan Queen's Bench in the *Daniels* (1990) case.

### **3. Distortion of Defences**

CAEFS believes that mandatory minimum sentences also contribute to systemic discrimination by putting pressure on lawyers to resort to extraordinary measures to avoid conviction and the mandatory sentence for their clients. Many of the problems that have been associated with the defences of self-defence and provocation are in fact distortions caused by the existence of a mandatory minimum sentence of life imprisonment for murder. Accused persons, lawyers, and judges are pressured to resort to constructs such as "Battered Woman Syndrome", "Homosexual Advance", "Homosexual Panic", "Cultural Defences", and "Rage" in order to avoid this sentence, even when such uses carry negative social policy consequences and in fact violate the *Charter* rights of the deceased victims and social groups such as women, lesbians and gays, and racialized people. The more appropriate response is to rid the law of the mandatory minimum sentence of life for murder.

### **4. Swelling Prison Populations**

CAEFS also opposes the use of the mandatory life sentence for murder based on its contribution to the growing population of prisoners in Canada, and particularly women prisoners. We know that women have not suddenly become more violent, yet the numbers of women serving life sentences have risen from 12-14 % in the late 1980s, to approximately 22% a decade later. CAEFS attributes this startling increase in the women's federal population to the impact of mandatory life sentences for murder. A similar trend has been documented in the United States, where the increased use of mandatory minimum sentences has produced its most dramatic expansion of prisoners in the women's population: 38 % of the growth in the women's prison population is attributable to drug offences, as compared with 17 % of the growth of the male inmate population (FAMM-gram, 1999 at 5).

Further, CAEFS notes that the effect of the mandatory minimum sentence for murder in Canada is to produce extraordinarily long sentences of incarceration, by international standards. For example, only just behind the U.S., Canada has the second longest average sentence served for first degree murder among many nations (U.S. 29 years, Canada 28.4 years, next highest is Japan at 21.5 years), and that the average sentence served among these nations is 14.3 years. The abolishment of the mandatory minimum sentence would permit Canada to move away from the U.S. and closer to its other comparators such as England (14.4 years), Australia (14.75 years), and France (15.5 years).

## 5. Contradictory Effects

Fifth, beyond the immediate and appalling consequences of systemic discrimination and lengthy prison sentences produced by mandatory minimum sentences, there is no hard evidence that these sentences make any positive contribution to reducing “crime”. To the contrary, in some jurisdictions, like Western Australia, it appears that the category of offence to which the mandatory minimum was attached, theft of a motor vehicle, increased by 50 % in the first year after the introduction of the new sentence (Thomson, 2000 at 4). A similar increase in the crime statistics for another category of offences, that of home burglaries, has been reported in the period immediately following enactment of the new three strikes law (Yeats, 1997).

Similarly, the U.S. studies conclude that no reduction in crime levels has been achieved by the various mandatory minimum laws in that jurisdiction (Tonry, 1995). At best, some studies indicate a short term, but no long term deterrence effect from mandatory sentencing laws (Tonry, 1995). And the cost of any reduction in crime in this regard is enormous: a Rand Corporation 1996 study indicates that California’s three strike laws requires an increase from 9-18 % of the state budget being allocated to corrections, which in turn requires a massive 40 % reduction in other social service budgets like education and health, if taxes are not to be increased (Hogg, 1999 at 263).

Mandatory minimums cannot perform the deterrence function that we aspire to here since such sentences can be avoided by different charging practices, by jury nullification, and by the parole process. For example, to the extent that members of the legal profession and public think that the mandatory minimum sentence of life imprisonment is too harsh in cases such as the *Latimer* decision, public debate, education, and social change can be circumvented by prosecutors who refuse to pursue charges of murder, by juries who refuse to convict, and by a parole process that responds more compassionately to certain types of prisoners.

## 6. Legal Constraints

Sixth, there are also legal objections to mandatory minimum sentences. As outlined in more detail in the brief presented by the National Association of Women and the Law (NAWL), they raise the spectre of *Charter* violations. Several Canadian academics have condemned the new mandatory minimum sentence for offences involving firearms as unconstitutional because it offends *Charter* guarantees such as the right to be free of “cruel and unusual punishment” (s. 12), the right to be free of a punishment that is disproportionate to one’s degree of moral culpability (s. 7), and the right to be free of arbitrary detention (s. 9) (Dumont, 1997; Manson, 1999). In addition, as the preceding analysis has demonstrated, mandatory minimum sentences also violate women’s s. 15 equality rights under the *Charter* because they have a disparate impact upon women, in part because the inequalities that produce women’s offending are obliterated by mandatory sentencing.

CAEFS adds to NAWL’s points here by emphasizing that mandatory minimum sentences fly in the face of the recommendations made by countless commissions that were intended to reduce the extremely high rate of incarceration experienced by Aboriginal people in Canada. Reports by many commissions – the Law Reform Commission of Canada (*Aboriginal Peoples and Criminal Justice*, 1991), the Canadian Bar Association (*Locking Up Natives in Canada*, 1988), and the Royal Commission on Aboriginal Peoples (*Bridging the Cultural Divide*, 1996), to name a few – have recommended that imprisonment be a last resort for Aboriginal offenders, that alternative measures be pursued wherever possible, and that the special circumstances of Aboriginal offenders be carefully considered at the sentencing stage. These recommendations cannot possibly be implemented within a mandatory sentencing regime. In fact, as indicated in NAWL’s brief, the principle in s. 718.2 of the *Criminal Code* that sanctions other than imprisonment ought to be considered for all offenders, “with particular attention to the circumstances of aboriginal offenders” is directly offended by these laws.

CAEFS also believes that mandatory sentences, and particularly mandatory prison sentences, offend principles accepted in international law, such as the International Covenant on Civil and Political Rights, to which Canada is a signatory, on the basis that they violate the principles of proportionality of punishment, as required in articles 7, 9, 10, 14, and 15 (Zdenkowski, 1999 at 311). CAEFS notes that a petition has been launched by Aboriginal Legal Aid Services of Australia to the United Nations Human Rights Commission, in which the Northern Territory’s mandatory sentencing law is being challenged for offending the United Nations Convention on the Rights of the Child (Thomson, 2000 at 5). It seems that this claim as well as a private member’s bill introduced federally to override the state legislation may have precipitated a Senate Inquiry, by the Legal and Constitutional Committee, into the impact of mandatory sentencing (Terms of Reference, 1999).

## 7. Sentencing Powers to Police and Prosecutors

CAEFS views mandatory sentencing laws as an unacceptable usurpation by the legislature of the judicial power, offending a basic principle of democracy that executive and judicial powers must be separate. It is not simply that the legislation itself replaces the judicial function, but that police and prosecutors have had their power increased dramatically, such that their choice of charge or willingness to plea bargain will effectively determine the accused person's sentence. Unlike judges who are required to act neutrally and who can be publicly exposed and legally challenged if they fail to live up to their obligations of fairness and impartiality, police and prosecutors are "partisan", to put it mildly (Vincent and Hofer, 1994 at 21). As one Australian academic frames it: "the laws have meant that police and prosecution are often placed in the position of sentencers. And, of course, unlike judicial decisions, the DPP's decisions are unpublished, unrecorded and unreviewable (save perhaps in exceptional circumstances of abuse of power)" (Goldflam and Hunyor, 1999 at 213).

Examples from Western Australia provide dramatic illustration of the enormity of this new power: "A number of defendants have alleged to their lawyers that they were told by police that they knew the defendant had committed a number of offences, and if he or she did not provide them with full admissions, they would simply charge them one by one, resulting in them receiving multiple cumulative sentences of increasing increments" (Goldflam and Hunyor, 1999 at 213). Other anecdotes refer to practices of delaying the laying of charges and of the specific order in which charges are laid, which also affect the application of mandatory minimum sentences.

## 8. Creating Tolerance for Mandatory Prison Sentences

Finally, CAEFS believes that tolerance of the mandatory minimum for murder paves the way in terms of acceptability of minimum sentences for other offences. The new mandatory minimum sentence of four years imprisonment for offences involving a firearm provides an example, as do numerous Private Member's Bills that propose new minimum sentences for offences and offenders that have been the subject of media-induced panic.

The new mandatory minimum sentence was introduced for offences involving weapons with little public debate or justification, as it was buried in the gun control legislation. It was intended to appease gun owners by punishing severely the "real criminals"- those who use guns in the course of committing other crimes (Doob, 1999). These minimum sentences, just like the mandatory minimum for murder, are essentially politically expedient solutions to grave social problems that have moral as well as legal implications.

**Recommendation #1:        Abolish the mandatory minimum sentence of life imprisonment for first and second degree murder, and all other mandatory minimum sentences.**

## **B. Abandon the Parole Ineligibility Rules for Murder**

CAEFS asserts that, in the absence of a mandatory life sentence for murder, there would be no justification for retaining the current, extremely lengthy, periods of parole ineligibility for murder. The offence should be governed by the same parole principles applied to all other offences pursuant to the *Corrections and Conditional Release Act*.

Furthermore, because murder as an offence generates so much potential for “law and order” hysteria and unleashes biases and prejudices, specific safeguards must be inserted into the parole process so as to guarantee basic *Charter* rights to those imprisoned for the offence of murder. Specifically, the period of parole ineligibility should only be extended beyond the statutory formula set out in the *Corrections and Conditional Release Act* upon a clear standard of proof, as recommended by a jury to a judge, and with written reasons justifying the decision. The basis for appeal of such legal decisions must include alleged violation of *Charter* rights. In addition, parole decisions made by the Parole Board must be subject to automatic judicial review based on alleged *Charter* violations.

**Recommendation #2: Abandon the parole ineligibility rules for murder.**

**Recommendation #3: Permit extension of the period of parole ineligibility for murder only upon a clear burden of proof, where a jury so recommends to a judge, and where reasons are provided in writing for the decision.**

**Recommendation #4: Make appellate review of parole ineligibility decisions and judicial review of parole decisions available automatically in the case of alleged Charter violations.**

### **C. Initiate Research and Consultation**

CAEFS" response to the document, *Reforming Criminal Code Defences*, is constrained by two important gaps that must be addressed by the Department of Justice prior to further commitment to a specific law reform platform.

First, there is a dearth of research and analysis of the actual implementation of the law of self-defence, defence of property, and provocation. While it is true that we have ample access to the reported cases in which these defences have been raised, we also know that these represent only the tip of the iceberg and, in some cases, may well distort the actual practices. We do not know, for example, how many men and women are charged by police with manslaughter instead of murder in connection with the deaths of intimate partners on the basis of evidence of self-defence or provocation. We do not know the frequency with which police decide not to charge at all in the case of owners who kill to protect property. We do not know the significance of the defence of property in the context of disputes over land claims by Aboriginal peoples. We do not know the statistics on pleas to manslaughter in reliance on these potential defences. We do not know the numbers of acquittals and convictions when these defences are advanced at trial. And, we do not know the impact on acquittals and convictions of different forms of evidence, argument, and instructions to the jury.

For example, many in the legal community had assumed that after the decision of the Supreme Court of Canada in the *Lavallee* (1990) case, the law of self-defence would no longer pose hurdles for battered women who kill, particularly since no problems seemed to be evident in reported case law. In fact, it has been confirmed by several investigators that many of the barriers are embedded in charging and prosecutorial practices and that there is a need for legal change to address these. The Department of Justice ought to itself undertake or fund empirical research that examines the questions set out above before promoting law reform in a social science and policy vacuum and thereby stifling a further round of reforms.

**Recommendation #5:      Initiate or fund quantitative and qualitative research into the current operation of self-defence and provocation in the context of intimate homicide and femicide, as well as other hate-inspired killings.**

**Recommendation #6:      Initiate or fund research into the use of the defence of property at the level of charging and prosecutorial and trial decisions, including an equality-based analysis of its relevance and significance in Aboriginal land disputes where possession is asserted.**

The Department of Justice must take advantage of the consultation process with women's advocates who work in the area of violence against women before proceeding further with a law reform agenda. The expertise offered by these advocates facilitates identification of practical failures and erroneous assumptions embedded in criminal law and practice. In turn this information allows for the development of sound legal and procedural rules around defences to crime, and ultimately contributes to the creation of law that has longevity and integrity. By way of example, the research and experience of women's advocates describes the way in which violent men threaten and harm others as a way to control and hurt their women partners. This knowledge pushes us to examine "defence of others" (s. 37) and to consider expanding its legal basis beyond threats to those "under one's protection" to include neighbours, family members, and friends.

In addition, consultation enables women's organizations to consider, negotiate, and resolve conflicts and competing interests. For example, at the consultation for Bill C-72 (extreme intoxication), while a number of women were willing to seriously consider a new offence of criminal intoxication or intoxicated sexual assault, representatives of Aboriginal women's groups persuaded the others that this option would have a disproportionate negative effect on Aboriginal and poor peoples and this reform option was abandoned. Similarly, there are competing interests at stake in the reform of self-defence and intoxication that warrant a broader process to consider Aboriginal, gay and lesbian, and criminalized women's interests and those of poor women, other racialized women, and women with disabilities. The advantage to the Department of Justice of such work is a better quality of legal response as well as broader based support for its legislative interventions.

Although officials from the Department of Justice had indicated during the fall 1998 Criminal Procedure reforms consultation that a further consultation would be provided for national women's organizations to discuss changes to self-defence and provocation before the federal government proceeded with a reform agenda, to date no such opportunity has materialized. Instead, in 1999 CAEFS itself organized, with a very small budget, a two day meeting with over 40 women representing Aboriginal women, women with disabilities, francophone women, women who work in shelters and crisis centres, as well as the National Action Committee on the Status of Women (NAC), the National Association of Women and the Law (NAWL), and the Women's Legal Education and Action Fund (LEAF). CAEFS held discussions on mandatory minimum sentences, self-defence, and provocation. As a result of this meeting, CAEFS has clarified its own positions on these two defences.

However, all of the women present found that much more time was needed for discussion of the specific reform implications of these two defences in order to develop a clear consensus. The women who were involved also noted the need to examine these proposed reforms in the context of other criminal law developments, such as the criminal procedure reforms and the victims' rights initiatives, on an on-going, rather than a piecemeal, basis.

**Recommendation #7:** **Convene and fund a national consultation on provocation and self-defence with women's groups who work on violence issues, and ensure an ongoing process of consultation with women's groups that work on violence against women.**

**Recommendation #8:** **Convene and fund a national consultation on the defence of property with women's and Aboriginal groups who have expertise in criminal defence work on behalf of Aboriginal protesters.**

#### **D. Address the Recommendations of the Self-Defence Review**

A federal response to the non-Criminal Code recommendations made by the Self-Defence Review is also critical before substantive reforms to the defences are addressed. Judge Ratushny recommended protocols for Crown prosecutors to require consideration of any evidence of the need to use self-defensive violence in the case of women who kill allegedly violent mates. She further urged that charges only be laid at the level of manslaughter if prosecutors are willing to accept a plea of guilty to manslaughter.

The Kondejewski trial in Brandon, Manitoba in 1998 (trial decision unreported), and the Getkate trial in Ottawa in the fall of 1998 (trial decision unreported), indicate that some prosecutors are not following this recommendation, whether in letter or spirit. The consequence of this failure is an enormous waste of resources and great stress and distress for the accused women. In both of these cases there was evidence of prior violence or threats by the deceased man. In Kondejewski the evidence was overwhelming and came from many sources; in Getkate the evidence consisted of her statements to a Crown psychiatrist as well as the physical evidence that the deceased had wired the house to blow up. In both cases the Crown was intransigent and insisted on proceeding to trial on first degree murder charges. In both cases, first degree murder was withdrawn from the jury by the presiding judge. In the Manitoba trial the woman was acquitted outright, whereas in the Ottawa trial she was found guilty of manslaughter, but given a sentence of conditional imprisonment.

CAEFS is of the view that these cases demonstrate abuse of prosecutorial authority. Neither Kim Kondejewski nor Lilian Getkate should have been charged at all, in light of the evidence of the threats they were acting under. At the very most, they should have been charged with manslaughter so as to obviate the very high stakes of a first degree murder trial. CAEFS points out that these were both cases in which there was evidence supporting the women's claim that they were under threat. This is so despite the fact that the Crown in the Getkate case made public and media statements to the effect that "there was no evidence of abuse" in her case. In fact, the house was wired to blow up, much as Getkate had stated that the deceased had threatened to do. In many cases, such as the recent murder of a Québec woman at a shelter (Peritz, 1999), women have no physical evidence to back up their fear that their mates will kill them and thus are not in a position to demand criminal law intervention. These not uncommon predicaments pose a serious challenge to a criminal justice system committed to preserving women's lives and to treating them justly if intervention prior to self-defensive homicide does not occur.

These cases show that women who defend against violent men are still considered the real criminals by our criminal justice system, and that they will be treated in a very heavy-handed manner by prosecutors in the guise of “gender neutrality”. The need for federal leadership is made manifest by examples such as these. After all, the *Criminal Code* itself and the mandatory minimum sentence for murder together put battered women in this untenable position. The *Charter*, as well as basic decency, requires that the federal government respond to Judge Ratushny’s recommendations in this regard. To reform the law of self-defence in the absence of resolution of such prosecutorial dilemmas at the provincial level will compound injustice and forestall this necessary legal change.

CAEFS suggests that a national consultation on how to create workable prosecutorial guidelines for the provinces and territories would be extremely productive. Ideas that could be considered include a guideline that recommends that no charges be laid against a battered woman who has killed her mate where there is any evidence supporting her assertion that she acted under threat of violence; a mechanism to allow review or legal challenge, by way of a preliminary motion, to a prosecutorial decision to proceed with murder charges in these circumstances; formalized training for the Crown Attorneys who must make such decisions; and a legal requirement that the Crown seek and receive approval from the Attorney General of the province, much as they must do when they seek to prosecute hate mongers and child abductors, before charging a battered woman with murder in relation to the death of her mate.

**Recommendation #9: Demonstrate federal leadership and co-ordination regarding provincial and territorial prosecutorial consultation and guidelines for the prosecution of intimate homicide and femicide and other hate-inspired killings.**

## **E. Reform Self-Defence**

The discussion in the consultation document creating the basis for reform of self-defence is weak. Justice frames the reform issues solely in terms of reducing complexity and rendering the law more consistent and clear. While those are concerns that reforms can respond to, if they are the sole concerns, then public consultation is really not needed as the changes are simply “technical”.

Unfortunately, there is no discussion of whether inequality or unfairness is perpetrated by the law of self-defence or its implementation. No reference is made to feminist concerns expressed repeatedly in other publications about whether the defence of self-defence is practically available to battered women and particularly to racialized, criminalized, and lesbian women.

In fact, Judge Ratushny’s Self-Defence Review confirmed a worrisome trend noted earlier by other researchers (Sheehy, 1994, 1995; Shaffer, 1997), namely, that battered women with apparent grounds for self-defence overwhelmingly plead guilty to manslaughter rather than go to trial on self-defence. This trend is suggestive of significant hurdles in self-defence doctrine for battered women, perceived bias in the trial process, and/or other structural or social inequalities that push such women to plead guilty rather than go to trial. Without specific attention to such inequities, Justice is at risk of reinforcing inequalities through these reforms and of creating further or new inequalities.

**Recommendation #10: Identify the promotion of equality and justice and the reduction of inequality as experienced on the basis of sex, race, disability, and/or sexual orientation as the impetus for reforming all criminal law, including the defence of self-defence and provocation. In particular, the criminal law must ensure that everyone has the same duty of self-control, and must strive to accord to all, on an equal basis, the rights to self-worth and to self-preservation.**

The defence of self-defence in its current version in the Criminal Code reads as follows:

S. 34 (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force used is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

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

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

(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

S. 35 (1) Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault on himself by another, may justify the use of force subsequent to the assault if

(a) he uses the force

(i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and

(ii) in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;

(b) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and

(c) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.

S. 36 Provocation includes, for the purposes of sections 34 and 35, provocation by blows, words or gestures.

S. 37 (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it;

(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

CAEFS' specific comments on the federal consultation proposal with respect to the reform of self-defence are organized generally to correspond to the headings used in the document.

## **1. Simplifying the Law**

The first question that Justice poses is whether there should be one general self-defence provision, much simplified over the current four provisions reproduced above, that would apply to all accused in all situations.

CAEFS is opposed to the creation of one "general rule" to cover all situations of self-defence. All of the feminist work on issues that affect women suggests that "general rules of general application" have the effect of promoting or reinforcing inequalities in the guise of "neutrality" (Lahey, 1984; Nowlin, 1993). It is only through more informed and contextual analyses that the specific effects for women are discernible and amenable to a response.

This does not mean that CAEFS supports complex or impenetrable legal rules, but rather that we ought first to identify and inform ourselves about the range and type of situations in which self-defensive violence is invoked in fact and in law. We then ask whether there are certain patterns, situations, perpetrators, and victims that require a different legal policy response. Only then should we begin to craft legal responses for the specific dilemmas presented by the context.

CAEFS therefore supports the notion that the rules for self-defence might vary depending on the nature of the relationship between the accused and deceased (stranger vs. intimate), the location of the confrontation leading to the use of self-defensive violence (tavern vs. car or home), the

relationship between the accused and the person who was protected by the violence (stranger vs. friend or family member), the role in which the accused purported to invoke self-defensive violence (police or prison guard vs. mother or spouse), and the question of who initiated the violence or abuse (or threatened to do so) that resulted in self-defensive violence by the accused.

**Recommendation #11: Create and develop data to identify the different paradigms in which self-defensive violence is invoked and employ policy analysts to undertake a feminist, anti-racist, gay and lesbian-positive analysis of the systemic factors that should be considered in developing self-defence doctrine.**

## **2. Duty to Retreat for Aggressors**

At the very least, CAEFS supports a different self-defence rule for persons exercising legal authority such as police and guards, as well as a separate rule for those who commence a physical altercation or threaten to do so. With respect to those who initiate violence or abuse or its threat, we should re-institute the legal requirement of retreat before resorting to further violence. This recommendation is based upon the work of Christine Boyle (Boyle, 1981) and Isabel Grant (Grant, 1996), who have expressed concerns about the impact of removing the special rules for those who initiate violence upon violent men who commit femicide.

Justice should respond to the Supreme Court of Canada decision in *McIntosh* (1995), in which the more stringent requirements for those who "provoked" the deceased (in s. 35) were effectively nullified through judicial interpretation. It should draft a new self-defence law that includes a clear duty to retreat for those who initiated the violence, abuse, or its threat, as opposed to those who "provoke" by "words or gestures" as provocation is currently defined in s. 36 for the purposes of self-defence. This duty should only be imposed where retreat would not pose a threat to the immediate or long-term safety of the accused. It should utilize an equality analysis that takes into account imbalances of power and relations of dominance. Specifically, this would mean that a woman who kills her mate should not be disqualified by a duty to retreat where the man has threatened to hunt her down and kill her should she leave, but the duty should disqualify police who kill in reliance upon stereotypes of racialized men as violent and who fail to retreat from a conflict that poses no apparent danger to others.

**Recommendation #12: Enact a duty to retreat, where it is safe to do so, for those who initiate or threaten violence or abuse.**

### **3. Narrow Self-Defence for Police and Prison Guards**

With respect to those in authority who use violence, the work of Harry Glasbeek (Glasbeek, 1993) should be used to ground a different set of legal criteria for self-defence. A more stringent standard of self-defence is justified on the basis that those in lawful authority typically have physical control over the deceased, whether through arrest, detention, or imprisonment. They are authorized to carry and use weapons, unlike all other citizens, and thus have an enormous responsibility not to quickly or erroneously use their weapons. And, they, unlike ordinary accused persons, can make far greater use of all of the traditional safeguards (such as the presumption of innocence, the rules of evidence) to secure acquittal in circumstances where other accused could never succeed (e.g. Officer Monette and the "flying guitar resembles gun" theory used by Eddie Greenspan to secure a self-defence acquittal regarding the shooting death of Vincent Gardiner).

**Recommendation #13: Exclude from the ordinary law of self-defence those who were exercising lawful authority and create a specific defence of self-defence for those in lawful authority that has more stringent criteria for self-defence.**

### **4. Distinction between Unintentionally and Intentionally Causing Death or Bodily Harm**

Justice asks whether the law of self-defence ought to differentiate between those defenders who intend to grievously injure or kill and those who do not. The current law, quite inexplicably, uses somewhat more rigid rules for those who unintentionally cause death as opposed to those who intend death as a result (compare s. 34(1) to s. 34(2)). A new law could instead make the defence less available to those defenders who intend to cause grievous bodily harm or death or it could eliminate any distinction.

CAEFS believes that the law of self-defence ought not to impose different legal requirements based on whether the accused did or did not intend to seriously injure or kill the aggressor. It must be almost impossible, in situations of self-defence, to draw this line in many cases. It seems to be a less dramatic legal change to merely remove any legal distinction between the two situations rather than to reverse the placement of the more onerous legal requirements. Furthermore, appeal courts have already effectively nullified the significance of the current legal distinction by ruling that a person who did not intend to cause death or grievous bodily harm is entitled to rely on the broader defence under s. 34(1).

**Recommendation #14: Draft a defence that does not differentiate between those who intend and those who do not intend to kill or seriously injure when defending themselves or another.**

## 5. Use of Force to Protect Other People

Justice asks the question of whether the current law that restricts the defence of others to those “under one’s protection”, s. 37, ought to be expanded to include persons beyond the narrow category of those who one is legally obliged to protect, such as one’s children and spouse.

CAEFS supports the view that we ought to expand the defence beyond killing to protect third persons “under one’s protection”. It is clear that the current wording of s. 37 may prevent successful reliance on self-defence for women whose relatives, friends, or neighbours were threatened by the deceased, as a way to control or threaten the accused. We also want to ensure that those brave people who intervene to protect total strangers are not denied a defence. While CAEFS recognizes that s. 27 of the *Criminal Code*, discussed below, should immunize this action, we would argue that it is too broad in permitting violent defence of property, excepting Aboriginal peoples in the circumstances described below, under **Defence of Property**. CAEFS thus supports Judge Ratushny’s recommendation that citizens be lawfully able to use force to defend any other person.

**Recommendation #15: Draft a defence that is open-ended in terms of protection of other persons, regardless of the legal relationship between the accused and the person protected.**

## 6. Judging the Circumstances; Judging the Force

Justice asks the question of whether the current way in which we assess the appropriate circumstances for the use of self-defensive violence in s. 34 ought to be retained. The current test asks both whether the accused person actually believed that force was needed and whether that belief was also objectively “reasonable”. Justice asks whether we should instead adopt a purely subjective test and abandon the restriction that is imposed through the objective, “reasonableness” requirement.

Justice also asks whether we should retain this same test for the assessment of the degree of force that the accused used in self-defence. The current law under s. 34 (2) requires that the accused both actually and reasonably believe that the degree of force used was necessary to avert the anticipated harm. Again Justice suggests the possibility of reverting to a purely subjective test with respect to the assessment of the degree of force used by the defender.

CAEFS supports the retention of a mixed subjective-objective test for both the danger faced by the accused or another and the need to use the degree of violence actually employed by the accused. This standard mirrors the test used by the current law and by the Self-Defence Review: did the accused actually and reasonably believe that the danger existed and did she actually and reasonably believe that she needed to use the force used to prevent it?

CAEFS believes that the objective test is an important component of the test for self-defence. In *Lavallee*, the objective test was used by the Supreme Court of Canada to justify reliance upon expert evidence with respect to wife battering, its dimensions, its impact, and its relevance to an accused woman's perceptions that violence from her mate is imminent and that she needs to use defensive violence to preserve herself or another. Further, the objective, "reasonable person" standard facilitates the introduction of evidence about women's collective experience of male violence and its legal response (see McLachlin and L'Heureux-Dubé, J.J. in *Malott*, 1998), which is critical to the jury's understanding of the context in which the woman evaluated her need to respond.

CAEFS opposes further subjectivizing self-defence. Women's experience of male battering is neither solely individual nor "subjective". The individual woman's personal experience of violence at the hands of her mate is properly part of the objective test, not the subjective test. It also must be situated in the broader context of women's collective experience of male violence. The law should not contribute to the socially-held delusion that wife battering is an individualized experience.

In fact, any move towards total reliance on a subjective test for self-defence is more likely to assist in defending femicide, gay bashing, and police killings of Aboriginal and African-Canadian people than it is to assist battered women on trial. Men who kill their female partners, who terrorize racialized people, or who kill in their roles as agents of the state are more likely to benefit from a legal test for responsibility that avoids looking at the larger context in which they are empowered to kill, and that instead focuses narrowly on their individual states of mind.

Finally, in addition to retaining the objective along with the subjective test, the objective component of the test for judging the circumstances and the degree of force used must be informed by equality principles consistent with s. 15 of the *Charter* and cases such as *Lavallee*. The "reasonable person" pursuant to such a standard does not rely upon myths and stereotypes regarding battered women. Neither does the reasonable person internalize racist fears and caricatures of others based upon their "race" or "culture" or sexual orientation. In the same vein, reliance upon an equality-based understanding of reasonableness should permit a prosecutor to expose and challenge the implicit racism that may underlie a claim to self-defence based upon "danger" as projected by the deceased's "race" or sexual orientation.

**Recommendation #16:      Require that an accused must actually and reasonably, consistent with a s. 15 equality analysis, believe in the need to use defensive violence and in the need to use the degree of violence invoked.**

## 7. Measuring the Force Used

The Justice document surveys several possible formulations for measuring the outer limits of acceptable force for the purposes of self-defence. Pursuant to the current law, under ss. 34 and 35, the force used must be “necessary”. Under s. 37, it must be “no more than is necessary”, often described as “proportionate”. Among the reform possibilities mentioned are the use of language such as “reasonable”, “proportionate”, or “necessary” to describe the limits on the permissible force. An earlier draft circulated as a White Paper (Standing Committee on Justice, 1993) had proposed all three as mandatory criteria. In contrast, the SDR suggested that while the accused must reasonably believe that the use of force is necessary, the force used need not be objectively “proportionate” or “necessary”.

CAEFS agrees with the recommendation of the SDR. CAEFS believes that the amount of force used by an accused should only need to be reasonable, but not necessary and/or proportionate. Proportionality is asking too much of an accused in a life-threatening situation and allows the trier of fact to conclude, for example, that murder is not proportionate to rape.

**Recommendation #17: Enact a self-defence law that requires the accused to believe that the use of force is necessary, but requires only that the degree of violence used by the accused be reasonable, not objectively necessary or proportionate.**

## 8. Defining “Reasonable”

Justice asks whether the law of self-defence ought to define and expand upon the concept of “reasonableness” in the Criminal Code itself. No other criminal law expands upon this concept, and so it would be somewhat unusual to adopt such a detailed approach in the law of self-defence. On the other hand, countless feminist academics have exposed the ways in which a generalized “reasonableness” test fails to do justice to women’s experiences of male violence and also reinforces, through the legal system, society’s male biases. They, along with Judge Ratushny for the Self-Defence Review, have recommended that “reasonableness” be defined through a detailed list of factors that inform the concept of “reasonableness” in the specific context of battered women who rely on the defence of self-defence.

The considerations that ought to flesh out an understanding of “reasonableness” can be based in part by the list of factors articulated by Judge Ratushny in the SDR, which was drawn from the ground-breaking Status of Women publication by Anne Marie Bertrand *et al.*, entitled *A Feminist Review of Criminal Law* (1985).

- the nature, duration and history of the relationship between the defender and the adversary, including prior acts of violence or threats on the part of the adversary, whether directed to the defender or others
- any past abuse suffered by the defender
- the age, race, sex and physical characteristics of the defender and the adversary
- the nature and imminence of the force used or threatened by the adversary
- the means available to the defender to respond to the assault, including the defender's mental and physical abilities and the existence of options other than the use of force; and
- any other relevant factors

CAEFS believes that the mandatory expansion of reasonableness by reference to the kinds of questions and considerations posed by Bertrand *et al.* is necessary because we cannot presume that a judge or jury (or prosecutor, for that matter) will undertake such a careful thought process. The statutory inclusion of such a list may ensure a better standard of lawyering and should also ensure admissibility of related evidence by rendering it clearly relevant to a matter at issue.

The questions that ought to be used in any expansion of the considerations for reasonableness should be in statutory form, and thus theoretically available to benefit all accused who claim to have experienced past violence and to benefit those who kill to protect a third person who had experienced such violence, whether or not it originated from the aggressor. The statutory enactment of the list would mean that if applicable, the relevant considerations would form part of the trial judge's instruction to the jury as a matter of practice, if not law.

The statutory list of "reasonableness" considerations ought to be triggered where an accused, or the person protected by the defensive acts of the accused, has experienced a pattern (as opposed to an isolated experience) of coercive control, including past violence, abuse, threats, or tangential abuse (e.g. through deprivation of material necessities, isolation, child neglect or discipline, public humiliation), threats to withdraw immigration sponsorship, etc. whether or not it emanates from the aggressor.

The inclusion of the concept of "coercive control" (Stark, 1995) is critical as it captures the pattern of the behaviour that carries a serious risk of ultimate control through fatal violence. It extends as well to behaviours that are not overtly violent. It also assists in validating women's very real anxieties, allows us to distinguish individual acts of violence by women against their male partners from the course of action engaged in by batterers, and also explains, for a jury, the woman's anger or assertive behaviour. The requirement of a pattern of "coercive control" also means that it will be more difficult for men who have killed their intimate partners to invoke this statutory list elaborating upon the concept of "reasonableness" should they attempt to argue "self-defence".

The expansion of the “reasonableness” requirement should include the following types of inquiries, which are derived from Bertrand et al., the Malott judgment, and the SDR:

- the nature, frequency, and degree of coercive control, including threats, violence, and/or abuse experienced by the broader group, of which the accused is a member, as shaped by sex, race, dis/ability, sexual identity, immigrant status, language, and class;
- the social, legal, and political response to this experience, including the access of members of that group to credibility and to justice, the availability of refuge, economic support, child protection, police and legal protection, and long-term security programs, both broadly and, where relevant, locally; the risk factors that increase the danger posed by coercive, controlling, violent and/or abusive persons, including jealousy regarding real or imagined friendships or lovers, anxiety about increasing independence or separation originating from the accused, and formal or informal reinforcement of entitlement emanating from family members, the community, or the legal system, among others;
- the nature, frequency, and degree of coercive control, threats, violence, and or abuse from any source, experienced by the accused or the person protected;
- the nature, frequency, and degree of coercive control, threats, violence, and or abuse inflicted by the aggressor against the accused or other persons;
- the age, health, physical condition, sex, economic status, psychological state, and race of the accused and the aggressor;
- any efforts made by the accused to resist, expose, or minimize the aggressor’s coercive control, threats, violence and/or abuse, and the results of such efforts, as well as the accused’s experience regarding the efforts of others to seek intervention or assistance;
- the nature of the harm anticipated or threatened, including whether it was avoidable with some degree of certainty, and whether an immediate response was needed.

**Recommendation # 18: Enact a statutory list of considerations going to “reasonableness” in cases where the accused or the person protected was subjected to a pattern of coercive control, violence, threats and or abuse. This list must include both systemic issues, as highlighted in Malott, and consideration of the particular features of the accused’s experience, as set out above.**

## **9. Sober Person**

The Justice paper asks whether the “reasonableness” standard ought to employ the standard of the sober person. This was the interpretation used by Judge Ratushny in the Self-Defence Review for evaluating women’s claims to self-defence. CAEFS agrees that the reasonable person should be viewed as a sober person. This definition fits with s. 33.1 of the Criminal Code regarding the denial of the defence of extreme intoxication alone or in combination with alleged “mistake of fact” related to consent to sexual assault (s. 273.2). CAEFS takes this position even though there is a strong relationship between the experience of abuse and violence and subsequent substance abuse, and knowing that this limit could also negatively affect women arguing self-defence.

**Recommendation #19: Require that the reasonableness of the accused’s belief regarding the need to use force and the degree of violence that is needed be assessed from the standpoint of the ordinary, sober person.**

## **10. Marked Departure Requirement**

Justice’s consultation paper also asks whether it should adopt another aspect of the model used by Judge Ratushny for the Self-Defence Review. In the SDR, she determined, consistent with case law pursuant to the Charter, that an accused should not fail the “reasonableness” test simply because her judgment that an assault was occurring was not “reasonable” or because her determination that a certain degree of force was required was unreasonable. Judge Ratushny instead said that the woman must have deviated markedly from the standard of the reasonable person for the error to constitute a criminal offence as serious as murder.

CAEFS agrees with Judge Ratushny’s definition in the SDR of “reasonable”, which used a fairly high standard of unreasonable behaviour as the bright line for criminalization. The accused’s perception with respect to the degree of the danger or force needed to repel it should only become unreasonable at law if it constituted a gross deviation from what a reasonable person would have thought or done in the same circumstances. This means that a fairly generous standard is being proposed for an accused, but it is supportable both in terms of the *Charter* and in terms of giving appropriate leeway to a person in a dire emergency to misjudge the degree of danger or force needed, without losing the defence, as long as that misjudgment is not excessive. CAEFS believes that the “gross deviation” standard must also be interpreted in a manner consistent with s. 15 of the *Charter*. For instance, a gross deviation would be established if the accused relied upon racist stereotypes of the deceased as his basis for self-defence.

**Recommendation #20: Draft a self-defence law that disqualifies an accused’s belief in the need to invoke defensive violence or the degree of force used as unreasonable only where it constitutes a marked departure from the beliefs or force used by the reasonable person, consistent with s. 15 of the *Charter*.**

## **11. Excessive Force Limitation**

The Justice consultation document does not discuss the law reform potential with respect to the current cut-off of “excessive force” for self-defence that the courts have imposed. Instead, Justice states that this doctrine would remain in place (Department of Justice, 1998 at 28). In several Supreme Court of Canada decisions, it has been held that if the force used in self-defence is “excessive” because it exceeds what was reasonable in the circumstances, then the defence fails absolutely and the accused must be convicted of murder (*Gee*, 1982; *Faid*, 1983).

CAEFS opposes the use of a specific “excessive force” limitation. The consideration of the totality of the factors used in the reasonableness assessment discussed above provides a more careful assessment of the degree of force used. CAEFS is of the opinion that the simplistic notion of “excessive force” is deeply gendered, such that men’s violence is rarely considered “excessive”, whereas women’s violence easily exceeds this threshold. CAEFS is particularly concerned about the three cases uncovered by Judge Ratushny in the Self-Defence Review, wherein the women were said to have qualified for self-defence but for the fact that the violence used by them was excessive.

By way of comparison, consider the case of *Murley* (1992), where an accused charged with murder in the Supreme Court of Victoria (Australia) was acquitted on the grounds of self-defence after alleging “homosexual advance” even though the deceased had been decapitated and his head bashed in with a telephone. It is highly unlikely that a woman would ever be acquitted on such facts, since such force would, if wielded by a woman, surely be considered “excessive”.

To further illustrate the ways in which women’s violence against their husbands is dramatized and seen as “excessive” in and of itself, consider the remarks of Judge Jean Bienvenue to Tracy Th  berge in her sentencing hearing in Trois Rivi  res, Qu  bec in 1995. She had been convicted of second degree murder with respect to the death of her husband: “[W]hen women ascend the scale of virtues, they reach higher levels than men...[but]...when they decide to degrade themselves, they sink to depths to which even the vilest man could not sink.” Judge Bienvenue went on to comment on the manner in which she had caused the death, saying: “[E]ven the Nazis did not eliminate millions of Jews in a painful or bloody manner. They died in the gas chambers, without suffering” (Bienvenue Inquiry, 1996).

CAEFS is also concerned that women who face dangerous situations are unjustly denied access to an acquittal as a consequence of this concept of “excessive force”, above and beyond the biases inherent in the concept itself. A woman in danger may be unable to assess when the assailant has been effectively stopped, and she may also be so traumatized by an assault or fear of reprisal at the hands of the deceased, should he be able to retaliate, that she should not be held to account criminally for excessive force in these circumstances. For example, there are cases (such as the Australian case of *Falconer* (1989), discussed under **Provocation**) where the trauma of the confrontation triggers past assaults and overwhelming anxiety such that even a clear account of what happened cannot be provided by the woman, much less an explanation of why she used the degree of force that she did.

CAEFS therefore proposes that the legal doctrine of “excessive force” be specifically rejected by a new law on self-defence and be substituted for by a thorough consideration of reasonableness.

**Recommendation #21: Abolish the “excessive force” limitation and instead rely on a thorough determination of “reasonableness”, as discussed in Recommendation [# 18](#).**

## 12. Availability of Self-Defence for Offences Other Than Homicide

Another law reform question not considered by the Justice consultation document in any depth is the question of which offences the defence of self-defence can be invoked for. Currently, only s. 34(1) and s. 37 contemplate a defence of self-defence for someone who acts to prevent a harm that is less than grievous bodily harm or death. Furthermore, these are the only self-defence sections open to someone whose act results in a harm to the aggressor that is less than grievous bodily harm or death. Both of these sections present the narrowest versions of self-defence. For example, in *Eyapaise* (1993), the accused was denied a s. 37 defence when she stabbed a man who touched her sexually several times and was undeterred by her clear resistance because the trial judge did not accept that she believed, on reasonable grounds, that she could not have otherwise preserved herself from harm .

CAEFS believes that self-defence ought to be available for accused charged with offences that involve less violence by the accused than killing or causing serious bodily harm, and ought also to be available to prevent crimes that are "lesser" than causing death or grievous bodily harm. Such a reform should, in particular, ensure that self-defence is available to defend against sexual assault. This reform would be consistent with the understanding that every woman who has been raped has looked death in the face. It would also reinforce the Supreme Court's interpretation in *McCraw* (1991), where it was held that a threat to rape constitutes a threat to cause serious bodily harm.

Judge Ratushny's recommendations for the Self-Defence Review similarly use "assault" or threatened "assault" as the basis for self-defence, without requiring that the assault involve serious bodily harm or death. CAEFS supports this recommendation by Judge Ratushny.

**Recommendation #22:      Draft a defence that can be used to defend against violence or threats of violence and that is available with respect to the commission of all offences involving violence.**

### 13. Imminence of the Threat

Nothing in the consultation paper addresses the issue of how imminent or temporally close the threatened violence must be before the accused can lawfully undertake defensive actions involving violence. While it is true that the Supreme Court in *Lavallee* (1990) and *Pétel* (1994) has left this an open-ended question and that there are therefore no strict legal limitations, it is suggested that the language in the Criminal Code that gives the right of self-defence to those “unlawfully assaulted” may be read narrowly by judges and by jurors to require that an assault actually be in progress before resort to self-defence can be justified. Such a narrow interpretation of the legal language may also be supported by commonly-held beliefs about women who kill, thereby denying self-defence to those who kill sleeping or “passed-out” victims.

While the imminence and nature of the assault anticipated by a battered woman may be evaluated as part of the objective test for self-defence (as is recommended by Judge Ratushny and discussed below), this is no guarantee that a jury will take an open-ended approach to this issue. For example, the model section in the Self-Defence Review (SDR) simply directs the trier of fact to consider, in terms of reasonableness, “the nature and imminence of the assault”. CAEFS is of the view that the defence ought to be available where the anticipated danger is unavoidable, in the sense that the accused cannot, by other means, guarantee safety and where the defensive violence is therefore immediately necessary.

In this context, it is important to emphasize that there often is no safe place for a woman to go. First, many women do not have the economic means to support themselves and their children when fleeing a violent man. Men who use violence to control their female partners often also use economic deprivation and financial control as well.

Second, we know that separation from a violent man increases a woman’s vulnerability to femicide, which has been demonstrated over and over again. Indeed, it is well-documented by the Women We Honour Action Committee’s two reports (Crawford and Gartner, 1991; Crawford *et al.*, 1997), as well as by Australian studies such as that by Alison Wallace (Wallace, 1984), and even by Statistics Canada as reported in its Juristat publications (Wilson and Daly, 1994).

Not all women have physical access to shelters. This is especially true for women with disabilities, Aboriginal women, and rural women. Many shelters are under-resourced, understaffed, and have waiting lists. Even shelters cannot guarantee women’s lives, as the murder of the woman at a Québec women’s shelter in 1999 well illustrates (Pertiz, 1999). Witness protection programs are rarely used to assist battered women in escaping violent men, and the federal government’s commitment to expanding fathers’ rights in the context of custody and access will only increase women’s and children’s captivity. It is thus critical that the law adopt a concept of danger avoidance in framing the temporal limits of self-defence. As well, as should be clear from Recommendation #9, the duty to retreat would not apply to a battered woman who faced unavoidable danger such that self-defensive violence was necessary.

**Recommendation #23: Qualify the defence by reference to assaults that are "unavoidable in the sense that the accused could not otherwise guarantee her or another's safety, rendering defensive violence necessary".**

#### **14. Jury Instructions**

Another area in which the Justice consultation document made no reform recommendations is with respect to the judge's instructions to the jury in cases of self-defence involving battered women on trial.

CAEFS supports the use of model jury instructions to assist trial judges in conveying the defence of self-defence to jurors. The issues regarding the availability of self-defence have become quite complex, and the common misperceptions and stereotypes that inform our thinking about male violence against women and children can only be countered if they are addressed squarely and clearly in the judge's charge to the jury.

While the *Lavallee* and *Malott* cases indicate that a trial judge is obliged to relate the evidence of past abuse to the legal elements of self-defence, the Supreme Court has not delineated the precise aspects of self-defence law that must be related to expert evidence and the degree of specificity that the judge should invoke when instructing the jury. It is clear from the study by Holly MacGuigan in the United States (MacGuigan, 1991), and even from a comparison of the charges to the jury in the Kondejewski trial and the Malott trial here in Canada, that there is a great deal of room for variance in the manner in which the defence is presented by the judge to the jury. This variance may be perceived as unfair and will certainly influence verdicts.

The model instructions for self-defence available from Criminal Jury Instructions (CRIMJI) reflect the majority decisions in *Lavallee*, *Pétel*, and *Malott*, but they do not refer to the broader contextual considerations identified in *Malott* by Justices L'Heureux-Dubé and McLachlin. They thus do not adequately capture the issues that need to be addressed in the cases of battered women on trial for killing abusive mates. Any model instructions must endeavour to fully and fairly put self-defence to the jury on behalf of women who have been battered.

The Department of Justice is in a good position to study, on a national basis, how judges are actually giving instructions in such cases. As well, Justice could clarify the law by amending the *Criminal Code* to render it a reversible error for a judge to fail to relate the law to the evidence, to fail to relate to the jury both the prosecutor's and the defence lawyer's theory of the case, and to fail to remind the jurors that they alone are the triers of fact. Such an amendment would essentially serve to reinforce and embody ss. 7, 11(d), and 15 *Charter* protections for the accused.

- Recommendation #24: Undertake a study of the use of model self-defence instructions by trial judges in Canada.**
- Recommendation #25: Amend the Criminal Code so as to require trial judges to relate the law of self-defence to the evidence presented, to relate the theories of both sides, and to remind jurors that the factual findings are their domain.**

## **F. Reform the Defence of Property**

The current defence of property encompasses several sections of the Criminal Code. These sections read as follows:

- S. 38 (1) Every one who is in peaceable possession of personal property, and every one lawfully assisting him, is justified
- (a) in preventing a trespasser from taking it, or
  - (b) in taking it from a trespasser who has taken it, if he does not strike or cause bodily harm to the trespasser
- S. 38 (1) Every one who is in peaceable possession of personal property, and every one lawfully assisting him, is justified
- (a) in preventing a trespasser from taking it, or
  - (b) in taking it from a trespasser who has taken it, if he does not strike or cause bodily harm to the trespasser
- (2) Where a person who is in peaceable possession of personal property lays hands on it, a trespasser who persists in attempting to keep it or take it away from him or from anyone lawfully assisting him shall be deemed to commit an assault without justification or provocation.
- S. 39 (1) Every one who is in peaceable possession of property under a claim of right, and every one acting under his authority, is protected by from criminal responsibility for defending that possession, even against a person entitled by law to possession of it, if he uses no more force than is necessary.
- (2) Every one who is in peaceable possession of personal property, but does not claim it as of right or does not act under the authority of a person who claims it as of right, is not justified or protected from criminal responsibility for defending his possession against a person who is entitled by law to possession of it.

S. 40 Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting under his authority, is justified in using as much force as is necessary to prevent any person from forcibly breaking into or forcibly entering the dwelling-house without lawful authority.

S. 41 (1) Every one who is in peaceable possession of a dwelling-house or real property, and every one lawfully assisting him or acting under his authority, is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or to remove a trespasser therefrom, if he uses no more force than is necessary.

(2) A trespasser who resists an attempt by a person who is in peaceable possession of a dwelling-house or real property, or a person lawfully assisting him or acting under his authority to prevent entry or to remove him, shall be deemed to commit an assault without justification or provocation.

S. 42 (1) Every one is justified in peaceably entering a dwelling-house or real property by day to take possession of it if he, or a person under whose authority he acts, is lawfully entitled to possession of it.

(2) Where a person

(a) not having peaceable possession of a dwelling-house or real property under a claim of right, or

(b) not acting under the authority of a person who has peaceable possession of a dwelling-house or real property under a claim of right, assaults a person who is lawfully entitled to possession of it and is entering it peaceably by day to take possession of it, for the purpose of preventing him from entering, the assault shall be deemed to be without justification or provocation.

(3) Where a person

(a) having peaceable possession of a dwelling-house or real property under a claim of right, or

(b) acting under the authority of a person who has peaceable possession of a dwelling-house or real property under a claim of right, assaults any person who is lawfully entitled to possession of it and who is entering it peaceably by day to take possession of it, for the purposes of preventing him from entering, the assault shall be deemed to be provoked by the person who is entering.

The Justice document considers reforms to defence of property without giving the reader any sense of the scope, context, or frequency of resort to this defence after physical or fatal violence. It is impossible to usefully reform this defence without any information about how it is currently understood or interpreted. For example, although the document suggests that courts have stated that defence of property alone can never justify taking human life, there have been cases, widely publicized, where police have decided not to lay any charges against shopkeepers who have killed intruders. In fact, the "law and order" or "vigilante" symbolism of this defence may be more critical than its narrow legal interpretation.

What is critical is to point out that persons defending property have options available to them that do not involve violence. Property defenders have the opportunity to withdraw and avoid or cease a confrontation.

Furthermore, the discussion document identifies the main problems with this defence as inconsistency and complexity in the law, while failing to inquire as to the equality and justice implications of the current law. CAEFS notes, for example, that property rights are unequally distributed according to race, sex, and class in Canadian society. Therefore, this defence *prima facie* reinforces inequalities. In particular, when one thinks of Canada's most property-less groups, one thinks immediately of First Nations peoples who are involved in a concerted effort to claim their lands by challenging conventional understandings of property and criminal law.

Women too are largely property-less, as understood by the criminal law. CAEFS urges the Department of Justice to return to first principles before proceeding with this reform. Guidance can be found in the writings of Bertrand *et al.*, *A Feminist Review of Criminal Law*, and Clare Beckton (Beckton, 1985), both of whom demonstrate the range of women's economic interests and argue for an expanded notion of "property", so as to equally protect women's, not just men's, economic interests in law.

Finally, CAEFS suggests that consideration be given to the question of whether this defence, like the defence of provocation, is so deeply rooted in inequality that abolition, not reform, is in order. Given the reality that property offences are most often committed by those who experience deprivation, it is possible that those killed or injured by persons relying upon the defence of property are also more likely to be poor or working class and Aboriginal or otherwise racialized. The demographics of our jails and prisons certainly suggest that the majority of offenders commit property versus violent offences, and that they are disproportionately poor, Aboriginal, and African-Canadian.

In light of the fact that the criminal law already punishes property violations in disproportionate and discriminatory ways, it is questionable whether the law should also support the use of violence to assert property rights. Some form of defence of property that permits Aboriginal peoples to defend their lands must be retained, however.

**Recommendation #26: Engage in an equality analysis of the defence of property, focussing particularly on women, Aboriginal, and otherwise racialized people.**

## 1. Values to be Protected

The Justice consultation paper does not provide a sound basis or justification for the existence of the defence of property. It states that these provisions are intended to protect possessory, not ownership rights in property. It also notes that some judicial decisions have ruled that deadly force can never be used to defend mere property interests alone. However, beyond these mentions, the document does not provide a values-based justification for the defence of property.

CAEFS takes the position that it is only legitimate to use force to defend property when security or safety of the person or the survival of lands and peoples is thereby threatened. The criminal law should not legitimate the use of violence to protect economic interest in property. Otherwise we run the risk of promoting vigilantism. This sort of clear statement by the criminal law is in keeping with the case law on the defence of property mentioned by the Justice document, and is also required in order to bring police practices regarding the use of force into line with this case law.

CAEFS would support the use of this defence even in cases involving the use of deadly force, when human life or safety, or survival interests are at risk. As a society, we assert that we value life more than property and the Criminal Code defences ought to reflect this value. Justice should also follow through and review sentencing practices for all offences, in an effort to ensure that the maximum sentences and benchmarks used by judges also reflect this priority of life over property.

At the same time, CAEFS would support a specific set of rules or principles for Aboriginal peoples attempting to defend their lands. These disputes do not involve simple private "property" interests, because of the relationship between land, identity, and cultural survival for Aboriginal peoples. Defence of land in this context is actually defence of the territory of a people, protected by s. 35 of the constitution of Canada. It should be clear that this is not an individual right, but rather a community-based right.

**Recommendation #27:** Amend the defence of property to make it available only where the threat to property also poses a threat to human physical security or safety.

**Recommendation #28:** Review and revise other Criminal Code provisions, including sentencing provisions, to ensure that they reflect the value of protection of human safety and life over property.

**Recommendation #29:** Create a specific rule for the use of force by Aboriginal peoples in defence of land.

## 2. Simplifying the Law

Justice again asks the question whether it should put forward simplified, general rules that would apply to all situations where defence of property is invoked.

CAEFS takes the position that we should not create general rules for defence of property to apply to all situations. Instead, the rules should be crafted to respond to particular yet paradigmatic situations. In particular, as stated above, a specific rule should be designed for situations where Aboriginal people occupy land and/or resist entry when they are in a land claims dispute. Generally, these situations involve Aboriginal peoples' relationship with the state, and not a conflict between two individual property rights.

In addition, if, contrary to the position taken by CAEFS, the defence of property is maintained for protection of property alone, as opposed to where human life or security is also threatened, then separate and stricter rules should be developed for this form of defence.

**Recommendation #30:     Develop specific rules according to the values to be protected through the defence of property.**

## 3. Types of Property Defended

Justice asks in particular whether a defence of property ought to differentiate based on whether it is real or personal property, and whether it is a dwelling-house or other real property.

CAEFS does not believe that the defence ought to differ depending on whether the person is defending his home or some other specific form of "property" interest, whether real or personal. Instead, the rule ought to depend on the nature and degree of threat to the person given that such a person otherwise has the choice to avoid the confrontation by retreating. Thus, the critical question should not be the type of property that is entered or encroached upon, but rather whether someone is inside or is likely to be inside, whose safety and security is threatened by the intrusion or denial (eg breaking into a car at night on the street versus entering a tent in a campground).

Furthermore, here CAEFS would insist on extending the defence to encompass an enlarged definition of "property", so as to include other economic interests such as social assistance or the preservation of an ecosystem that yields subsistence.

**Recommendation #31:     Create a defence of property rule that is broad enough to include the range of economic interests of equality-seeking groups and that is tied to human security and safety.**

#### **4. Nature of Interference With Property**

The Justice document asks whether a new law should expand to permit the use of force to defend against broader forms of interference with property, beyond physical trespass and removal of property.

In considering whether one should be able to use force to protect against a broad range of interference or simply trespass and removal, CAEFS would again emphasize that the protection of personal safety and security represents the paramount criterion. We should therefore limit the defence to situations where the actions of the "trespasser" constituted a threat to the security of others. Consistent with an expanded definition of property protected by this defence, actions that do not amount to trespass or physical removal could justify the use of force to protect, for example, entitlement to welfare or public housing.

**Recommendation #32: Define the defence so as to include defence against a range of infringements of "property" interests.**

#### **5. Priority for Possession or Claim of Right**

The Justice document proposes to continue to accord priority in terms of defence of property to those who assert a legal claim or right to property. In situations where both parties or neither party claims a legal entitlement, the consultation document proposes to give the right of defence to the person exercising "peaceable possession", which is defined by the document as "possession in circumstances that are unlikely to lead to violence" (Department of Justice, 1998 at 43).

CAEFS would abandon the "peaceable possession" rule as the criterion by which one's right to use force to defend property is engaged. In some Aboriginal land claims disputes, an effort may be made to defend lands under dispute by attempting to take possession of those lands or to resist police efforts to remove them using violence. In light of the specific constitutional relationship that exists between Aboriginal peoples and the Canadian state, the history of colonization and the use of the criminal law in Canada to dispossess Aboriginal peoples of their lands, it would be manifestly unjust to now require actual or peaceable possession as a precondition to defence of land. There may also be instances where women need to defend their "property" interests, but would, by this limitation, be precluded from doing so if they had not managed to first assert "possession".

Instead, a person should be able to defend where human life or security or the land itself is at risk and the person claims "colour of right" in the "property" at issue. "Colour of right" should be understood as an honest belief that one has a legitimate claim in law to an interest in the "property" as part of an assertion of s. 15 *Charter* and s. 35 constitutional rights.

**Recommendation #33: Hinge the defence of property on "colour of right" in combination with a risk to human life or security.**

## 6. Judging the Circumstances

Justice's consultation document asks whether the defence of property should be reformed such that the defence could be successfully invoked where an accused claims only a subjective belief that someone was unlawfully interfering with his property rights, whether or not that belief was reasonable. Alternatively, it proposes to retain a mixed subjective-objective test for judging the circumstances in which the need to defend property arose, much like the test proposed for self-defence.

CAEFS is of the view that the standard that ought to be used for the accused's assessment of the need to use violence in protection of property should mirror the standard used for self-defence given that CAEFS is arguing that this defence should only be available where the threat to property also poses a threat to security of the person. The mixed subjective-objective test proposed by Judge Ratushny, which asks whether the accused actually and reasonably believed that there was a need to use force and actually and reasonably believed that the degree of force used was necessary, should be adopted for defence of property. This test should be interpreted in a manner that is consistent with *Charter* values, including equality rights.

If, however, Justice retains the defence of property for circumstances where there is no threat to personal safety, then the criteria should be much more stringent. Such a defence should be tested on a purely objective basis in terms of the degree and nature of the risk and the needed force. In such circumstances, CAEFS would also support an additional criterion that the force used be proportionate, as suggested in the consultation document.

**Recommendation #34: Adopt the mixed subjective-objective test for the defence of property with respect to the accused's belief that force is needed and that the degree of force used was necessary.**

## 7. Judging the Degree of Force

The consultation document prepared by Justice notes that the current law requires that the use of force be "necessary". It asks whether it should reform the law by also requiring that it be "reasonable" and "proportionate", much as was proposed with respect to the law of self-defence.

CAEFS believes that it would be appropriate to adopt the same test for defence of property as was recommended for self-defence, which is simply to require that the force used be reasonable, in all of the circumstances. This position is based upon the narrowing of the defence of property to confine it to situations where life or lands are at risk. It may become necessary, in the future, to expand upon the reasonableness test for defence of property through a list of factors to consider, as has been proposed for self-defence.

**Recommendation #35: Require that the defence of property through violence be "reasonable", but not also "necessary" and "proportionate".**

## 8. Use of Deadly Force

The Justice document asks whether property defenders ought to be lawfully permitted to use deadly force to defend property. It also suggests that adding a “proportionality” requirement to the “reasonableness” requirement would restrict the availability of the defence.

The “reasonableness” requirement ought to be capable, on its own, of restricting the defence of property to defend homicide only where another person’s safety was at risk or where the defence of lands was imperative. CAEFS reiterates here that it supports a narrow defence of property that can only be invoked, except in the case of defence of Aboriginal lands, where human life is threatened by the intrusion upon property rights.

**Recommendation #36:     Require that the defence of property be dependant on defence of the person or Aboriginal lands, such that the use of deadly force could only be justified in such circumstances.**

## G. Abolish Provocation

CAEFS begins its analysis of provocation by noting a number of weaknesses in the overview provided in the consultation document. These weaknesses are pointed out here not to be pedantic, but to emphasize that an adequate theoretical and contextual analysis is a necessary precondition to credible law reform. In that spirit, CAEFS points out the following:

- While acknowledging that the history of provocation was grounded in three situations, “chance medley” (historically understood as the situation where two men suddenly engaged in a violent confrontation), a man discovering his wife in an adulterous situation, and a man discovering a man committing sodomy on/with his son, the consultation paper fails to link these roots explicitly with current manifestations of “provocation”.
- The statistics around femicide, homicide, and the killing of gay men are used by the consultation document to reach some erroneous conclusions. For example, the fact that provocation is raised in cases involving male-on-male violence in no way detracts from the feminist analysis that this defence reinforces and privileges male rage and violence.
- Furthermore, while the reported Canadian cases may indicate that men’s efforts to use provocation in defence of murder of their mates are often unsuccessful, this in no way accounts for the way that provocation affects charging decisions and plea negotiations. It is simplistic to suggest that the reported cases paint a complete or conclusive picture. In addition, this research method does not catch the “rage” cases, such as *Klassen* (1997), where the victim’s words and behaviour are not presented formally as a provocation defence but rather as a “no intent” defence.
- Finally, the statistics discussed in the consultation document should be re-focused so that one notices that, of the 115 cases analyzed, 55 involved woman killing, 16 involved alleged homosexual advances, and 8 were men killed who had commenced an intimate relationship with the accused’s former mate. This adds up to 79/115 cases that fit the

historical model of patriarchal rage. What remains are 7 cases of husband killing and 29 cases where men killed other men absent any known or particular relationship.

- The report indicates that the Department of Justice is responding to concerns raised by women's and "homosexual groups". The groups that represent gays and lesbians do not use this language to describe themselves.
- The attribution to "ethno cultural communities" of the notion that "honour" may motivate femicide in the face of adultery is offensive and ought to be repudiated. There seems little or no distinction whatsoever between this and the kind of defence of provocation invoked by men like Thibert, for whom a similar notion of male "honour" and entitlement underpinned his defence, as highlighted by the dissenting comments of Major, J. in the Supreme Court's decision (*Thibert*, 1995). It is insulting and erroneous to flag this behaviour or use of provocation as "ethno cultural", when it is identical to the defence used by white males to excuse and justify femicidal violence. The uncritical use of such concepts and language in a government publication contributes to systemic racism and should be eschewed vigorously.
- In discussing the effect of the successful use of a provocation defence, the document states that women's advocates say that women receive a message that their lives are worthless, they experience heightened fear as a result, and they perceive that men are not being held accountable for their actions. This description misses the point that provocation gives men the legal and social message that their violence is excusable, which simply reinforces the batterer's mentality that his violence is not his fault, it is hers.
- Finally, although the document is clearly drawing on Joanne St. Lewis and Sheila Galloway's work (St. Lewis and Galloway, 1995), they are never cited and are not even included in the reference list. Nor are there references to other feminist work or other studies apparently relied upon, making assessment of many of the points in the consultation document impossible.

**Recommendation #37: Engage in an equality-based analysis of the defence of provocation that examines the broader implications of the defence beyond the results in reported cases.**

## Option 1: Abolish Provocation

The abolition of the defence of provocation was the main recommendation emerging from *Reforming the Law of Provocation*, Joanne St. Lewis and Sheila Galloway's 1995 paper for the Status of Women Canada. CAEFS endorses this position and recommends abolition contingent on the abolition of the mandatory minimum sentence for murder.

The Department of Justice should note that there have been many calls for the abolition of this defence in the U.K. (Horder, 1992), New Zealand (New Zealand Criminal Law Reform Committee, 1976; New Zealand Crimes Consultative Committee, 1991) and in Australia, based upon the way in which it legitimizes violence against women and gay men, allocates responsibility to the victim, and is unequally available based upon sex and sexual orientation (Howe, 1998; Goode, 1990). Abolition was also advanced by the Gibbs Report in 1990 (Attorney General, Australia, 1990, at para. 13.56) and by the Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General for all of the states in Australia (Standing Committee of the Attorneys-General, Australia, 1998 at 69-107).

CAEFS has carefully considered the question of whether historically disempowered groups such as women and racialized people stand to lose the potential of a significant future legal development by the abolition of provocation. It is arguable that battered women might benefit from provocation in future and that racialized peoples might avail themselves of theories proposed in U.S. legal literature, such as a defence of "Black rage". According to Professor Joanne St. Lewis, the essence of the partial defence or "excuse" of provocation is that it depends upon a shared understanding of compassion. She notes, however, that compassion is not equally available to all members of society and is in fact tied to privilege such that it reflects dominant sensibilities and experiences, including the pseudo-passion of male violence against women partners and former partners.

Professor St. Lewis argues that while the sympathetic context for certain violent actions can be readily understood within dominant accounts and popular culture, such as the wife who is a harridan or the sexual advance by the gay man, the experience of the daily insult of racism and its unrelenting aggression remain unknown and often denied by white men and women. The result is that the experience and its effects on the human psyche remain mysterious. Hence, compassion for the racialized person who strikes out is inaccessible.

Further, she argues, it is unjustifiable to suggest that the excuse of provocation and compassion should be available to one who kills a person with whom the accused, unlike the battered woman, has no personal or intimate relationship, but whose words or act symbolize for the accused a lifetime of oppression. Unlike the battered woman whose victim has engaged in dangerous and illegal conduct, the racialized accused has instead killed a relative stranger who has not necessarily engaged in violence towards the accused or others.

Finally, she cautions that the presentation of a defence of provocation based on “Black rage” will pathologize African-Canadians as a group, resonate with popular understandings of African-Canadians as “violent”, and carry the potential that the event will be understood as caused by mental illness, thereby transposing the individual accused into a symbol. She links this particular theory of defence to other so-called social context-based defences such as “television intoxication” and “urban psychosis”, and concludes that rather than advancing equality interests for previously marginalized groups, such inversions of equality advancements negate individual accountability and avenge large scale oppression through individualized criminal accounts.

While supporting the abolition of provocation in accordance with these concerns for a number of reasons, CAEFS would, however, oppose abolition of provocation if it were not accompanied by abolition of mandatory minimum sentences. First, CAEFS is concerned that there are some women who may unjustly be denied access to self-defence and who should be able to rely on provocation to at least reduce the offence to manslaughter if a mandatory life sentence remains the only sentencing option upon conviction. The main category of women here will be those women who allegedly use excessive force in self-defence. While CAEFS does not believe that the provocation defence provides the answer, it would be a gross injustice to deny them access to any mitigation of sentence in such circumstances.

Second, CAEFS speculates that this category of women who fail in arguing self-defence is likely to include women who appear unsympathetic to a jury, such as women who work in the sex trade, lesbian women, and racialized women. CAEFS would be loathe to foreclose a possible future avenue of defence for marginalized groups for whom it may be a critical last resort and the only fair way to represent and explain their actions. However, if the mandatory minimum sentence were abolished, then women’s sentences could be mitigated to take into account reduced culpability.

Third, CAEFS is unequivocally opposed to a “law and order” agenda and believes that abolishing provocation without also ridding the law of mandatory minimum sentences will further a regressive platform by increasing state power in the hands of police and prosecutors and decreasing the power of defence lawyers representing accused persons to negotiate a plea bargain with provocation as an available defence.

**Recommendation #38: Abolish provocation at the same time that the mandatory minimum sentence of life imprisonment for murder is abolished.**

If provocation as a defence is abolished, it would be important to remove, at the same time, “victim provocation” as consideration in mitigation of sentence from the common law. “Victim provocation” is another way of expressing patriarchal rage, and it infests the doctrine of *mens rea* and the mitigation of sentence, and will undoubtedly continue to influence criminal justice as long as women live under conditions of inequality. While culpable loss of self-control itself might stand as a mitigating factor in sentencing, it must be focussed on the accused’s shortcomings rather than the deceased victim’s identity or behaviour.

**Recommendation #39: Remove “victim provocation” as a factor in mitigation of sentence.**

## **Option 2: Reform the Defence of Provocation**

The defence of provocation in the Criminal Code reads as follows:

- S. 232 (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.
- (2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purpose of this section if the accused acted on it on the sudden and before there was time for his passion to cool.
- (3) For the purposes of this section, the questions
- (a) whether a particular wrongful act or insult amounted to provocation, and
  - (b) whether the accused was deprived of the power of self-control is by the provocation he alleges he received, are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.
- (4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

CAEFS believes that if provocation is not abolished, in conjunction with the abolition of mandatory minimum sentences, there will need to be fundamental reform of the defence of provocation. However, the over-riding reform that must be implemented should provocation be retained is that the defence must be interpreted in a manner that is respectful of the s. 15 equality rights under the *Charter* of women, racialized people, people with disabilities, the poor, and lesbians and gays. The ideas emerging from the consultation document are discussed below.

### **1. Removal of the Phrase "In the Heat of Passion"**

The Justice document proposes that the phrase in s. 232(1) "in the heat of passion" in order to reject the association between romantic imagery and male violence against women. This language could be replaced by broader language such as "fear and terror" to recognize more worthy emotions as part of the defence of provocation.

CAEFS agrees that language such as “the heat of passion” uses an excusing imagery and romanticizes patriarchal rage. New wording must avoid the romantic reference, and should not attempt to identify the motivating emotion: instead the language should use some concept of immediacy such as “in the heat of the moment”. This reform must be combined with other changes as indicated below. Most importantly, it must be accompanied by limitations that the accused must have been provoked by an “unlawful act” and it must have been an act that would have caused a reasonable person who respects the *Charter* value of equality to lose the power of self-control.

**Recommendation #40: Delete the phrase "in the heat of passion" and substitute language that identifies a temporal link between the alleged provocation and the accused's response.**

## **2. Replace “Wrongful Act or Insult” with “Unlawful Act”**

Justice proposes to narrow the allegedly provoking act or insult such that only unlawful acts would qualify as the trigger for the defence. The positive impact of such a change would be that men who commit femicide could not claim to have been provoked by their partner's infidelity, by her intention to leave the relationship, or by her defiance of male authority. In addition, men who allege mere “homosexual advance” as opposed to “homosexual assault” could not claim provocation since sexual advances, in contrast to assaults, are not “unlawful”.

CAEFS is concerned that the substitution of “unlawful act” for “wrongful act or insult” may preclude the use of a provocation defence by someone who responded to a racist insult, given that insults alone are not criminal acts. This proposed change could also effectively deny a defence under this new definition in such cases as the Australian case of *Falconer* (1989), where an abusive man allegedly taunted his wife that she could never prove in the courts her and her children's allegations of rape.

However, racist insults and taunting by a man such as the deceased in *Falconer* are intended to remind the recipient of their subordinate position, to reinforce it, and to thereby render the recipient vulnerable to unlawful domination. Further, such taunting is often the prelude to violence, and therefore may in fact be treated by the accused and the law as a threat of assault, which is in fact an “unlawful act”.

CAEFS recognizes, moreover, that the most common scenarios involve men killing women who are exercising their rights to autonomy and men who kill allegedly sexually aggressive gay men. It is thus critical to devise a restriction, such as the requirement that the provoking act be “unlawful”, that would stem the use of provocation by men who kill women to control them and by men who kill gay men.

**Recommendation #41: Replace the phrase “wrongful act or insult” with “unlawful act”, employing an equality-based understanding of insults that encompasses the implicit threat posed by racist insults and other taunting.**

### **3. Reform the “Ordinary Person” Test to Reflect a Mixed Subjective-Objective Test**

The current law uses a purely objective test --the “ordinary person”-- test to assess the gravity of the allegedly provoking act or insult. Justice asks whether the law should be changed to also add in a subjective element to this test, such that the accused person’s subjective make-up or state of mind would also form part of the test.

CAEFS opposes the abandonment or watering down of the objective test for provocation. Adding in a subjective test may further legitimize patriarchal rage by allowing men to bring forth evidence of their jealous nature or misogynist beliefs in order to demonstrate that they were “provoked”. CAEFS believes that it is important to retain a pure objective test for this branch of provocation to reinforce societal expectations for self-control.

**Recommendation #42: Retain the "ordinary person" test for provocation.**

### **4. Reform the Defence by Expanding the “Suddenness” Requirement**

The Justice document raises the question whether the current limitation that the accused react “on the sudden, before there was time for his passion to cool” should be removed from the defence of provocation. The document suggests that such a change would meet the concerns expressed by advocates of the rights of battered women that the time frame for the defence of provocation cannot accommodate “slow-burning effects of prolonged and severe abuse”.

CAEFS notes that this reform may benefit battered women who do not strike back immediately, but rather respond in anger a some later time. However, it is unlikely to help those persons who have a long gap between the alleged provocation and their response on the basis that it suggests “planning”. Even under this expanded understanding of provocation, conduct that appears deliberate or contemplated will not fit the paradigm of “loss of control” that provocation relies on.

CAEFS believes that broadening the time frame for the response to a provoking act may provide further opportunities for violent men to react murderously to their female partners’ alleged “provocation”. The real problem here for battered women who kill abusive men is the narrow and sex discriminatory way in which the law of self-defence is drafted and applied. As a defence for such women, provocation is both inadequate, because it is only a partial defence that results in a manslaughter conviction, and inappropriate, because it suggest a loss of control rather than a rational decision to save one’s own life. Instead of deleting the “suddenness” requirement, CAEFS advocates thorough reform of the defence of self-defence and abolition of the mandatory minimum sentence of life imprisonment for murder, as indicated above.

**Recommendation #43: Retain the “suddenness” requirement for the accused’s reaction to the alleged provocation.**

## **5. Reform the Defence So That it is Not Available in Cases of Spousal Homicide**

The consultation document proposes to preclude those who kill their spouses from reliance on the defence of provocation in order to send the message that killings based on jealousy or “ownership” are not excusable in law.

CAEFS would not support this reform as currently cast in “gender neutral” terms. A gender neutral approach hides the unequal availability and differential impact of reliance on provocation for women who kill their mates as opposed to men who kill their mates. CAEFS would support the limitation if it were recast to prohibit reliance on provocation in cases of male violence against women and children. The limitation must also be extended to other significant, non-egalitarian uses of provocation (alleged homosexual advance killings and femicide where the offender and victim were not in a formal relationship), but not to the very few women who might invoke it with respect to the killing of their mates, as the gender neutral version posed by Justice would have it. To resolve this dilemma, CAEFS argues below that it would be preferable to use equality principles as a limit on the defence.

**Recommendation #44: Do not create a formal bar on the provocation defence for "spouses", but enact one instead for male violence against women and children and for killings inspired by alleged gay advances or “homosexual panic”.**

## **6. Reform the Defence So That it is Not Available in Cases Where the Victim Asserts His or Her Charter-Protected Rights**

This option presented by the Justice document arises from the work of St. Lewis and Galloway. These authors have suggested that the defence of provocation incorporate an equality analysis into the construction of the “ordinary person” test: the ordinary person would not be provoked by a woman’s attempts to assert her autonomy or by a lesbian’s lifestyle. Similarly, reactions inspired by misogyny or racism, for example, are inconsistent with Charter values and would not be “reasonable” under this test.

CAEFS supports this reform as an interesting and challenging one that requires judges, lawyers, and the public to engage in debate about equality values and what they mean for “ordinary” people. To be more effective, this new clause ought to go on to specify the attributes of the ordinary person who accepts Charter values, such as that this person is not racist or homophobic, accepts women’s autonomy, et. cetera. This option must be combined with the other changes advocated above if the defence of provocation is not abolished.

**Recommendation #45: Qualify the ordinary person test such that the person is one who adheres to *Charter*, specifically equality values.**

## **7. Reform the Defence to Limit It to Situations Where Excessive Force Was Used in Self-Defence**

This proposal presented in the Justice document comes out of the analysis of the Self-Defence Review, which identified a gap in the law of self-defence. Currently, a woman whose self-defence claim fails only by virtue of excessive use of force can alternatively rely on provocation. One possible reform, which is close to CAEFS' main position that provocation ought to be abolished, would be to deny the defence of provocation in all situations except where the accused person was acting in self-defence. Preserving provocation for that narrow category of cases where self-defence fails due to the use of excessive force might serve the interests of battered women who kill.

CAEFS does not support retaining provocation only in the narrow form of excessive force for self-defence. This position comes from CAEFS' concern that such a reform would predispose the cases of battered women who kill in the direction of the partial defence of provocation rather than the complete defence of self-defence. This formulation of the defence would also exclude the cases of battered women who kill in circumstances where provocation, if retained, ought to be available, such as the case of *Falconer* (1989). It would also preclude the litigation of other provocation claims such as those that might be made by racialized persons subjected to racist abuse.

**Recommendation #46: Do not restrict provocation to those who fail self-defence only by reason of their use of excessive force.**

## **H. Address Systemic Discrimination in the Criminal Justice System**

Although this was not a topic included in the Department of Justice document, CAEFS believes that it is an issue that requires discussion. All issues of criminal law reform are profoundly affected by systemic discrimination and the devaluation of the credibility, dignity, and lives of those living with disabilities, Aboriginal peoples, African-Canadians, poor people, lesbians, gays, and women. The proposals advanced by CAEFS to abolish all mandatory minimum sentences, the broadening of the defence of self-defence, and the restriction of the defence of provocation must be accompanied by some mechanism that would monitor, prevent, and redress discrimination as it appears in the criminal justice system, and particularly at the sentencing stage.

CAEFS has grappled with the concerns expressed by advocates from within the community of women with disabilities that the lives of those who experience disabilities will be further devalued by the removal of the mandatory minimum sentence for murder. Given the social construction of disability and the total failure of social welfare systems to provide adequately for families who care for individuals with disabilities, dominant accounts of compassion will sympathize with the parent or caregiver who allegedly kills to alleviate suffering. The legal and public reaction to the *Latimer* (1997) case provides an illustration of this pattern.

The experience of women's groups and others representing equality interests reveals that most criminal law reforms operate to further reinforce patterns of dominance and subordination. Federal leadership and responsibility is required to confront and restrain systemic discrimination in judicial practices and to anticipate the outcome of new reforms. Legal mechanisms must be devised in order to redress race, sex, class, disability, and sexual orientation discrimination in all aspects of the criminal process. In particular, s. 15 of the *Charter* must be used as a measure by which sentencing laws and practices can be challenged and changed.

Section 15 of the *Charter* must be implemented at the sentencing stage such that, if there were no mandatory minimum sentence, the act of someone like Latimer would not deserve mitigation on the basis of either his hardship or a suggestion that his child's life was not worth living. Such an argument in mitigation clearly violates the letter and spirit of s. 15 of the *Charter*. CAEFS argues that it is this label of murder, more than the actual sentence, that will have the greater educative value for the broader community. The risk of retaining the mandatory sentence of life imprisonment is that the notoriety of a case like *Latimer* may move jurors to avoid the murder label altogether by refusing to enter a conviction for murder in cases involving victims with disabilities.

**Recommendation #47: Create a legal mechanism that would repudiate discriminatory sentencing patterns and practices, and that would create the potential for public accountability and legal challenge of such sentences.**

## IV. Resource List

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