

Ministry of Social Affairs, Community Development and Sports
Gender Secretariat
Republic of Seychelles

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Registration No: P281, Cultural Property and Copyright Unit,
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First printed 2012

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ISBN: 978-99931-824-6-7

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Abbreviations

CEDAW	-	Convention on the Elimination of all Forms of Discrimination against Women
ICCPR	-	International Covenant on Civil and Political Rights
<i>CEDAW Law Review</i>	-	CEDAW LAW Review prepared by Iris Carolus 31 May 2010
<i>2011 Report</i>	-	The Republic of Seychelles combined periodic reports 1993-2009, October 2011
SADC Protocol	-	Southern African Development Community Protocol on Gender and Development
UN	-	United Nations

Preface

The Republic of Seychelles is a signatory party to legally binding human rights treaties which focus on the promotion of gender equality and advancement of women. These treaties include, but are not limited to, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), its Optional Protocol, and the SADC Protocol on Gender and Development. The Government of Seychelles takes its due diligence responsibility as set out in these instruments very seriously and is committed towards ending all forms of discrimination against women in the justice system and for upholding the Constitutional right to equal protection of the law without discrimination.

The role of the justice system in providing women and girls equal protection under the law is paramount. The Laws on Seychelles are in general, compliant with key human rights treaties, including CEDAW and the SADC Protocol on Gender and Development. However, areas of discrimination remain that require particular attention. It is necessary that judges, state counsels, prosecutors and other legal professionals familiarise themselves with CEDAW and the SADC Protocol to ensure that the Laws of Seychelles are interpreted as far as possible in a manner consistent with these treaties.

The drafting of this manual was achieved with financial support from the European Union, through the 10th European Development Fund Governance Capacity Building Programme and its Small Grants Programme. The Ministry of Social Affairs, Community Development and Sports extends its gratitude to the Lead Consultant Tony Angelo and his team consisting of Danica McGovern, Mothla Majeed and Mihiata Pirini for their work. In addition, the Ministry gratefully acknowledges the contribution made by stakeholders who assisted in the information gathering stage.

I Introduction

The purpose of this Manual is to provide information and resources for Parliamentarians, Judges, Lawyers and law enforcement agencies on gender related matters under the law of Seychelles.

The Manual draws on previous work done by the Gender Secretariat in the Social Affairs Department, Ministry of Social Affairs, Community Development and Sports and supplements the *CEDAW Law Review* prepared by Iris Carolus in May 2010. That *Law Review* is a substantial document. It provides a legal assessment of the laws of Seychelles using the definition of “Discrimination” contained in article 1 of CEDAW, the CEDAW assessment tools, and the CEDAW Commentary and Guidelines. In tabular form it identifies and comments on Seychelles law in relation to each of the articles of CEDAW, and the areas of compliance and non-compliance are indicated.

The general conclusion, from the *CEDAW Law Review*, and from the combined *Periodic Reports to the United Nations on Seychelles Implementation of CEDAW (1993-2009)* of October 2011 is that the Seychelles Constitution and laws “are largely compliant with the articles of the CEDAW Convention, and provide a very facilitative framework for women”(paragraph 684).

The *2011 Report* concluded that -

The Constitution of Seychelles which came into force in 1993 and is the supreme law of the country is modern and forward looking. Chapter 3, the Seychellois Charter of Human Rights and Freedoms, provides for comprehensive protection of human rights for both men and women. (Paragraph 684)

It however noted that -

Pervasive and evasive forms of gender discrimination exist in the *de facto* situation due to deeply entrenched cultural stereotypes, harmful perceptions of masculinities and femininities that are the hardest to combat. (Preface)

In paragraph 685 it was stated that the entrenched cultural ideas -

can help to explain the continuing scourge of domestic violence which affects many women of all social strata in Seychelles and limits their freedoms.... [and] Government will renew its efforts to challenge these stereotypes and to step up its sensitisation and advocacy programme based on increased understanding and research of our unique cultural and social gender dynamics.

In its consideration of article 5 of CEDAW (sex roles and stereotyping) the *2011 Report* notes that “Women’s and men’s status and position in the public and private sphere remain unequal in some areas... in spite of facilitative legislation and frameworks” (paragraph 150). There is thus a greater need to gender-sensitise those in top decision-making positions.

It is against that background that this Manual has been prepared. It builds on the *CEDAW Law Review* and on the *2011 Report* to the UN; It develops the ideas set up in paragraphs 622 to 666 of the *2011 Report*. The *CEDAW Law Review* and the *2011 Report* are an extensive resource on Seychelles compliance with CEDAW and should be a continuing point of reference for reform of the law.

The Manual identifies the key principles of international human rights relevant to gender equality (Part II), considers the relationship of international law to local law and the interpretation of local law in a manner consistent with international law (Part III), lists options for vindicating rights (Part IV), indicates ways to minimise the use of gendered language in the law (Part V), and provides commentary on and suggestions for development of specific areas of civil law (Part VI) and criminal law (Part VII). Besides the survey of the existing legal environment, the Manual includes material for a changed approach by Legislators, Judges and Lawyers to matters of gender equality, and to the structure and formulation of law.

This Manual takes as its starting-point article 16 of the Seychelles Constitution, which provides that:

Every person has the right to be treated with dignity worthy of a human being...

which is complemented by article 27 which states -

Every person has a right to equal protection of the law including the enjoyment of the rights and freedoms set out in this Charter without discrimination on any ground, except as is necessary in a democratic society.

The equality of men and women is a principle to which Seychelles is committed. The goal is therefore to see the practical realisation of this principle and, to that end, to ensure that there is “recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil and every other field” (CEDAW article 1).

It is for the Legislators and Judges of Seychelles to lead the way to ensuring that the constitutional guarantees of equality and respect are realised in Seychelles. This aspiration is reinforced by the Official Oaths Act under which all Legislators, Judges and Lawyers must take an oath of allegiance to “defend the Constitution” and Judges must take an additional oath “to do right in accordance with the Constitution... and in accordance with the laws of the Republic”.

Consistent with their obligations to the Constitution, Legislators, Judges and Lawyers need to find an approach, in their application of the law, that respects each human being as an individual regardless of their status, wealth or gender.

There are clear areas of the laws of Seychelles where new policies are required to inform legislative change – these are matters for the government and the legislators. There are also areas where the approach of the legislation rather than the content of the rules should be changed to support policies of elimination of gender discrimination. That too is for the legislators but does not require the formulation of any new policy.

Judges and Lawyers can in some areas make better use of the existing law to eliminate gender bias. Judges and Lawyers can also lead by example in their use, in oral and written pleadings and in judgments, of gender neutral language.

II International Law and Gender Equality

In the context of gender and the law, treaties are very important. They set the international standards and guidelines for behaviour at state level.

Seychelles is a party to and therefore bound by the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of all Forms of Discrimination against Women. These conventions have been accepted by Seychelles without reservation. They are the most significant ones from the point of view of gender equality.

Seychelles is also a party to the Optional Protocols of the ICCPR and CEDAW. This means that Seychelles is externally accountable for its compliance with these treaty requirements. Seychelles has a duty to report on its compliance with the treaties.¹ In addition, under the Protocols, an individual from Seychelles may petition the United Nations Human Rights Committee or the Committee on the Elimination of Discrimination Against Women to consider whether that person has been a victim of a violation by Seychelles of the rights guaranteed by the ICCPR or CEDAW.

A The Charter of the United Nations

The United Nations Charter reaffirms “faith in fundamental human rights, and the dignity and worth of the human person, in equal rights of men and women” (preamble), and lists as one of the purposes of the United Nations to “promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion” (article 1).

B The Universal Declaration of Human Rights

In its turn the Universal Declaration of Human Rights declared that “All human beings are born free and equal in dignity and rights” (article 1) and further that:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status (article 2).

Article 7 states: “All are equal before the law and are entitled without any discrimination to equal protection of the law”. And in Article 16 (3): “the family is the

¹ The 2011 Report is an example of such a report.

natural and fundamental group unit of society and is entitled to protection by society and the state”.

The Universal Declaration of Human Rights was a statement of ideals. Because of its widespread acceptance, most of its principles have now achieved the status of customary international law.

C The International Covenant on Civil and Political Rights (ICCPR)

Implementing the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights creates binding obligations on the States parties to it. The ICCPR provisions most relevant to the present Manual are articles 2, 3 and 23.

Article 2 provides -

Each State Party to the present Covenant, undertakes to respect and ensure to all individuals within the territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The article goes on to say that where measures are not in place each State Party will at the domestic level take the steps necessary to give effect to the rights adopted in the ICCPR. Each person in the State must have an effective remedy for those situations where their rights or freedoms are violated and there must be access to an appropriate judicial or administrative authority for decisions on the right, and proper provision for enforcement of any remedies granted.

Article 3 binds Seychelles to ensure the equal right of men and women to the enjoyment of all civil and political rights set out in the Covenant”. Article 23 (1) provides “The family is the natural and fundamental group unit of society and is entitled to protection by the society and the State”.

D The Optional Protocol to the ICCPR

The ICCPR established a Human Rights Committee to oversee the implementation of the ICCPR, and the Optional Protocol to the International Covenant on Civil and Political Rights, which has been ratified by Seychelles, gives an individual in Seychelles who claims to be the victim of a violation by Seychelles of any of the rights in the ICCPR the right to communicate the matter to the United Nations Human Rights Committee for its consideration:

[I]ndividuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration (Article 2 Optional Protocol).

E CEDAW

The treaty most relevant to gender based discrimination is CEDAW. This deals expressly with discrimination against women. “Discrimination against women” is defined in article 1:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Seychelles has by article 2 (b) of CEDAW committed itself to -

take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women

and to embody the principle of the equality of men and women in its Constitution or other appropriate legislation and ensure, through law and other appropriate means, the practical realisation of this principle.

Article 15 (1) of CEDAW requires that “States Parties shall accord to women equality with men before the law”. Articles 15 and 16 indicate in detail the areas in which discrimination is likely to occur and specific areas where steps have to be taken to eliminate it.

F The Optional Protocol to CEDAW

CEDAW established a Committee on the Elimination of Discrimination against Women to oversee its implementation. By the Optional Protocol of 1999, an individual in Seychelles who claims to be the victim of a violation of any of the rights in the Convention may communicate with the Committee. The Committee will consider the matter and where appropriate formulate recommendations to the State party concerned².

² Article 4: “The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief”.

G SADC Protocol on Gender and Development

Most recently Seychelles has ratified the 2008 SADC Protocol on Gender and Development (SADC Protocol). The Protocol is an ambitious endeavour to eliminate gender discrimination in all its forms in the Member States, with a Protocol target date of 2015.

In addition to setting goals the Protocol establishes obligations. For instance -

Article 6 (Domestic Legislation)

1. State Parties shall review, amend and or repeal all laws that discriminate on the grounds of sex or gender by 2015.
2. State Parties shall enact and enforce legislative and other measures to:
 - (a) ensure equal access to justice and protection before the law;
 - (b) abolish the minority status of women by 2015;
 - (c) eliminate practices which are detrimental to the achievement of the rights of women by prohibiting such practices and attaching deterrent sanctions thereto; and
 - (d) eliminate gender based violence.

Article 19 (Equal Access to Employment and Benefits)

.....

3. State Parties shall enact and enforce legislative measures prohibiting the dismissal or denial of recruitment on the grounds of pregnancy or maternity leave.
4. State Parties shall provide protection and benefits for women and men during maternity and paternity leave.
5. State Parties shall ensure that women and men receive equal employment benefits, irrespective of their marital status including on retirement.

Article 20 (Legal)

.....

3. State Parties shall, by 2015, review and reform their criminal laws and procedures applicable to cases of sexual offences and gender based violence to:
 - (a) eliminate gender bias; and
 - (b) ensure justice and fairness are accorded to survivors of gender based violence in a manner that ensures dignity, protection and respect.
4. State Parties shall put in place mechanisms for the social and psychological rehabilitation of perpetrators of gender based violence.

5. State Parties shall, by 2015:
 - (a) enact and adopt specific legislative provisions to prevent human trafficking and provide holistic services to survivors, with the aim of re-integrating them into society;
 - (b)
6. State Parties shall ensure that cases of gender based violence are conducted in a gender sensitive environment.
7. State Parties shall establish special counselling services, legal and police units to provide dedicated and sensitive services to survivors of gender based violence.

Article 22 (Sexual Harassment)

.....

2. State Parties shall ensure equal representation of women and men in adjudicating bodies hearing sexual harassment cases.

Much will be required by Seychelles to fulfil the SADC Protocol requirements. Early consideration of the matters dealt with in the *CEDAW Law Review*, in the *2011 Report*, and in this Manual will assist in achieving the SADC goals.

III International Law and the Law of Seychelles

A Sources of Law

The manner in which the rules in treaties become effective for individuals in a particular country is determined by the law of that country. It is therefore necessary to consider the sources of law in Seychelles. This will indicate who is responsible for making a treaty into local law and where in the local laws individuals may look for protection of their rights.

The law of Seychelles is found primarily in the legislation of Seychelles and secondarily in the judgments of the courts of Seychelles as they interpret and apply the legislation.

1 Legislation

(a) The Constitution

The Constitution is, by article 5, “the supreme law of Seychelles”. A consequence of this is that any other law which is inconsistent with the Constitution is void.

Many provisions of the Constitution reflect a commitment to principles of gender equality. Specifically, by article 16 “Every person has the right to be treated with dignity worthy of a human being...” and by article 27 which states:³

Every person has a right to equal protection of the law including the enjoyment of the rights and freedoms set out in this Charter without discrimination on any ground, except as is necessary in a democratic society.

This protection “without discrimination on any ground” fulfils the international law requirement that the implementation by a State of the international rights treaties be “without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Article 2 ICCPR).

Article 32 of the Constitution reflects provisions in the Charter of the United Nations, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and in the International Covenant on Economic Social and Cultural Rights, by stating -

³ Article 27 also provides that action taken with a view to improving the conditions of any disadvantaged group is not unconstitutional.

The State recognises that the family is the natural and fundamental element of society and the right of everyone to form a family and undertakes to promote the legal, economic and social protection of the family.

Article 39 of the Constitution recognises the place of “cultural and customary values of the Seychelles people” subject only to such restrictions as may be provided by law and as are necessary in a democratic society.

A law of Seychelles which is inconsistent with these constitutional rights is void.

(b) Statutes and Regulations

Subordinate to the Constitution are the laws made by the National Assembly (Acts) and statutory instruments made under the authority either of the Constitution or of an Act of the Assembly. The usual form of such statutory instruments is Regulations.

Though many international human rights are protected in the Constitution, a most important means of treaty implementation is by Act.

2 *Decisions of the Courts*

The cases of most significance to the development of the law are those of the Supreme Court and of the Court of Appeal. Each court in the system is obliged to follow the decisions of the courts of higher status within the system. The courts have no power directly to implement a treaty. They depend on the treaty being covered by legislation.

The main role for courts in relation to treaties for which there is no Act or regulations, is to interpret the law of Seychelles as far as possible in a manner consistent with treaties.

In relation to human rights matters not only are the statements of legal principle of significance but the practices and procedures of the courts are also relevant because they may condition the application of the legal rights.

B Treaties

1 Effect of Treaties on Seychelles Domestic Law

Treaties are obligations entered into by states in accordance with the rules of international law. Treaties bind the states which are parties to them in the same way that contracts bind the individuals who are parties to the contracts. The Executive branch of government represents the state in international law and it is the Executive that makes treaties for Seychelles. Law within a state is made by the legislative branch of government which, in the case of Seychelles, is the National Assembly.

The fulfilling of Seychelles treaty obligations has two aspects. The first is that of implementing the treaty obligation within the domestic legal system. That means that in a human rights matter the individual rights should be legislated at a domestic level to enable their enforcement by individuals. The second is the interpretation of Seychelles law compatibly with the Seychelles treaty obligations.

The distinction between international law-making and domestic law-making is made clear in article 64 of the Constitution. That article provides that the President has the power to sign treaties in the name of the Republic, but the treaty will have no effect on Seychelles “unless it is ratified by – a) an Act; or b) a resolution passed by the votes of a majority of the members of the National Assembly”.

Accordingly there is a two-step process before a treaty becomes the law of Seychelles and enforceable as such. The first step is that the Executive makes Seychelles a party to the relevant treaty; the second step is that the Legislature passes a law to implement the treaty within Seychelles. In the absence of such legislation, the treaty will bind Seychelles as a state but will give no right to any person within Seychelles to bring claims before a Seychelles court on the basis of the treaty provisions.

Some treaties do not affect the rights of private individuals and therefore legislation may not be needed for their proper operation. But those treaties which do have implications for individuals within the state need to be implemented by legislation of Seychelles and typically by an Act of the National Assembly.

A resolution of the Assembly (article 64 of the Constitution) would be insufficient to give a treaty a domestic role. On the other hand, an Act of the Assembly is a domestic law of Seychelles and, depending on its wording, the Act envisaged by article 64 may give domestic effect to the treaty provisions.

Article 64 is consistent too with the general law and is supported by paragraph 2 of Schedule 7 of the Constitution, which provides for the continuance of “existing law” unless it is inconsistent with the Constitution. The “existing law” on this matter is:

... there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. ... [T]he stipulations of a treaty duly ratified do not ... by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. (*Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326, 347).

2 *Methods of Incorporation of Treaties*

There are many ways that a State may give local force to a treaty obligation.

(a) Enact the Treaty

The first and simplest is for an Act of the National Assembly to say that a particular treaty is law for the country. Typically the treaty will then be appended to the Act as a Schedule. Most States deal with the Geneva Convention on Diplomatic Immunities and Privileges in this way.

(b) Enact the Treaty principles

The second way is to incorporate the principles of the treaty into domestic law. An example of this is the many treaty principles of equality and principles protecting against discrimination on the basis of gender which find expression in domestic Seychelles legislation: For example article 388 of the Civil Code (which provides a uniform age of adulthood for men and women).

There is no Act of Seychelles which states expressly that the ICCPR and CEDAW are law in Seychelles. However many of the provisions of those treaties are covered by Seychelles law. For instance, article 26 of the ICCPR is enacted in almost identical terms in article 27 of the Constitution, and many human rights matters are provided for in Chapter III of the Constitution.

This approach provides for coherence within the legal system, but has a disadvantage because the international origin or treaty compliance role of the principle is neither declared nor obvious. The consequence of that is that the National Assembly could readily amend a

law which was enacted to fulfil an international obligation of Seychelles, without being aware that the amendment will result in a breach of the international obligation. Therefore where this method of treaty implementation is used, there needs also to be a way of signalling the role of the treaty in the legislation. This may be done by an appropriate title to the Act, by a purpose clause which indicates clearly the object of the legislation or by footnotes to the provisions. At the time of any subsequent legislative amendment there will therefore be a clear signal to the legislators that the legislation is fulfilling not just a domestic purpose but also implementing an international treaty obligation.

Where treaty principles are included in domestic legislation, it is most important that the principles be incorporated using the same wording as of the treaty. This avoids the situation where the domestic legislation and the treaty have different words and are seen to conflict. It also enables a court to draw readily on international precedent because the treaty and legislation have the exact same wording.

(c) Rewrite the Treaty as Domestic Legislation

A third method of treaty implementation in domestic law is by legislation which rewrites the provisions of the treaty using local wording. This method is subject to the same objections as the second method. It also suffers a more serious objection which is that in the process of redrafting and recasting the legislative provisions, the local legislature puts its own interpretation on the treaty provisions. This means that ultimately there will be a conflict between the treaty provision to which the state is bound and the domestic legislation which purports to implement the treaty. In such circumstances courts are bound to follow the wording of the Act, not the wording of the treaty.

3 *Interpretation of Domestic Law using Treaties*

Where a treaty has not been implemented in domestic legislation, the case law is clear. In interpreting or applying a domestic law a court should, when the opportunity arises because of the generality of the domestic law or of an ambiguity in the domestic law, interpret or apply the domestic law so as to make it consistent with the treaty obligations that the state has accepted. The reason behind this rule is that the state should not be said to have intended to create a rule domestically which conflicts with its obligations at international law. Nevertheless where a domestic law is in clear conflict with an international treaty obligation the courts are bound to apply the domestic legislation. These matters are addressed in article 48 of the Constitution.

Article 48 says that the fundamental human rights and freedoms in the Seychelles— shall be interpreted in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms

and a court shall, when interpreting the provisions of [Chapter 3 of the Constitution - the Seychellois Charter of Fundamental Human Rights and Freedoms], take judicial notice of – a) the international instruments containing these obligations,

and among other things international reports and decisions and “the Constitutions of other democratic States or nations”.

This is an express constitutional statement of the more general rule about treaty compatible interpretations of domestic law.⁴ The Interpretation and General Provisions Act section 12 provides that “A construction of an Act which is consistent with the international obligations of Seychelles is to be preferred to a construction which is not”. The application of this principle is illustrated in the case of *Controller of Taxes v British Airways* [1982] SLR 126. There it was stated (at page 135) “in case of equally possible interpretations, an intention to honour international obligations must be presumed and would be the decisive factor” and further (at page 137)–

to suppose that the government of Seychelles, with an avenue open to it... which would be consistent with international law, would have chosen instead to achieve that result by enacting municipal legislation which would be at variance with the treaty is a proposition difficult to accept.

The Courts will interpret and apply Seychelles law in a manner consistent with Seychelles treaty obligations whenever that is possible.

⁴ See also *Ah-Wan v Republic* SCA 1/2002 (judgment of 20 December 2002).

IV Guaranteeing Human Rights

The enjoyment of human rights is protected in most cases by the ordinary law, for example the inheritance rights of descendants are assured without any distinction on the grounds of age, gender, wealth or status (article 745 of the Civil Code).

Exceptionally the law may not provide for rights or may be inconsistent with or contrary to guaranteed rights. In such cases the person whose rights are not protected may sue in the Courts, complain to the National Human Rights Commission under the Protection of Human Rights Act, or in some cases be able to address the matter to the UN Human Rights Committee or to the Committee on the Elimination of Discrimination against Women.

A Claims to the Courts

The duty of the Courts is to make decisions on matters relating to the application and enforcement of the laws of Seychelles and in particular to deal with the “application, contravention and enforcement or interpretation” of the provisions of the Constitution. The Supreme Court sitting as the Constitutional Court has power to declare any law which contravenes the Constitution to be void. Where a law has been declared void the matter will be referred to the President of the Republic and to the Speaker of the National Assembly. Consistent with the doctrine of the separation of powers it is then the role of the Legislature to take any steps necessary following from the fact that a law or a provision of a law is void.

For breaches of fundamental rights the Constitutional Court has specific powers under article 46 of the Constitution. The remedies are most easily provided against a State entity. In a private law matter, the victim of gender or status discrimination may not get direct relief: A court may declare a law void because it is discriminatory but the victim may take no direct benefit from that. The benefit will be for the future after the legislation has been reformed. A person may suffer discrimination or not be given equal protection by the law but that would not be sufficient reason to affect the private rights of another individual (eg property rights under article 26 of the Constitution) who has abided by the law.

B Claims to the National Human Rights Commission

The Protection of Human Rights Act provides for complaints to be made to the National Human Rights Commission in relation to the rights and freedoms referred to in the Constitution. It is not specifically directed to complaints which are based on lack of equal protection by the law, but does not exclude the possibility of such a complaint. The ability of the Commission to address such complaints is concurrent with the right of Courts to pass judgment on the compatibility of legislation with the Constitution. If however a matter has been brought before the Constitutional Court under article 46 of the Constitution then the National Human Rights Commission has no jurisdiction.

In response to a complaint before it the Commission may “recommend action to alleviate the factors or difficulties that inhibit the enjoyment of human rights”, and “exercise such other functions as it may consider to be conducive to the promotion and protection of human rights”.

C Claims to the United Nations Human Rights Committee and to the Committee on the Elimination of Discrimination against Women

An individual whose rights under the ICCPR have been contravened or denied may communicate with the UN Human Rights Committee for its examination of the matter. Such a communication can be made only after all means of redress in Seychelles have been tried without success. Following its examination of the matter, the Committee forwards its views to the State concerned. The views are not binding on the State but carry considerable authority. The expectation is that the state will honour its international commitment and do what is necessary to remedy the breach or legislate to correct any deficiency in the law identified by the Committee. An overview of the individual complaints procedure may be found here: <http://www2.ohchr.org/english/bodies/petitions/individual.htm>

A similar procedure is available for a person who claims to be the victim of a violation of a right set out in CEDAW. The standard form for a communication and the procedures to be followed can be found at <http://www.un.org/womenwatch/daw/cedaw/opmodelform.html>.

V Gender Neutral Language in the Law

It is important that Seychelles legislation be gender neutral. Gender equality will be achieved only if the spoken or written language used by each person reflects the fact that basic principles of law should, and almost always do, apply to men and women without discrimination.

Contemporary Seychelles legislation is typically expressed in gender neutral language, but some legislation dates from a period when the use of gendered language was the norm.

The common law of Seychelles is in the Civil Code: “The source of the civil law shall be the Civil Code of Seychelles” (article 4 of the Civil Code). The Civil Code is written in masculine gendered language. It sets up a culture which is gender based: the family of the Civil Code is patriarchal,⁵ and the rights of women, though frequently expressed to be equal, are stated to be so by way of exception to the male norm or by a fiction or deeming provision rather than on the simple basis of equality. For instance, article 3 (5) of the Civil Code states: “A married woman shall have her own domicile for all purposes”; Article 215 (1) states “A married woman shall have full capacity as if she were a femme sole”; Article 388 provides that “A minor is a person of either sex who has not yet reached the full age of 18”.

Often only with considerable conscious effort can thoughts be expressed in gender neutral language. The ingrained use of gendered language in the law is supported by the Interpretation and General Provisions Act which provides in section 19 that unless a contrary intention appears in legislation, in all the legislation of Seychelles “words importing the masculine gender include females and words importing the feminine gender include males”. In practice, words importing the masculine gender are used and this is legitimated by that section.

Change is possible and necessary -

- Lawyers, judges and legislators should use gender neutral language in their oral and written expression. In this way, they would be role models and encourage others to follow by example.
- A thorough-going expunging from legislation of gender specific language should occur, except where the topic requires a gender specific expression. The Constitution is expressed in gender neutral terms. Because of its foundational role, the most critical piece of legislation for reform in this respect is the Civil Code.

⁵ In the Civil Code the children are male, with perhaps the sole exception of article 332 where an adult child is “it”.

- In most cases rendering the legislation in gender neutral language is a simple editorial task because the substance of the law is not being changed.

There are several ways to address the habit of gender based language patterns -

1. Omit the use of the pronoun eg “The President may resign his office” may be simply “The President may resign from office” or “The President may resign office”.
2. Use both pronouns eg “On resignation the President will be paid the retirement allowance due to him”; this might be rendered as “the retirement allowance due to him or her”. This approach is cumbersome but in some cases appropriate.
3. Repeat the noun in the phrase eg “The Judge shall make whatever order as to costs he thinks fit”: “The Judge may make such order as to costs as the Judge thinks fit”.
4. Render everything in the plural eg “A judge may claim his out-of-pocket expenses for travel” could be “Judges may claim their out-of-pocket expenses for travel”.
5. Conversion of a noun form to a verb form eg “The President may give her consent...” would become “The President may consent...”
6. Use a relative clause eg “Prescription shall run against any person provided that he does not come under any exception established by law” would be “Prescription shall run against any person who does not come under...”.
7. Use a passive expression eg article 1664 of the Civil Code: “The seller entitled to an option to redeem may bring his action against a subsequent buyer...” would become “Action may be brought against a subsequent buyer by the seller entitled to an option to redeem ...” .

VI Civil Law Issues

A Marriage and Living en Ménage

1 Discrimination on Ground of Status

At a social level, non-marriage relationships can give rise to a particular property concern at the time of their termination. The termination can result either from the separation of the parties or by the death of one of them.

The law is not expressly discriminatory, but in the socially analogous situation of a marriage the law provides specific rules for dealing with the property of the parties. For the married couple property provision is made for inter vivos termination and, on termination by death, for substantial protection of the surviving spouse in the case of intestacy. Unmarried couples are without these protections.

The impact of the law on couples in a domestic relationship, whether marriage or en ménage, is significant. Partners in such relationships have the right to enter into a contract to regulate their property rights, and a surviving spouse or partner may take under a will of the deceased spouse or partner. They also have equal rights under articles 1370 to 1381-1 of the Civil Code and in particular to make claims in unjust enrichment. Beyond those commonalities there are differences that flow from status. The specific status of a married woman is spelt out in the Status of Married Women Act and in articles 214 and 215(1) of the Civil Code; the rights of a married man are presumed. There is no legislative provision for the rights of a person who is living en ménage.

Inter vivos, a married woman has access (as does her husband) to financial relief against the other party to the marriage in a number of different forms – maintenance for a period, a lump sum payment, and as a result of an order under section 20(1)(g) of the Matrimonial Causes Act such order “as the Court thinks fit, in respect of any property of a party to the marriage or any interest or right of a party in any property for the benefit of the other party”. Civil Code property rights can in this way be altered because the relationship between the parties was one of marriage. Therefore even though the parties may have lived in a regime of separation of property the Court has a potentially wide discretion to make a property adjustment as between the parties when the marriage breaks down.⁶

Where a marriage is terminated by death, the surviving spouse has an entitlement under article 205(2) of the Civil Code to receive maintenance from the estate. The surviving spouse has no reserved rights where there is a testacy; in the case of an intestacy the

⁶ Factors to be taken into account are set out in *Esparon v Esparon* SCA 12/1997 (judgment of 4 December 1998), LC 148.

surviving spouse has significant rights as indicated in articles 723, 766 and 767 of the Civil Code.

Given that the non-marriage relationship is an established social feature in Seychelles⁷, there is a certain incongruity in the legal system when it provides expressly for those who are married but not for those living en ménage. The Constitution provides that everyone is to be treated with dignity (article 16) and is entitled to equal protection of the law without discrimination on any grounds (article 27). The legal discrimination here is on the basis of status - ie whether a person is married or not.

The non-marriage relationship which has broken down gives rise to no claim⁸ by one party against the other similar to those set out in section 20 of the Matrimonial Causes Act. Further there is no provision in the Civil Code for a non-married partner to benefit from the alimentary obligation (article 205(2) of the Civil Code), nor does the law on intestate succession provide for the surviving partner of a non-marriage relationship.

The area of status discrimination can be illustrated by reference to the recent cases of *Serret v Serret* SCA 20 of 2012 (judgment of 13 April 2012), and *Labiche v Ah-Kong* SCA 33 of 2009 (judgment of 13 August 2010). Both concerned the property rights of couples who had lived together for 15 years or more.

In *Serret* the couple were married and had access to discretionary orders by the Court which could determine the share of each in the matrimonial home (the property was in the joint names – the court divided the property 55/45). Had the relationship ended by death rather than divorce, the surviving spouse would have received one year's maintenance from the estate and if the deceased left no will, a substantial interest in the property of the deceased.

In *Labiche*, the couple lived en ménage. The property was in the man's name. There could be no redress for the woman on dissolution of the relationship whether inter vivos or on death except by a claim in unjust enrichment for the value of her contributions made to the other party's property.

The sense of frustration felt because of the present unequal social impact of the existing laws relating to the division of property on the termination of a non-marriage relationship has led to suggestions that section 6 of the Courts Act may give a judge the discretion to do justice for unmarried couples in a manner similar to that provided for married

⁷ The 2002 figures show that 21% of the community were living in non-marriage relationships and 27% were in married relationships. The Population and Housing Census 2010 showed 19.3% unmarried couples and 24.6% married couples.

⁸ Eg *Edmond v Bristol* [1992] SLR 353 illustrates the operation of article 1381 of the Civil Code. In the instance the claimant received back her contribution to the property of the other party.

couples under section 20 of the Matrimonial Causes Act. This approach has been rejected by the Court of Appeal.

The Courts Act section 6 provides –

The Supreme Court shall continue to be a Court of Equity and is hereby invested with powers, authority, and jurisdiction to administer justice and to do all acts for the due execution of such equitable jurisdiction in all cases where no sufficient legal remedy is provided by the law of Seychelles.

Despite its reference to the law of Equity of English origin, the Equity of England is generally not Seychelles law. Section 6 of the Courts Act gives the Supreme Court power to use procedures and remedies of equity, but it does not incorporate substantive equitable concepts into Seychelles law (eg section 6 is not seen to be a basis for the incorporation of the law of trust). Were the Supreme Court to draw on English principle it would probably declare constructive trusts in relation to disputed property. Constructive trusts depend on property; the result of their use in the typical Seychelles case of the separation of an unmarried couple may not be very different from that achieved currently by the use of the Civil Code.

The Courts of Seychelles have struggled to do justice in these situations and the law is still evolving. There are however limits to what the Courts can do. The Courts have no power under article 26 of the Constitution to order the redistribution of property of individuals unless there is legislative authority for that.⁹ The main basis for relief of disadvantaged en ménage partners is in the provisions in the Civil Code for unjust enrichment. The use of these provisions may allow a non-property holding partner to gain, from the partner with the property, the recognition of the contribution to the property held in that other's name. The result will typically be a money award.

In the case of a functioning relationship of many years the consequence on breakdown as between the parties would be that where the value of their joint efforts has been invested in the name of one partner who holds the home and other items of value, the non-property holding partner will at best be entitled to the return of the material contribution to the property held in the name of the other.

2 *Gender Equity*

There is further a question of gender equity. In the case of non-marriage relationships the present law in practice may work against women. In a male oriented society and where the common law has a patriarchal bias, the legal reality is that property is typically in the name of the male partner. This means that on termination, absent any other factors, the property that has been used by the couple during their relationship remains with the male

⁹ It is presumed here that section 20 of the Matrimonial Causes Act is within the provisions of article 26(2) of the Constitution.

partner. There are means at law which could be used to avoid this consequence but those means are typically only used by well advised partners. For instance it would not be typical to expect those entering into an affective relationship to seek legal advice in order to ensure that future property will be held in an appropriate manner. The informal nature of the non-marriage relationship may be presumed to make seeking advice or making a contract less likely than in the case of marriages that begin with a formal public event.

3 Conclusion

On the bases of respect for the dignity of the individual and of giving equal protection of the law, it may be argued that, for all but relationships of short duration, more should be recognised than simply the relative property inputs¹⁰ and that the commitment to a joint life would be respected by the recognition not only of the contributions of each to the property but also of the contribution to the relationship.

Legislation could resolve the social equity issue by providing for a statutory property regime for those who are living or have lived in a marriage or similar domestic relationship. Such a regime could be a universal one (all the property of each party) or one of the property acquired during the relationship. Any such regime would resolve the status discrimination issue, and at the same time elevate domestic relationships above those governed purely by notions of individual property. A regime of sharing property on dissolution would place the focus on the relationship and on the parties' participation in it rather than on the property held in each party's name.

This is an area in which the judiciary may find some legislative support in the Constitution for their efforts to provide just solutions. Ultimately any change will need to flow from legislative action which would give full effect to the spirit of the international conventions to which Seychelles is a party and to the constitutional rights of equality.

B The Status of Married Women Act

The Status of Married Women Act has its origins in English legislation.¹¹ It embodies principles that were incorporated into the laws of many Commonwealth countries. The motivation was clearly to provide a married woman equality of status with that of her husband. The legislation is very specific in addressing points of law where there was an inequality of status. The move from denial of a woman's having status separate from that of her husband to a legal situation where the status of a woman in marriage would become close

¹⁰ The analogy in the Civil Code is with property arrangements unconnected with an intimate personal relationship.

¹¹ By Ordinance No 50 of 1949 the Mauritius legislature dealt with the matter in a different and arguably better manner. The Mauritius statute had only four substantive provisions (as compared with the 28 substantive provisions of the Seychelles Act). The essence of the Mauritius statute was that by effect of the Act "the wife shall have full capacity to act in all matters whatsoever as if she were not married".

to that of her husband was a significant legislative move reflecting changes in social attitudes. The legislation was clearly a corrective measure.

There are several difficulties with the legislation as it stands in the 21st century. Not least is the fact that it is clearly legislation of English origin and therefore its integration into the law of Seychelles, and particularly its relationship with the Civil Code of Seychelles, is awkward. More critical for present purposes is the fact that even if the Act was the proper method of correction within the law in 1948, it is no longer appropriate given the constitutional principles of gender equality and equal respect for all individuals.

The Act is clearly premised on the fact that by marriage a woman has lost legal status and, as a consequence, much capacity at law. The Act, on an item by item basis, addresses a number of the capacity issues.¹² What remains is legislation which grants women rights by way of exception while presumptively leaving married men in a free position.

A good example of the nature of this Act is section 29 which provides “A woman may remarry immediately after the dissolution of a previous marriage”. Historically this is a reference to the situation where a woman had no capacity to remarry till 10 months after the date of termination of the marriage¹³. In contrast to section 29 there is no statement about the capacity of the former husband. A literal implication of section 29 would be that the man may not remarry immediately. Because that is wrong, the Interpretation and General Provisions Act rule might arguably be used. Article 29 would then read “A woman or man may remarry immediately after the dissolution of a previous marriage”. That however is not a situation where the Interpretation and General Provisions Act can be used. If such an approach were used, the whole of the Status of Married Women Act would become unnecessary - that is to say men and women would be treated throughout in the same way because every reference to a wife would be read as a reference to a husband and every reference to a husband a reference to a wife.

The better and more equal approach to the remarriage provision would have been to repeal article 228 of the Civil Code (which in 1948 provided that the wife could not contract a new marriage except after 10 months from the dissolution of the former marriage). Such a provision would have left the parties to the marriage in a position of equality: The marriage had been dissolved and therefore both had the capacity of a single person.

¹² The different status is reflected in some current legislation. For example, the Registration of Business Names Act provides that where an “individual is a married woman, the words “wife of” followed by the forenames and surnames of her husband shall be mentioned after and in addition to her own name.” (section 22 (2)).

¹³ This rule was concerned with the attribution of paternity to a child born in the period immediately following the termination of the marriage.

The Status of Married Women Act does not provide for respect for the dignity of women nor equal treatment for them. The Act is premised on inequality of rights and seeks to ameliorate the situation by reference to specific inequalities. The use of the feudal expression *feme sole* in the Act (femme sole in article 215 of the Civil Code) indicates the starting-point of the legislator – A married woman does not have the capacity of an adult human being which is her constitutional right but has a fictional capacity premised on her not having a husband. If appropriate adjustments were made to the Civil Code, the Status of Married Women Act could be repealed.

C Domicile

Domicile is an important matter because it is the law of the country of a person's domicile that determines a person's status (eg whether the person is married, single, adult or child). At law capacity flows from status. Seychelles has adopted the English law relating to domicile and provides for it in the Domicile Act 1948 and in the Civil Code.

The Domicile Act provides –

Subject to articles 3 and 102 of the Civil Code of Seychelles the law of domicile shall be the law of England for the time being.

The most important Civil Code provision is article 3 paragraphs 3, 4, and 5 –

- 3 Status and capacity shall be governed by such laws as are from time to time enacted. Subject to this provision, capacity shall further be determined by the domicile of a person... .
- 4 The time at which a person first becomes capable of having an independent domicile shall be when he attains the age of eighteen or marries under that age.
- 5 A married woman shall have her own domicile for all purposes.

Under English law a married woman had the domicile of her husband. That rule has been abrogated and the current Seychelles law on the matter is that in article 3 (5) of the Civil Code. The law however retains a patriarchal bias in the sense that the domicile of a child born of married parents is that of the father; this is a gender based rule in favour of the male party to the marriage. It is also a status based rule in the sense that the rule is different for a child whose parents are not married. Article 3(4) in itself also presents a gender bias: To accord with the constitutional protections of equality it should apply equally to married men and married woman eg “Every person of 18 years of age or more has an independent domicile”.

D *Employment Law*

There are two points to note here.

The first point concerns the remark in the *CEDAW Law Review* (pages 14 and 56) that the repeal of section 24 of the Employment Act in 2006 runs counter to CEDAW Committee General Recommendation 19. Article 6 of CEDAW requires Seychelles to “take all appropriate measures, including legislation” to suppress trafficking in women and prostitution. A major source of women for trafficking and exploitation through prostitution is local recruitment for employment abroad. Section 24 of the Employment Act required a Seychellois leaving Seychelles for employment abroad as a domestic worker to seek a certificate from a competent officer in Seychelles.

This is an area where the National Assembly should review the Seychelles legislation to fulfil the CEDAW requirements. A law is needed that is compatible with the constitutional right to freedom of movement but which also provides protection against exploitation. The protection can be addressed particularly to the needs of persons under 18 and to recruitment practices. Recruiters and recruitment practices can be subject to regulation which involves contract scrutiny, consideration of repatriation arrangements and the depositing of security.

The second point concerns gender based conditions and practices that may exist in relation to migrant workers and in some specific fields of Seychelles employment. Contract conditions that contain restrictions that do not respect the Constitution are void. Any restriction on freedom of association or the right to establish a family must be found in legislation. The Civil Code (article 6) is clear that there can be no contracting out of the rules of public policy. The fundamental rights and freedoms under the Constitution are at the heart of Seychelles public policy.

The government should ensure that employers know the law and also that employers who deny employees’ rights may be held liable to employees for the breach of those rights.

VII Criminal Law Issues

A Victims as Defendants: The Availability of Defences to Battered Defendants who Kill Abusive Partners

[T]here is a major problem confronting women who seek to rely on... criminal defences. It is that these defences have been developed through a long history of judicial precedents on the basis of male experiences and definitions of situations. Consequently female defendants whose experiences and definitions fall outside these male-inspired defences are confronted with the prospect of either failing to plead them successfully or having to distort their experiences in order to fit them into the defences.¹⁴

In *Jane Labiche v Republic*¹⁵ the Seychelles Court of Appeal was confronted with the difficult issue of the legal relevance of domestic abuse suffered by a defendant in a criminal case, when that abuse was argued to have played a role in her offending. Seychelles does not yet have a body of case law on the use of statutory and common law defences to criminal charges by battered defendants. Accordingly, this chapter:

- Explores the relevance of the effects of abuse suffered by a criminal defendant to the defences available under Seychelles law;
- Highlights aspects of these defences which, in other jurisdictions, have been criticised for failing to adequately protect battered defendants; and
- Discusses ways in which the law could be developed in Seychelles so that it recognises and responds justly to the circumstances which lead victims of domestic abuse to commit offences.

1 “Battered Women’s Syndrome”

“Battered Women’s Syndrome” was a term coined by Dr Lenore Walker, to describe the effects of domestic abuse on women and to explain why some women remain in abusive relationships.¹⁶ She described Battered Women’s Syndrome as a sub-category of Post-Traumatic Stress Disorder, which is recognised as a mental disorder.¹⁷

Much research on the effects of abuse has been undertaken since Dr Walker’s theory was published, and the term “Battered Women’s Syndrome” is no longer favoured amongst mental health professionals or the community support and advocacy sector. It is now accepted that domestic violence can have a wider range of effects than allowed for by the

¹⁴ Stanley Yeo “Resolving Gender Bias in Criminal Defences” (1993) 19 Monash L Rev 104.

¹⁵ SCA 1(a) of 2004, 29 November 2006.

¹⁶ Lenore E Walker *The Battered Woman Syndrome* (Springer, New York, 1984).

¹⁷ *Diagnostic and Statistical Manual of Mental Disorders* (4th ed, text revision, American Psychiatric Association, Washington DC, 2000).

original theory, and that victims respond to abuse in many different ways. Further, describing the effects of abuse as a “syndrome” has the unfortunate consequence of suggesting that the abused person is mentally unwell, rather than recognising the behaviour as a normal response to an extreme and traumatic situation.¹⁸

The courts in some jurisdictions have responded to these concerns by avoiding the use of the term “Battered Women’s Syndrome.” Instead, they will accept evidence about the effects of the abuse on the particular defendant and the ways in which it might have played a role in the alleged offending.¹⁹ For example, the New Zealand Court of Appeal in *Ruka v Department of Social Welfare* noted:²⁰

[W]hile the syndrome represents an acute form of the battering relationship... it is probably preferable... to avoid references to it and to speak simply of the battering relationship. There is a danger that in being too closely defined, the syndrome will come to be too rigidly applied by the Courts... It is the effects of the violence on the battered woman’s mind and will, as those effects bear on the particular case, which is pertinent. It is not, therefore simply a matter of ascertaining whether a woman is suffering from battered woman syndrome and, if so, treating that as an exculpatory factor. What is important is that the evidence establish that the battered woman is suffering from symptoms or characteristics which are relevant to the particular case.

Similarly, the Supreme Court of Canada noted in *R v Malott*:²¹

Concerns have been expressed that the treatment of expert evidence on battered women syndrome, which is itself admissible in order to combat the myths and stereotypes which society has about battered women, has led to a new stereotype of the “battered woman”... It is possible that those women who are unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided... The legal inquiry into the moral culpability of a woman who is, for instance, claiming self-defence must focus on the *reasonableness* of her actions in the context of her personal experiences, and her experiences as a woman, not on her status as a battered woman and her entitlement to claim that she is suffering from “battered woman’s syndrome”.

¹⁸ New Zealand Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001) at 3–6; Managay Reddi “Battered woman syndrome: Some reflections on the utility of this ‘syndrome’ to South African women who kill their abusers” (2005) 18 S Afr J Crim Just 259 at 261–264.

¹⁹ *Ruka v Department of Social Welfare* (1996) 14 CRNZ 196 at 220 (per Thomas J).

²⁰ At 220.

²¹ [1998] 1 SCR 123 at 140–143, per L’Heureux-Dube J.

The remainder of this chapter discusses the ways in which the effects of abuse on defendants in criminal cases may be relevant to the availability of defences.

2 Self-Defence

Defendants who have killed or injured their abusive partners may seek to rely on self-defence. Self-defence is recognised under s 18 of the Penal Code, which reads as follows:

Subject to any express provisions in this Code or any other law in operation in Seychelles criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English common law.

The principles of contemporary English law on public and private defence can be summarised as follows:²²

- When the accused has raised the issue of self-defence, the burden is on the prosecution to prove beyond reasonable doubt that the accused was not acting in self-defence.
- The question of whether the *use* of force was necessary is determined by reference to the circumstances as the accused believed them to be. Accordingly, a mistaken or unreasonable belief may justify the use of force (unless the belief is the result of voluntary intoxication).
- The question of whether the *degree* of force used was reasonable in the circumstances as the accused believed them to be is an objective enquiry.
- A successful claim of self-defence results in an acquittal.

The questions for the fact-finder are:

1. What were the circumstances as the accused believed them to be?
2. In those circumstances, was the use of force necessary?
3. In those circumstances, was the degree of force used reasonable?

The most recent Seychelles Court of Appeal cases to discuss self-defence are:

David Dodin v Republic SCA 6/2003, 27 October 2004;

Norris Pothin v Republic SCA 2/2007, 14 December 2007; and

Gonzaque Sidonie v Republic SCA 14/2010, 10 December 2010.

²² Richard Card *Card, Cross & Jones: Criminal Law* (19th ed, Oxford University Press, Oxford, 2010) at 713; David Ormerod *Smith and Hogan's Criminal Law* (13th ed, Oxford University Press, Oxford, 2011) at 379–383.

There are no Seychelles cases dealing with a claim of self-defence by a battered defendant.

In other jurisdictions, defendants who have killed or injured their abusive partners have often struggled to establish that it was necessary to use force and that the degree of force was reasonable. This section highlights these issues, and discusses ways in which they have been addressed. It is hoped that the discussion will assist the Seychelles courts if they are required to consider a claim of self-defence by a battered defendant in the future.

(a) The circumstances as the accused believed them to be

The issue here is the genuineness of the accused's belief that she was going to be killed or seriously injured. While a mistaken or unreasonable belief can found the defence, it still needs to be accepted that the accused honestly held that belief. Its reasonableness may be taken into account in making that assessment. Expert evidence on the effects of abuse may be of assistance:²³

Typically, [evidence of the effects of abuse] is raised to bolster a self-defence theory where a woman has attacked her batterer in circumstances where her fear of imminent death or grievous bodily harm would not otherwise appear objectively reasonable. Expert testimony is presented to demonstrate that the recurrent abuse heightened the woman's apprehension of danger and added to the belief that her only means of escape was through the use of force.

For example:²⁴

[T]he battered woman's intimate knowledge of her batterer, a knowledge that is necessary to her survival, may make her more acutely aware of cues that a new, or escalated violent episode is about to occur than an "objective" observer would be. Thus, while a man's action of tapping on a handcuff might not seem to present an imminent or serious threat to many non-battered persons, such an action may carry an entirely different connotation to a woman who was routinely placed in handcuffs before being severely beaten.

Sidonie v R is a Seychelles Court of Appeal case in which a father claimed self-defence for the killing of his son. This case may be of some assistance to battered defendants seeking to establish a genuine belief that they were about to be killed or seriously injured by their partner. The Court of Appeal said:²⁵

²³ Managay Reddi "Battered woman syndrome: Some reflections on the utility of this 'syndrome' to South African women who kill their abusers" (2005) 18 S Afr J Crim Just 259 at 264.

²⁴ MJ Willoughby "Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?" (1990) 38 U Kan L Rev 169 at 184.

²⁵ *Sidonie v R* SCA 14/10, 10 December 2010 at 4–6.

The law does not state that it is only when the aggressor is armed with a weapon or lethal object that the one put in peril becomes entitled to a right of self defence. This may have a bearing on one's apprehension of grievous harm to himself and in regard to the question whether the force used was reasonably necessary. A fear of being pushed or manhandled by a person younger and physically stronger than oneself may result in apprehension of grievous harm...

In the law relating to self defence no exceptions are made to the relationship between the aggressor and defender, although it may have a bearing on the issue of whether the accused had reason to apprehend grievous harm from a close family member and should have reacted in the way he did. Just as much as the Prosecution can argue that the Appellant should not have acted in the way he did because the deceased was his son and the Appellant was accustomed to his behaviour, the Appellant is entitled to argue and as he has done in this case, that he would not have done what he did on the day of the incident unless the deceased had behaved in a more violent and aggressive manner than on earlier occasions, putting him in immediate peril.

Similarly, a battered defendant's knowledge of the ordinary course of their abusive partner's behaviour may help to explain why on the occasion in question they believed they were in danger of being killed or seriously injured.

(b) The use of force

When assessing whether the use of force was necessary in the circumstances as the accused believed them to be, two factors are typically taken into account. These are whether the threatened harm was imminent, and whether alternative courses of action were available to the accused. If the harm was not imminent, or alternatives were available, the use of force tends not be considered necessary. This is because self-defence is a justification (so carries the message that the accused's actions were not wrong) and because of the need to preserve the sanctity of life.

However, when considering imminence and the availability of alternatives in the context of a claim of self-defence by a battered defendant, it is important for the court to have regard to the nature and dynamics of abusive relationships. As will be illustrated below, the concept of "imminence" may need to be applied differently in the context of a claim of self-defence arising from an abusive relationship to the way it is applied in one-off instances of violence between men. Further, the alternative courses of action which may be available in respect of one-off instances and violence between strangers or mere acquaintances may not be available to battered women. Accordingly, judges and juries may benefit from hearing

expert evidence on these issues. This evidence should be taken into account when assessing whether the use of force was necessary.

(i) Imminence

In *Pothin v R* the Seychelles Court of Appeal stated that self-defence is only available if there had been an attack and the danger had not yet passed.²⁶ In that case, the deceased had attacked the accused's concubine, and there was evidence that the accused's assault on the deceased began after the attack was over, when there was no longer any immediate peril.

However, the requirement of an attack may make it difficult for women who kill abusive partners to avail themselves of the defence. In a number of cases in other jurisdictions, women have killed abusive partners who were asleep or who have passed out, or who were leaving the room. The women acted in response to a threat from their partner that they would be killed later that night or the next day.

In some of these cases, the courts held that the threat was not imminent, because there was no immediate danger of its being carried out, and therefore the use of force was not necessary. Accordingly, the claim of self-defence failed.²⁷ This is problematic in this context, because:²⁸

The past abuse forms the basis for the battered woman's perception that the threat is imminent. Thus, the term "imminent," in the context of the sleeping batterer, arguably has a broader meaning than a strictly temporal one. Because the battered woman is certain her husband will kill her, but does not know exactly when, she lives in a constant state of terror. Thus, for her, especially when the cycle of violence has escalated, the harm is always imminent.

In other cases, the courts have accepted that a threat of this nature could be considered imminent. For example, in *Lavallee v R*, the Supreme Court of Canada reasoned:²⁹

The situation of the battered woman ... strikes me as somewhat analogous to that of a hostage. If the captor tells her that he will kill her in three days time, is it potentially reasonable for her to seize an opportunity presented on the first day to kill the captor or must she wait until he makes the attempt on the third day? I think the question the jury must ask itself is whether, given the history, circumstances and perceptions of the appellant, her belief that she could not

²⁶ SCA 2/2007, 14 December 2007 at 12.

²⁷ See for example *R v Wang* [1990] 2 NZLR 529; *State v Stewart* 243 Kan 639, 763 P.2d 572 (1988); *R v Whynot (Stafford)* 7 CR 3d 198.

²⁸ MJ Willoughby "Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?" (1990) 38 U Kan L Rev 169 at 182.

²⁹ *Lavallee v R* [1990] 1 SCR 852 at [64] per Wilson J.

preserve herself from being killed by [the deceased] that night except by killing him first was reasonable.

Two Australian cases, summarised in an article by Angelica Guz and Marilyn McMahon³⁰, also illustrate a wider interpretation of “imminence”. In *R v Kontinnen*:³¹

Erica Kontinnen shot and killed her *de facto* partner (George Hill) as he slept. Extensive evidence was given of Hill’s previous violence towards Kontinnen and his other *de facto* partner. Before falling asleep, Hill had threatened that he would kill the accused, his other *de facto* partner and their son upon waking. The trial judge allowed self-defence to go to the jury on the basis that although Hill was sleeping, the threat he issued was imminent as it still continued to have effect at the time of the killing.

In *R v Sternquist*:³²

A woman fatally shot her abusive husband in the back after he had assaulted her and then started to walk away. An extensive history of violence by the deceased towards the accused was presented to the jury as an overall and continuing threat that she had endured. The accused succeeded in her claim of self-defence.

Another approach (as recommended by the New Zealand Law Commission) is to change the law “to make it clear that there can be situations in which the use of force is reasonable where the danger is not imminent but is inevitable.”³³ This avoids concerns about distorting the concept of “imminence” in order to fit deserving cases within it.

Western Australia reformed its self-defence provision in this way in 2008. Under s 248(4) of the Criminal Code Act 1913, an act is self-defence if:

- (a) The person believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent; and
- (b) The person’s harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and
- (c) There are reasonable grounds for those beliefs.

A partial defence (reducing murder to manslaughter) is available under s 248 where the beliefs are not found to be based on reasonable grounds.

³⁰ Angelica Guz and Marilyn McMahon “Is Imminence Still Necessary? Current Approaches to Imminence in the Laws Governing Self-Defence in Australia” (2011) 13 Flinders LJ 79.

³¹ Unreported, Supreme Court of South Australia, 30 March 1992.

³² Unreported, Cairns Circuit Court, Derrington J, 18 June 1996.

³³ New Zealand Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001) at 9–12.

(ii) Alternative courses of action

A second, and related, factor usually taken into account when assessing whether the use of force was necessary is whether the accused had alternative courses of action available.

Alternatives that may be available to other people (such as walking away, calling the police, or asking for help from friends or family members) may not be available to battered defendants:³⁴

For the battered woman, escape from the abusive situation may not be a viable alternative. Frequently, a battered woman may have no access to money, alternative shelter, or means of transportation or support for herself or her children. Even if she were to obtain the necessary physical and economic means to leave her batterer, she may be psychologically incapable of leaving because the repeated battering have left her feeling helpless, hopeless and lacking in self-worth. She may also fear that the batterer will come after her and perhaps kill her.

In addition:³⁵

[W]here a woman is attacked by her partner in her home, to require her to flee from that attack is to require her to leave her home. Even at the time when a duty to retreat was assumed, that duty did not arise where it would have entailed a retreat from the home. Further, where the woman has children in the home, to require her to flee from violent attack would be, in many cases, to require her to leave those children with the attacker. These factors must weigh in the assessment of whether her use of force was necessary in the circumstances as must the futility or perceived futility of flight as anything other than a temporary measure. The lack of adequate social welfare and low-cost housing and wide-spread perception of the police as hostile towards or at best apathetic in dealing with ‘domestics’, together with an often well-founded fear of retaliation, prevent many women from leaving their abusers. Even without trawling the murky waters of the so-called ‘battered woman syndrome’ it is clear that, viewed from the woman’s perspective, her use of force might be the only way to escape an escalating spiral of violence which she believes will end with her death.

Expert evidence on whether alternative courses of action really were available to the accused in the particular case may assist the court to determine whether the use of force was necessary in the circumstances as the accused believed them to be.

³⁴ MJ Willoughby “Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?” (1990) 8 U Kan L Rev 169 at 186.

³⁵ Aileen McColgan “In Defence of Battered Women who Kill” (1993) 13 Oxford J Legal Stud 508 at 516–517.

(c) The degree of force

The third requirement for self-defence is that the degree of force used was reasonable in the circumstances as the accused believed them to be. The Seychelles Court of Appeal discussed this requirement in *Sidonie*:³⁶

Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by instant reaction... If there has been an attack so that defence is reasonably necessary, it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his defensive action. If the Jury thought that in a moment of unexpected anguish a person attacked had only done what he had honestly and instinctively thought necessary, that would be the most potent evidence that only reasonable defensive action had been taken.

Battered defendants have sometimes struggled to establish that the force used was reasonable, particularly when they have used a weapon to defend themselves against an unarmed attacker. Aileen McColgan described the difficulties such defendants have faced, and a solution adopted in the United States, as follows:³⁷

The proportionality requirement has developed through cases concerning male defendants, and is generally taken to demand parity between attack and defence. This is justifiable where the adversaries are of comparable strength, but may operate unfairly where the attacker is male and the defender female, particularly where she knows from experience that unarmed resistance by her to an unarmed attack by him may result in an escalation of that attack...

In *Wanrow*³⁸ the Washington Supreme Court recognized that any instruction limiting self-defence to the use of equal force denied women defendants the equal protection of the law. The trial judge refused the defendant's self-defence plea on the ground that she had used unequal force in the shape of a gun against an unarmed man. The words of the Supreme Court bear repetition:³⁹

³⁶ *Palmer v R* (1971) AC 814 (PC), followed by *Sidonie v R* SCA 14/10, 10 December 2010 at 6–7.

³⁷ Aileen McColgan “In Defence of Battered Women who Kill” (1993) 13 Oxford J Legal Stud 508 at 521.

³⁸ 88 Wash 2d 221.

³⁹ At 240.

The impression created [by the trial judge] that a 5'4" woman with a cast on her leg and using a crutch must, under the law, somehow repel a 6'2" intoxicated man without employing weapons in her defence, unless the jury finds her determination of the degree of danger to be objectively reasonable – constitutes a separate and distinct misstatement of the law and, in the context of this case, violates the respondent's right to equal protection of the law.

The decision marked a turning point in the US in its recognition that reasonableness must be assessed in the context of the defendant's own circumstances, and that therefore factors such as the disparate physical size, strength and training of defendant and deceased would have a bearing on the reasonableness of the force used by her. This individualized approach to the question of reasonableness allows proper consideration of the circumstances under which women kill, and is necessary to counterbalance the bias against women defendants which results from the paradigmatically male structure of traditional self-defence. The object is not to give women or battered women any special consideration, as might be appropriate in particular cases in an excuse-based defence, but rather to recognize and compensate for existing bias.

The Seychelles Court of Appeal in *Sidonie* took a similar approach to the question of the reasonableness of the degree of force. It held that in determining whether the degree of force used was reasonable in the circumstances, both the pressures that the defendant was subject to in the moment and the circumstances and characteristics of the defendant must be taken into account:⁴⁰

A court has to necessarily consider the circumstances in which the Appellant had to make his decision whether or not to use the knife and the shortness of the time available to him for reflection. The hypothesized balancing of risk against risk, harm against harm, by a person in immediate peril of danger is not undertaken in the calm analytical atmosphere of the court-room after counsel with the benefit of retrospection have expounded at length the reasons for and against the kind and degree of force that was used by the Appellant, but in the brief second or two which the Appellant had to decide whether to use the knife or not under all the stresses to which he was exposed. This was a case where a 68 year old man had to act on the spur of the moment with his emotions of anger and fear all mixed up and when his son who was much younger and stronger than him was aggressively and violently

⁴⁰ *Sidonie v R* SCA 14/10, 10 December 2010 at 8–9.

cornering him on to a wall with the threat of: “I will fight with you today. If it is not me it will be you.”

Taking this approach in cases involving battered defendants would assist the Court to apply the law of self-defence in a way that gives equal protection to female and male defendants. Differences between men and women in physical size and strength may make it reasonable for a woman to, for example, use a weapon to defend herself against an unarmed man, when she believes she is going to be killed or seriously injured.

3 Provocation

Section 197 of the Penal Code provides for the partial defence of provocation, which reduces murder to manslaughter:

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.

“Provocation” is defined by s 198 of the Penal Code:

The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered.

When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give the latter provocation for an assault.

A lawful act is not provocation to any person for an assault.

An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby furnish an excuse for committing an assault is not provocation to that other person for an assault.

An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

For the purposes of this section the expression “an ordinary person” shall mean an ordinary person of the community to which the accused belongs.

When determining whether the defence of provocation is available to an accused, three questions must be asked:

1. Was there provocation in law, under s 198?
2. Did the provocation cause the defendant to lose self-control? This is a question of fact.
3. Was the provocation sufficient to induce an ordinary person (of the community to which the accused belongs) to lose self-control? This is a question of fact.

In *Labiche v Republic*, the Seychelles Court of Appeal considered a claim of provocation by a battered defendant. On the facts of that case, provocation was not available as a defence.

Difficulties with the defence which have been identified across jurisdictions, and the ways in which the Courts have addressed them, are discussed below in relation to questions two and three.

Did the provocation cause the defendant to lose self-control?

Battered defendants have sometimes struggled to establish that their actions were a result of a loss of self-control. Section 197 requires that the defendant acted in the “heat of passion” and “before there is time for his passion to cool”, which may be more suited for men’s than women’s violence. The New Zealand Law Commission summarised the difficulties as follows:⁴¹

Anger is the emotion most commonly associated with sudden loss of self-control. However, women who kill their violent partners tend to do so because of fear and despair, rather than anger. Although fear and despair may also affect self-control, they are less likely to lead to a sudden explosive reaction immediately following the provocation. Many battered defendants who kill their abusers behave in an outwardly calm and deliberate manner. More importantly, research and case law indicate that victims of domestic violence often do not react to the abuse with immediate retaliation. If there is a disparity in physical strength, it is often unsafe to meet force with force.

There have been cases where the courts have acknowledged that a loss of self-control may not follow immediately upon an instance of provocative conduct, but may build up over time. In *R v Ahluwalia* the English Court of Appeal accepted that a time lapse between the

⁴¹ New Zealand Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend, A discussion paper* at 29.

provocation and the assault should not negative, as a matter of law, the claim of provocation, because:⁴²

[W]omen who have been subjected frequently over a period to violent treatment may react to the final act or words by...a “slow-burn” reaction rather than by an immediate loss of self-control.

Whether the defendant had in fact lost self-control was an issue in *R v Thornton*. That case was an appeal against a murder conviction on the basis that Ms Thornton acted under provocation (the abusive acts of her husband towards her over the course of their marriage). Trial counsel had not argued provocation, because on her own evidence, Ms Thornton did not lose self-control. The first appeal was dismissed, on the basis that provocation was only available where there was a loss of self-control.⁴³ However, her second appeal was allowed, on the basis that fresh evidence was available which suggested that her statements to the effect that she had not lost self-control may have been unreliable because of her mental state at the time.⁴⁴ Admitting expert evidence on the typical response patterns of battered women to provocation, and the ways in which abuse has affected the defendant and how that might explain her behaviour, could assist juries to assess whether the defendant in fact lost self-control.

Was the provocation sufficient to induce an ordinary person (of the community to which the accused belongs) to lose self-control?

The courts have been willing to accept that when there has been cumulative provocation (a series of abusive acts over a long period of time); a reasonably minor incident may provide the “last straw”. In these circumstances, when assessing the sufficiency of the provocation to induce loss of self-control in an ordinary person, the provocation should be looked at in its entirety, rather than relying only on the final triggering incident.⁴⁵

4 Diminished Responsibility

The partial defence of diminished responsibility is provided for by s 196A of the Penal Code:

- (1) Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his

⁴² *R v Ahluwalia* [1993] 96 Cr App R 133 at 139.

⁴³ *R v Thornton* [1993] 96 Cr App R 112 at 117–119.

⁴⁴ *R v Thornton (No 2)* [1996] 2 Cr App R 108 at 115–116.

⁴⁵ *R v Ahluwalia* [1993] 96 Cr App R 133; *R v Pita* (1989) 4 CRNZ 660, 665–666 (CA); *R v Osland* (1988) 159 ALR 170, 185 (HC); *R v Humphreys* [1995] 4 All ER 1008 (CA); *Muy Ky Chhay* (1994) 72 A Crim R 1, 13–14 (NSW).

mental responsibility for his acts and omissions in doing or being a party to the killing.

- (2) On a charge of murder it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.
- (3) A person who but for this section would be liable to be convicted of murder shall be liable instead to be convicted of manslaughter. In such a case the court instead of or in addition to inflicting any punishment which it may inflict on a conviction for manslaughter, may order the convicted person to be detained in custody during the President's pleasure and thereafter he shall be detained in such custody as the President shall from time to time direct.
- (4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it.

Battered women's syndrome,⁴⁶ post-traumatic stress disorder,⁴⁷ depression,⁴⁸ and a personality disorder (in cases where the woman has suffered abuse over her lifetime)⁴⁹ have all been accepted as founding a defence of diminished responsibility where a battered defendant has killed her abuser. Evidence from a psychiatrist or psychologist is required to establish that the defendant was suffering from a condition which can be considered an 'abnormality of mind' for the purposes of the defence. It is usually helpful for an expert to interview the defendant at an early stage. Medical evidence from an expert may have supported a defence of diminished responsibility in the case of *Labiche v Republic*.

While the difficulties of establishing self-defence and provocation (outlined earlier) make it desirable to put forward a defence of diminished responsibility in suitable cases, diminished responsibility has been criticised for medicalising the effects of abuse, and pathologising the defendant rather than the situation:⁵⁰

Unless they fall within the narrow parameters of the defences of self-defence or provocation, the actions of these women can be categorised by the criminal law only as either bad or mad; they do not qualify as reasonable responses to unreasonable situations. Unless these women behave as the reasonable man would, by fighting back or by walking out, the law has shown itself unwilling

⁴⁶ *R v Hobson* [1998] 1 Cr App R 31 (CA); *R v Lawrenson* [2004] 1 Cr App R (S) 5; *R v Fell* [2000] 2 Cr App R (S); *R v Thornton (No 2)* [1996] 2 Cr App R 108;

⁴⁷ *R v Lawrenson* [2004] 1 Cr App R (S) 5.

⁴⁸ *R v Lawrenson* [2004] 1 Cr App R (S) 5; *R v Fell* [2000] 2 Cr App R (S); *R v Ahluwalia* [1993] 93 Cr App R 133.

⁴⁹ *R v Lawrenson* [2004] 1 Cr App R (S) 5; *R v Thornton (No 2)* [1996] 2 Cr App R 108.

⁵⁰ Felicity Kaganas "Domestic Homicide, Gender and the Expert" in M Richards, S Day-Clater and A Bainham (eds) *Body Lore and Laws: Essays on Law and the Human Body* (Hart Publishing, Oxford, 2002)

to excuse or exonerate their behaviour. Their principal recourse has been to seek to show that they suffer from some abnormality of mind...

In that event, battered women's actions become explicable through science and excusable in law. But the price of this is the marginalization of women's experiences and their designation as 'mad'.

Self-defence is a justification: It says that the defendant's conduct was right in the circumstances. Provocation is an excuse: It is a concession to ordinary, understandable, human frailty. That the defence most readily available to battered defendants requires them to prove abnormality, and the readiness of psychiatry and psychology to describe the normal effects of abuse as abnormality, demonstrates the gender bias in both law and psychiatry and psychology.

There are several options for addressing these issues.

One option for the Courts, when accepting a claim of diminished responsibility, is to emphasise that the state of mind and the actions of the defendant were understandable in the circumstances, and a result of unacceptable conduct by the deceased. Comments of this kind could display insight into the woman's experience and denounce domestic violence as a social problem, while still holding her accountable for taking a life.

A second option is to develop self-defence and provocation in ways that accommodate the situations of battered defendants, so that they do not have to rely on diminished responsibility as often.

A third option (following jurisdictions such as New Zealand) is to introduce a sentencing discretion for murder, which would allow the sentencing Judge to take the abuse into account as a mitigating factor, and impose a substantially reduced sentence. This would reduce the need for battered defendants to rely on the partial defences of provocation and diminished responsibility.

This would be a big change to the law of Seychelles, but it could be one well worth considering.

B Protecting Vulnerable Witnesses: Reforms to the Rules of Evidence in Criminal Cases

The extreme distress of a complainant giving evidence in a rape case and reliving the trauma of the ordeal in the witness box, can be seen in the Courtroom at any time. It is not an uncommon occurrence, and it is done in

the name of justice. But there can be no justice in a practice which brutalises the victim of a crime in a way which is repugnant to all civilised persons.⁵¹

There are some measures which England and Wales and other jurisdictions have adopted in order to ease the trauma and distress of giving evidence for rape complainants and other vulnerable witnesses. One of these measures, the option of giving evidence in an alternative way, is already a possibility under the Seychelles Evidence Act. Ways in which it could be made more effective are discussed in this Chapter. Three other measures (prohibiting the accused from personally cross-examining the complainant, statutory limitations on the admission of sexual history evidence, and the removal of the requirement to give a corroboration warning in respect of children's evidence) are also discussed in this Chapter. They are potential reforms to Seychelles law to protect vulnerable witnesses, the majority of whom are women and children in sexual and family violence cases. Providing better protection to vulnerable witnesses is necessary for Seychelles to meet its obligations under the SADC Gender and Development Protocol.

1 Alternative Ways of Giving Evidence

Allowing witnesses to give evidence in alternative ways, for example from behind a screen or via closed-circuit television, can help them feel more comfortable, which can minimise their distress and allow them to give their best evidence. It can reduce any feelings of intimidation from the presence of the accused, and make it easier to discuss the often very traumatic and intimate details of the incidents forming the basis of the charges.

(a) Existing statutory provisions

Section 11B of the Evidence Act (Cap 74) allows for "special arrangements" for the evidence of vulnerable witnesses. It reads as follows:

(1) In this section –

"special arrangement" means an arrangement for –

- (a) evidence of a witness to be given outside the courtroom and simultaneously transmitted to the courtroom by means of closed circuit-television;
- (b) obscuring a witness' view of a party to whom the evidence of the witness relates or any other person who might intimidate or otherwise cause distress to the witness while allowing the witness to be seen and heard by the court and the parties to the proceedings by allowing the witness to give evidence behind a screen, partition or one-way glass;

⁵¹ EW Thomas "Was Eve Merely Framed; or Was She Forsaken?" [1994] NZLJ 368 at 372.

(c) a witness to be accompanied by a relative or friend for the purpose of providing emotional support to the witness but where the relative or friend is visible to and can be heard by the court and all parties to the proceedings;

“vulnerable witness” means –

- (a) a witness who is under the age of 16 years;
- (b) a witness who suffers from an intellectual disability;
- (c) a witness who is the alleged victim of a sexual offence to which the proceedings relate;
- (d) a witness who is, in the opinion of the court, at some special disadvantage because of the circumstances of the case, or the circumstances of the witness.

(2) Where the court is of the opinion that it is desirable and practicable that special arrangement be made for the taking of evidence from a vulnerable witness –

- (a) to protect the witness from embarrassment or distress;
- (b) to protect the witness from being intimidated by the atmosphere of the courtroom;
- (c) for any other proper reasons,

and that the special arrangement would not prejudice a party to the proceedings the court may, subject to this section, make an order accordingly.

(3) Where, on a trial by jury, the court makes an order under subsection (2), the judge shall warn the jury not to draw from that fact any inference adverse to an accused and not to allow it to influence the weight to be given to the evidence of the witness in respect of whom the order was made.

(4) The court may, of its own motion or on the application of a party to the proceeding or the witness, vary or revoke an order made under subsection (2).

(b) Putting the statutory provisions into practice

(i) Responsibilities of prosecutors

In order for this section to be used effectively, prosecutors need to meet with witnesses and/or their caregivers in good time before the hearing, explain the different options for giving evidence, and consult the witness on their preference. An application must then be made to the Court prior to the hearing, to allow the Court to consider the matter and, if the application is granted, to allow the practical arrangements for an alternative way of giving evidence to be made.

In some jurisdictions, prosecutors have been reluctant to allow vulnerable witnesses to make use of alternative ways of giving evidence. There has been a concern that if a witness shows less emotional distress when giving evidence, he or she may be considered less credible by the jury. On the other hand, a witness who is too distressed or intimidated to give a full account of the incident and to withstand cross-examination will also come across as less credible. From a tactical perspective, this is a dilemma for prosecutors. However, the decision may be easier if the well-being of the witness and the need to respect his or her wishes about the way in which evidence is taken are given a central place in the decision-making process.

(ii) Responsibilities of judges

In New Zealand, more statutory guidance than in Seychelles is provided to assist the Court in deciding whether it is appropriate to grant an application for a witness to give evidence in an alternative way. The factors for judges to take into account (under s 103(3) of the Evidence Act 2006) are:

- (a) the age or maturity of the witness:
- (b) the physical, intellectual, psychological, or psychiatric impairment of the witness:
- (c) the trauma suffered by the witness:
- (d) the witness's fear of intimidation:
- (e) the linguistic or cultural background or religious beliefs of the witness:
- (f) the nature of the proceeding:
- (g) the nature of the evidence that the witness is expected to give:
- (h) the relationship of the witness to any party to the proceeding:
- (i) the absence or likely absence of the witness from New Zealand:
- (j) any other ground likely to promote the purpose of the Act.

Section 103(4) of the Act provides that judges must have regard to:

- (a) the need to ensure –
 - (i) the fairness of the proceeding; and
 - (ii) in a criminal proceeding, that there is a fair trial; and
- (b) the views of the witness and –
 - (i) the need to minimise the stress on the witness; and
 - (ii) in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offence; and
- (c) any other factor that is relevant to the just determination of the proceeding.

Directing the jury that no inference should be drawn from the fact that a witness is giving evidence in an alternative way (as required by s 11B(3) of the Seychelles Evidence Act) is one way to guard against unfairness to an accused.

Seychelles could consider whether an expanded s 11B, along the lines of the New Zealand provision, would provide useful guidance to counsel making applications for alternative ways of giving evidence and for the Court when considering them.

2 *Cross-Examination by an Accused in Person*

Allowing defendants to personally cross-examine vulnerable witnesses can make cross-examination particularly traumatic for them, and prevent them from giving their best evidence. This issue arises in cases where the defendant is self-represented. Some jurisdictions have a statutory prohibition on cross-examination of complainants of certain offences and other vulnerable witnesses by the accused in person. Rather than allowing an accused to conduct the cross-examination of vulnerable witnesses personally, a lawyer must be appointed to conduct the cross-examination, or the questions must be put by another person (usually the Judge, who has the discretion to “edit” the questions to ensure they are appropriate).

For example, section 34 of the Youth Justice and Criminal Evidence Act 1999 (England and Wales) reads as follows:

No person charged with a sexual offence may in any criminal proceeding cross-examine in person a witness who is the complainant, either –

- (a) in connection with that offence, or
- (b) in connection with any other offence (of whatever nature) with which that person is charged in the proceedings.

Section 35 extends this protection further, to prevent cross-examination by an accused in person of a “protected witness”. Section 35 states:

- (1) No person charged with an offence to which this section applies may in any criminal proceedings cross-examine in person a protected witness, either –
 - (a) in connection with that offence, or
 - (b) in connection with any other offence (of whatever nature) with which that person is charged in the proceedings.
- (2) For the purposes of subsection (1) a ‘protected witness’ is a witness who –
 - (a) either is the complainant or is alleged to have been a witness to the commission of the offence to which this section applies, and
 - (b) either is a child or falls to be cross-examined after giving evidence in chief (whether wholly or in part) –
 - (i) by means of a video recording made (for the purposes of section 27) at a time when the witness was a child, or
 - (ii) in any other way at any such time.

- (3) The offences to which this section applies are –
 - (a) any offence under –
 - (i) the Sexual Offences Act 1956,
 - (ii) the Indecency with Children Act 1960,
 - (iii) the Sexual Offences Act 1967,
 - (iv) section 54 of the Criminal Law Act 1977,
 - (v) the Protection of Children Act 1978,
 - (vi) Part 1 of the Sexual Offences Act 2003.
 - (b) kidnapping, false imprisonment or an offence under section 1 or 2 of the Child Abduction Act 1984;
 - (c) any offence under section 1 of the Children and Young Persons Act 1933;
 - (d) any offence (not within any of the preceding paragraphs) which involves an assault on, or injury or a threat of injury to, any person.
- (4) In this section ‘child’ means –
 - (a) where the offence falls within subsection (3)(a), a person under the age of 17; or
 - (b) where the offence falls within subsection 3(b), (c), or (d), a person under the age of 14.
- (5) For the purposes of this section ‘witness’ includes a witness who is charged with an offence in the proceedings.

New Zealand also has protection against cross-examination by an accused in person of vulnerable witnesses. Section 95(1) of the Evidence Act 2006 (New Zealand) covers a wider range of offences than the corresponding English provision:

A defendant in a criminal proceeding that is a sexual case or a proceeding concerning domestic violence or harassment is not entitled to personally cross-examine –

- (a) a complainant;
- (b) a child (other than a complainant) who is a witness, unless the Judge gives permission.

Section 95 also sets out factors to be taken into account when making an order preventing cross-examination in person of a witness who does not fall within s 95(1):

- (2) In a civil or criminal proceeding, a Judge may, on the application of a witness, or a party calling a witness, or on the Judge’s own initiative, order that a party to the proceeding must not personally cross-examine the witness.

(3) An order under subsection (2) may be made on 1 or more of the following grounds:

- (a) the age or maturity of the witness:
- (b) the physical, intellectual, psychological, or psychiatric impairment of the witness:
- (c) the linguistic or cultural background or religious beliefs of the witness:
- (d) the nature of the proceeding:
- (e) the nature of the proceeding:
- (f) any other grounds likely to promote the purpose of the Act.

(4) When considering whether or not to make an order under subsection (2), the Judge must have regard to –

- (a) the need to ensure the fairness of the proceeding and, in a criminal proceeding, that the defendant has a fair trial; and
- (b) the need to minimise the stress on the complainant or witness; and
- (c) any other factor that is relevant to the just determination of the proceedings.

Further, section 95 sets out the procedure to be followed when the accused may not personally cross-examine the complainant or witness:

(5) A defendant or party to a proceeding who, under this section, is precluded from personally cross-examining a witness may have his or her questions put to the witness by –

- (a) a lawyer engaged by the defendant; or
- (b) if the defendant is unrepresented and fails or refuses to engage a lawyer for the purpose within a reasonable time specified by the Judge, a person appointed by the Judge for the purpose.

(6) In respect of each such question, the Judge may –

- (a) allow the question to be put to the witness; or
- (b) require that the question be put to the witness in a form rephrased by the Judge; or
- (c) refuse to allow the question to be put to the witness.

Seychelles could consider adopting a similar provision to the English or New Zealand statutory prohibitions on cross-examination by an accused in person of vulnerable witnesses. Doing so would offer better protection to these witnesses, and ensure that they are able to give their best evidence at trial, which is in the interests of justice. Consideration would need to be given to the most appropriate way to conduct cross-examination when an accused is self-represented. Whether a lawyer should be appointed for the purposes of cross-

examination, or the judge should put questions to the witness on behalf of the accused, would depend in part on what is feasible in the conditions under which trials operate in Seychelles.

3 *Admissibility of Sexual History Evidence*

Cross-examination of complainants in sexual cases about their past sexual behaviour has been the subject of much concern across jurisdictions. It is a difficult area of law, and one which has been the subject of a great deal of debate. However, there are some areas of agreement:⁵²

A number of replicated findings and commonly held perspectives may be distilled from the significant literature on this topic:

1. Complainants consider it distressing, irrelevant, embarrassing, unfair and distracting to be asked about their previous sexual experience. Complainant distress impacts on the quality of evidence they are able to give. The fact that victims of sexual offences know they are likely to be asked about their sexual experience may well be a factor in low reporting rates.
2. Admission of evidence concerning a complainant's sexual history makes it more likely the fact-finder will attribute blame to the complainant and less likely they will consider the accused's conduct criminal. (This is more likely to occur when the evidence concerns the complainant's sexual history with the defendant...) The prejudice arising from such evidence cannot be meaningfully countered by a direction from the judge, nor does it appear that 'limited use' directions are an effective way of ensuring that the evidence is used by the jury only for specific purposes (for example, to assist the decision about belief in consent and not for the impermissible purpose of informing jury opinion about the credibility of the complainant).
3. The admission of sexual history evidence has traditionally not been appropriately controlled in the absence of a specific rule (that is, subjecting the evidence to a relevance requirement has not been sufficient to prevent the admission of irrelevant and highly prejudicial sexual history evidence).
4. Rape shield provisions that allow for the exercise of judicial discretion ... may be a less effective way of preventing the introduction of irrelevant and prejudicial sexual history evidence. Category-based exclusion provisions are arguably more effective yet are more open to challenge on the basis of potential or actual unfairness to an accused.

⁵² Elisabeth McDonald and Yvette Tinsley "Reforming the rules of evidence in cases of sexual offending: thoughts from Aotearoa/New Zealand" (2011) 15 Int'l J Evidence & Proof 311 at 321–322.

This section outlines the current position in Seychelles and options for reform which Seychelles may wish to consider.

(a) The current position

The law governing the admission of sexual history evidence in Seychelles is the English common law as at 1968. It should be noted from the outset that English law has moved on considerably since 1968, as knowledge about sexual violence has increased and attitudes towards women and sexuality have changed. However, at common law, evidence of the complainant's sexual history could be relevant to two issues: her credibility as a witness, and the likelihood that she consented to intercourse. These are discussed in turn.

(i) Relevance to credit

At common law, complainants could be cross-examined on their sexual history in order to determine whether they should be believed under oath. This only applied to complainants in sexual cases; the sexual history of other witnesses has never been considered relevant to their credibility.

McGolgan summarised the main criticism of admitting sexual history evidence as relevant to credibility in the following way:⁵³

There is no logical link between sexual behaviour and truthfulness *per se*... It seems, rather, that the perceived relevance of sexual history is to the complainant's *moral*, rather than to her *probative* credibility. The distinction is drawn by Adrian Zuckerman: *probative* credibility relates to the truth-value of a witness's testimony, *moral* credibility to his or her standing as a person. Sexual history evidence is used to attack complainants' *moral* credibility: 'to suggest that the morality and humanity of the witness is so inferior that no verdict can be based on (her) testimony... to "show the complainant to be so morally inferior as either not to deserve the court's sympathy or not to provide a suitable foundation for punishing the accused."⁵⁴

(ii) Relevance to consent

At common law, the complainant's sexual history was not considered relevant to the issue of consent "unless it went to show that the complainant was a prostitute, or of 'notoriously immoral character', or if it related to sexual intercourse with the defendant himself."⁵⁵

⁵³ Aileen McColgan "Common Law and the Relevance of Sexual History Evidence" (1996) 16 Oxford J Legal Stud 275 at 281, citing Adrian Zuckerman *The Principles of Criminal Evidence*.

⁵⁴ Paul Roberts and Adrian Zuckerman *Criminal Evidence*, (2nd ed) Oxford University Press, Oxford, 2010)

⁵⁵ Aileen McColgan "Common Law and the Relevance of Sexual History Evidence" (1996) 16 Oxford J Legal Stud 275 at 281–282.

Roberts and Zuckerman criticised the logic employed in deciding that sexual history evidence may be relevant to consent in those circumstances:⁵⁶

Over the years some strange notions of relevance became embedded in the common law. For example, it was assumed that evidence of prostitution diminishes the credibility of a rape complainant and increases the probability that intercourse was consensual, when on a dispassionate appraisal; one might expect prostitutes to be the last people to make false allegations of rape, since sending customers to gaol can hardly be good for business. Equally, a promiscuous person is not the most likely to concoct a false accusation of rape in order to protect her reputation, nor would one particularly expect a sexually experienced person (as opposed to a shrinking violet with no previous sexual history to exploit) to be overcome by shame or remorse into falsely accusing her partners of rape. All-too-frequently, it would appear, the real purpose of such cross-examination was to suggest that the complainant was herself too morally flawed to deserve the court's sympathy or justify punishing the accused.

The remainder of this section outlines options for reform which have been adopted or considered by England and Wales and other jurisdictions, and which would go some way to addressing these issues.

(b) Requirement to seek leave of the Judge

The English law on admissibility of sexual history evidence was amended by section 2 of the Sexual Offences (Amendment) Act 1976. Section 2 did not change the common law rules on relevance, but was an attempt to control the admission of irrelevant sexual history evidence at trial, by requiring parties to articulate the reasons the evidence was argued to be relevant and seek leave of the judge to adduce it. It read as follows:

- (1) If at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant.
- (2) The judge shall not give leave in pursuance of the preceding subsection for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked.

⁵⁶ Roberts and Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 443–444.

- (3) In subsection (1) of this section "complainant" means a woman upon whom, in a charge for a rape offence to which the trial in question relates, it is alleged that rape was committed, attempted or proposed.
- (4) Nothing in this section authorises evidence to be adduced or a question to be asked which cannot be adduced or asked apart from this section.

Section 2 was criticised for failing to control the admission of sexual history evidence, because it had no impact on when evidence might be considered relevant. Accordingly, evidence about the complainant's past sexual behaviour was very often considered relevant and readily admitted on the grounds that it would be unfair to the defendant to exclude relevant evidence. Section 2 was replaced by a category-based inclusion provision, s 41 of the Youth Justice and Criminal Evidence Act 1999.

(c) Category-based inclusion provisions

Section 41 of the Youth Justice and Criminal Evidence Act 1999 (England and Wales) reads as follows:

- (1) If at trial a person is charged with a sexual offence, then, except with the leave of the court –
 - (a) no evidence may be adduced, and
 - (b) no question may be asked in cross-examination, by or on behalf of any accused at trial, about any sexual behaviour of the complainant.
- (2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied –
 - (a) that subsection (3) or (5) applies, and
 - (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.
- (3) This subsection applies if the evidence or question relates to a relevant issue in the case and either –
 - (a) that issue is not an issue of consent; or
 - (b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the incident which is the subject matter of the charge against the accused; or

- (c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar –
 - (i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or
 - (ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event, that the similarity cannot reasonably be explained as a coincidence.
- (4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.
- (5) This subsection applies if the evidence or question –
 - (a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and
 - (b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

This provision was intended to remove much of the trial judge's discretion on the question of the relevance and probative value of sexual history evidence. Under s 41, sexual history evidence will not be admitted if its purpose or main purpose appears to be impugning the credibility of the complainant. Sexual history evidence will only be admitted on the issue of consent if it took place at or about the same time as the incident to which the charge relates or is strikingly similar. Further, evidence of this kind will only be admitted if excluding it might render unsafe a conclusion of the jury or the court on an issue in the case.

However, s 41 has been criticised as infringing on the defendant's right to a fair trial. It has been argued that the relevance and probative value of any piece of evidence should be determined contextually, rather than subject to categorical rules. The fetter on judicial discretion has been argued to result in the exclusion of evidence which could reasonably change the mind of jurors or the court, and so denies the defendant the right to a fair trial. In fact, the English courts have read s 41 loosely, to allow them to continue to exercise discretion.

(d) Heightened relevance

An option for reform which would allow trial judges to make contextual assessments of the relevance and probative value of the evidence in question, but would still offer complainants more protection than was available at common law, would be the adoption of a heightened relevance test.

Section 44 of New Zealand's Evidence Act 2006 is an example of this type provision:

- (1) In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the Judge.
- (2) In a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the reputation of the complainant in sexual matters.
- (3) In an application for permission under subsection (1), the Judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it.
- (4) The permission of the Judge is not required to contradict evidence given under subsection (1).
- (5) In a sexual case in which the defendant is charged as a party and cannot be convicted unless it is shown that another person committed a sexual offence against the complainant, subsection (1) does not apply to any evidence given, or any question that relates directly or indirectly to the sexual experience of the complainant with that other person.
- (6) This section does not authorise evidence to be given or questions to be put that could not be given or put apart from this section.

Section 44 only applies to evidence of the complainant's sexual experience with a person other than the accused. There is concern about the prejudice to complainants caused by admitting evidence of their sexual experience with the accused. When this evidence is admitted, less responsibility tends to be attributed to the accused and more to the complainant, denying the complainant the right to decide on each and every occasion whether or not she consents to sexual activity.

The Australian Law Commission proposed a heightened relevance provision that would cover sexual experience both with the accused and with any other person, and which provides guidance on the way in which judges should exercise their discretion:⁵⁷

Complainants of sexual assault must not be cross-examined in relation to, and the court must not admit any evidence of, the sexual reputation of the complainant.

The complainant must not be cross-examined, and the court must not admit any evidence, as to the sexual activities – whether consensual or non-consensual – of the complainant, other than those to which the charge relates, without leave of the judge.

The judge must not grant leave unless the judge is satisfied that the evidence has significant probative value and that it is in the interests of justice to allow the cross-examination or to admit the evidence, after taking into account:

- (a) the distress, humiliation and embarrassment that the complainant may experience as a result of the cross-examination or the admission of the evidence, in view of the age of the complainant and the number and nature of the questions that the complainant is likely to be asked;
- (b) the risk that the evidence may arouse discriminatory belief or bias, prejudice, sympathy or hostility;
- (c) the need to respect the complainant's personal privacy;
- (d) the right of the defendant to fully answer and defend the charge; and
- (e) any other relevant matter.

The type of provision which would be most suitable for Seychelles is a complex issue, which it would be useful to consider further.

4 Corroboration Warnings

In *Lucas v Republic*,⁵⁸ the Seychelles Court of Appeal held that it is not mandatory for a judge to give a warning that it is dangerous to convict on the uncorroborated evidence of a complainant in a sexual case. This decision is in line with contemporary English law. From a gender equity perspective, the decision is welcome. The requirement to give a corroboration warning in respect of the evidence of complainants in sexual cases treated those complainants differently from other witnesses, on the basis of discriminatory reasoning. As the Court in *Lucas* noted:

⁵⁷ Australian Law Reform Commission *Family Violence- A National Legal Response* (2010) at 1242.
⁵⁸ SCA 17/09; 2 September 2011.

- 25) The corroboration warning is viewed by many as misogynistic in conception. In *Conoway v State*, 156 S.E. 664, 666 (Ga. 1931), Russell C.J. speaking of the corroboration warning stated that it was “expounded in a remote age when woman was considered little more than a chattel, and presumed, unless she was corroborated, to have been willing to engage in sexual intercourse almost upon suggestion.” It perpetuates an archaic and unjustified stereotype of women and is highly insulting because it is based on “the folkloric assumption that women are by nature peculiarly prone to malice and mendacity and particularly adept at concealing it.”
- 26) In the Preamble to our Constitution we have recognized the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation for freedom and justice and declared to uphold the rule of law based on the recognition of the fundamental human rights and freedoms enshrined in the Constitution and on respect for the equality and dignity of human beings. Article 27 of the Constitution states:
- 27) (1) Every person has a right to equal protection of the law including the enjoyment of the rights and freedoms set out in this Charter without discrimination on any ground except as is necessary in a democratic society.
- (2) Clause (1) shall not preclude any law, programme or activity which has as its object the amelioration of the conditions of disadvantaged persons or groups.

To say that every complainant in a sexual offence case is less worthy of belief than another witness is an affront to their dignity and violates the right guaranteed under article 27(1) of the Constitution...

A further consideration for Seychelles is whether the requirement to give a corroboration warning in respect of children’s evidence should also be removed. This is a particular issue in the case of child complainants in sexual cases. The body of psychological evidence suggests that children’s evidence is no less reliable than adult’s evidence, but rather that it is important to pay attention to the way in which the evidence was obtained.⁵⁹

Other jurisdictions have responded to this evidence by removing the requirement to give a corroboration warning in respect of children’s evidence. For example, s 125 of New Zealand’s Evidence Act 2006 reads as follows:

⁵⁹ See the discussion in Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (2nd ed, Brookers, Wellington, 2010) at 324.

- (1) In a criminal proceeding tried with a jury in which the complainant is a child at the time when the proceeding commences, the Judge must not give any warning to the jury about the absence of corroboration of the evidence of the complainant if the Judge would not have given that kind of a warning had the complainant been an adult.
- (2) In a proceeding tried with a jury in which a witness is a child, the Judge must not, unless expert evidence is given in that proceeding supporting the giving of the following direction or the making of the following comment:
 - (a) instruct the jury that there is a need to scrutinise the evidence of children generally with special care; or
 - (b) suggest to the jury that children generally have tendencies to invent or distort.
- (3) This section does not affect any other power of the Judge to warn or inform the jury about children's evidence exercised in accordance with the requirements of regulations made under section 201.

Regulation 49 of the Evidence Regulations 2007 (NZ) applies to the evidence of children under six years of age:

If, in a criminal proceeding tried with a jury in which a witness is a child under the age of 6 years, the Judge is of the opinion that the jury may be assisted by a direction about the evidence of very young children and how the jury should assess that evidence, the Judge may give the jury a direction to the following effect:

- (a) even very young children can accurately remember and report things that have happened to them in the past, but because of developmental differences, children may not report their memories in the same way or to the same extent as an adult would:
- (b) this does not mean that a child witness is any more or less reliable than an adult witness:
- (c) one difference is that very young children typically say very little without some help to focus on the events in question:
- (d) another difference is that, depending on how they are questioned, very young children can be more open to suggestion than other children or adults:
- (e) the reliability of the evidence of very young children depends on the way they are questioned, and it is important, when deciding how much weight to give to their evidence, to distinguish between open questions aimed at

obtaining answers from children in their own words from leading questions that may put words in their mouths.

A possible reform to the way in which children's evidence is dealt with by the courts should be part of a larger discussion about legislative reforms required to modernise the law of evidence in Seychelles to ensure that it provides adequate protection for vulnerable witnesses, including complainants in sexual cases and child complainants.



Ministry of Social Affairs, Community Development and Sports
Gender Secretariat
Republic of Seychelles

ISBN: 978-99931-824-6-7