

# *Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand*

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## *Abstract*

This article takes stock of what is happening in the defence of battered women who are charged with homicide across three jurisdictions — Australia, Canada and New Zealand. In Part II, we briefly outline the current legal requirements for the most relevant defences in all three jurisdictions, with a focus on those legal developments that are likely to assist in the defence of battered women. In Part III, we examine general trends in how homicide cases involving accused battered women were resolved in the three jurisdictions from 2000 to 2010. This analysis suggests that further work is needed to improve the legal response to these kinds of cases, but that the changes needed are not necessarily in the area of statutory reform.

## **I Introduction**

In the last two decades there has been a great deal of advocacy and law reform intended to improve the criminal justice response to intimate partner homicides. While the need to accommodate battered women better was not the exclusive impetus for law reform, this was a key focus of reforms in several countries. However, the reforms adopted have not been uniform and a comparative analysis of Australian states and territories, New Zealand and Canada demonstrates a disparate array of defences and partial defences, with different technical requirements. Our purpose here is to examine what is happening in the defence of battered women who are charged with homicide across three jurisdictions — Australia, Canada and New Zealand.<sup>1</sup>

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<sup>1</sup> Our review is necessarily constrained. A more comprehensive review is timely and has been recommended in the Australian Law Reform Commission (ALRC) and New South Wales Law Reform Commission (NSWLRC), *Family Violence — A National Legal Response*, Report No 114/128 (2010) 650, [14.96]–[14.97].

In Part II, we set out the defences that are likely to be relevant in homicide cases involving accused battered women. As well as the statutory requirements of the various defences, we provide examples of key areas where the common law has taken a sympathetic or narrow interpretation of these requirements or their application. Where possible, we draw on cases that have been determined since key reforms to reflect on how the reforms have been given effect. This approach was not always possible given that some reforms are very recent and homicide cases are relatively infrequent. In Part III, we provide a brief overview of general trends in the resolution of homicide cases involving battered women defendants in Australia, Canada and New Zealand — in terms of both processes and outcomes — and draw some brief conclusions.

## II Relevant Defences in Australia, Canada and New Zealand

Battered women face numerous obstacles to raising self-defence in homicide cases. Some of these obstacles also arise with respect to partial defences. In this section we analyse the current legal requirements for the most relevant defences in all three jurisdictions, with a focus on those legal developments most likely to assist in the defence of battered women.

The essence of self-defence is that the accused's life or physical wellbeing was seriously threatened and she had no legal means of defusing that threat. As a consequence, she was forced to resort to violent self-help, using only that amount of force needed to effectively remove the threat.<sup>2</sup>

The (implicit) requirement that the accused be defending herself against an 'imminent' attack rules self-defence out for many women who could not take their perpetrator on in hand to hand combat — without risk of death or serious injury — and therefore used stealth or surprise to avoid that possibility.<sup>3</sup> Another obstacle is that expert evidence on Battered Woman Syndrome ('BWS') is often interpreted by the Crown, judges and juries as explaining the woman's subjective state of mind but not the state of mind of a reasonable person in her position. BWS evidence attempts to explain why the woman reasonably perceived herself to be trapped in the violent relationship, under a particularly dangerous threat and unable to defuse the threat by legal means. In other words, even if the expert gives evidence that the woman's response was a *normal or reasonable* response to having lived through her abusive circumstances, the testimony may be understood as explaining why she had an *unreasonable* but *understandable over-reaction* to her circumstances.<sup>4</sup> This is part of a deeper struggle to communicate to judges and jurors what it is to experience a profound emotional bond and severe trauma

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<sup>2</sup> As this article is about defences for battered women, feminine pronouns have been used throughout to refer generically to 'the accused' or 'the defendant'.

<sup>3</sup> See, eg, Rebecca Bradfield, 'Is Near Enough Good Enough? Why isn't Self-Defence Appropriate for the Battered Woman?' (1998) 5 *Psychiatry, Psychology and Law* 71, 76–7; Nan Seuffert, 'Battered Women and Self-Defence' (1997) 17 *New Zealand Universities Law Review* 292, 299–300; Patricia Eastal, *Less Than Equal — Women and the Australian Legal System* (Butterworths, 2001) ch 3.

<sup>4</sup> Elizabeth Sheehy, Julie Stubbs and Julia Tolmie 'Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations' (1992) 16 *Criminal Law Journal* 369.

concurrently and cumulatively over the passage of time, as well as to illuminate the structural constraints of women's lives, particularly those of women embedded in dangerous relationships.<sup>5</sup> Another problem is that 'relevance' can be interpreted very narrowly. Because the threat the accused was facing is understood as the immediate attack she was responding to, courts may limit the 'context evidence' they are prepared to hear.<sup>6</sup> For example, evidence about the relationship history with the deceased if it was distant in time, or the deceased's violence towards other people, may not be considered relevant.<sup>7</sup>

In this section we provide a brief overview of what the different legal jurisdictions have done to accommodate these problems. We will first look at whether self-defence in each jurisdiction (i) retains the requirement of an 'imminent attack' and (ii) accommodates the accused's subjective beliefs about her circumstances when judging the reasonableness of her defensive response to those circumstances (thus removing the need for the defendant to convince the jury that her perceptions were entirely objectively reasonable as opposed to largely honestly held). We then look at what partial defences are available for those situations where a woman's defensive force is not considered to be legally justifiable and whether there are provisions expanding the range of evidentiary material that is admitted in these kinds of cases.

## A Self-Defence

Self-defence<sup>8</sup> is legislated in all states in Australia, in Canada and in New Zealand. In Canada, new legislation was proposed in February 2011 in response to public outcry about criminal charges against property owners who had assaulted or killed thieves and intruders. It was passed into law in June 2012.<sup>9</sup> It simplifies and consolidates the very complex law of self-defence.<sup>10</sup> The new law

<sup>5</sup> Elizabeth Schneider, 'Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman Abuse' (1992) 67 *New York University Law Review* 520.

<sup>6</sup> The relevance of context evidence, in preference to BWS, has been endorsed in a major US review: US Department of Justice and US Department of Health and Human Services, *Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials: Report Responding to Section 40507 of the Violence Against Women Act* (1996); see also Julie Stubbs and Julia Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Use of Expert Evidence on Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709; but see the jury studies reviewed in Regina Schuller, 'Expert Evidence and Its Impact on Jurors' Decisions in Homicide Trials Involving Battered Women' (2003) 10 *Duke Journal of Gender, Law and Policy* 225, which seem to suggest that any form of expert testimony — whether BWS or social context evidence — makes a difference for battered women on trial.

<sup>7</sup> See, eg, *R v Dzuiba*, (Unreported, Supreme Court of Western Australia, 27 November 2006).

<sup>8</sup> Note that the Australian Capital Territory also has a complete defence of sudden or extraordinary emergency: *Criminal Code 2002* (ACT) s 41. The defence is available if the defendant believes that circumstances of sudden or extraordinary emergency exist and that committing the offence is the only reasonable way to deal with the emergency, and the conduct is in fact a reasonable response to the emergency. The Northern Territory has a similar defence (with slightly different requirements): *Criminal Code 1983* (NT) s 43 BC.

<sup>9</sup> *Citizen's Arrest and Self-defence Act*, SC 2012, c 9.

<sup>10</sup> Canada's *Criminal Code* had numerous sections devoted to self-defence — ss 34–7. Judge Lynn Ratushny, among others, has described self-defence as one of the most technically complex of all defences: Lynn Ratushny *Self Defence Review: Final Report to the Minister of Justice and the Solicitor General of Canada*, 132–3, 150–2. For an overview of the new law see Kent Roach,

applies to any acts taken in self-defence or defence of another, including non-violent ones. It has also abandoned the language of ‘justification’, possibly opening up self-defence to those who pre-meditate homicide or engage contract killers, where self-defence as justification was arguably unavailable previously.<sup>11</sup> While the law has some other positive aspects for women, discussed below, it may worsen the situation of battered women on trial by requiring that the court consider ‘imminence’ and ‘proportionality’ in assessing whether the action taken in defence was ‘reasonable’, words that were not previously in the statutory language of self-defence.

### *Imminence*

While Western Australia (WA)<sup>12</sup> and Victoria<sup>13</sup> have provisions that expressly provide that it is *not* necessary to prove that the accused is responding to an imminent threat in self-defence (although in Victoria this relaxation is confined to cases involving family violence only), the definitions of self-defence in Queensland,<sup>14</sup> South Australia,<sup>15</sup> New South Wales (NSW),<sup>16</sup> the Northern Territory (NT),<sup>17</sup> the Australian Capital Territory (ACT),<sup>18</sup> Tasmania<sup>19</sup> and New Zealand<sup>20</sup> say nothing about whether the accused must be responding to an imminent threat. The previous definition of self-defence in Canada<sup>21</sup> was also silent on this issue and the Supreme Court of Canada ruled in 1990 and 1994 that since ‘imminence’ was not in the *Criminal Code*, it acts simply as a common sense proxy for assessing the reasonableness of the accused’s belief that she faced extreme danger and had no other reasonable way out.<sup>22</sup> The jury should consider ‘imminence’ as one factor in determining these questions. The new version of self-defence directs the court to consider, among other factors, the imminence of the force anticipated in determining whether the accused’s act was reasonable.<sup>23</sup> Australian case law also suggests that imminence is not a legal requirement but a matter to be considered in determining whether the accused’s

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‘A Preliminary Assessment of the New Self-Defence and Defence of Property Provisions’ (2012) 16 *Canadian Criminal Law Review* 247.

<sup>11</sup> See, eg, *R v Ryan*, [2011] NSJ No 157 [71], where the Nova Scotia Court of Appeal (per MacDonald CJNS) upheld Nicole Ryan’s acquittal for counselling murder on the basis of duress, noting that had she succeeded in having her former partner killed, self-defence would not be available on the basis that contract killing cannot be ‘justified’. This case is under appeal.

<sup>12</sup> *Criminal Code 1913* (WA) s 248(4)(a).

<sup>13</sup> *Crimes Act 1958* (Vic) s 9AH(1)(c). Note that under s 9AH(1)(d), in cases involving family violence the common law rule as to proportionality — that the defensive force must be proportional to the threatened harm that is being defended against — is also abolished.

<sup>14</sup> *Criminal Code 1899* (Qld) s 271(2).

<sup>15</sup> *Criminal Law Consolidation Act 1935* (SA) s 15.

<sup>16</sup> *Crimes Act 1900* (NSW) s 418.

<sup>17</sup> *Criminal Code 1983* (NT) s 43BD(2).

<sup>18</sup> *Criminal Code 2002* (ACT) s 42.

<sup>19</sup> *Criminal Code 1924* (Tas) s 46.

<sup>20</sup> *Crimes Act 1961* (NZ) s 48.

<sup>21</sup> *Criminal Code*, RSC 1985 c 46, s 34.

<sup>22</sup> *Lavallee* [1990] 1 SCR 852; *R v Pétel*, [1994] 1 SCR 3.

<sup>23</sup> *Criminal Code*, RSC 1985 c 46, ss 34(1) and (2). This was amended by the *Citizen’s Arrest and Self-defence Act*, SC 2012, c 9.

defensive force was necessary.<sup>24</sup> Furthermore, there have now been a series of cases involving battered accused where the Australian courts have been sensitive to the need to look past the question of imminent attack in deciding whether lethal defensive force was necessary in such cases.<sup>25</sup> Thus in *R v Falls*<sup>26</sup> Applegarth J said, in the context of self-defence:

[I]t doesn't matter that at the moment she shot Mr Falls in the head he didn't at that moment offer or pose any threat to her. He had assaulted her. There was the threat that there would be another one and another one and another one after that until one day something terrible happened. It might have been the next day, it might have been the next week, but the risk of death or serious injury to her was ever present.<sup>27</sup>

This approach to 'imminence' involves an entirely different enquiry — not whether the accused was facing an attack that was just about to happen, but whether the dangerous nature of her relationship meant that an attack *could* happen at any time and inevitably *would* happen at some stage in the near future.

While in New Zealand there is similarly no requirement of imminence articulated in the statutory definition of self-defence,<sup>28</sup> a more conservative approach has been taken in the case law and legal commentary<sup>29</sup> on this issue than that currently evidenced in Australia and Canada. In *R v Wang*,<sup>30</sup> a case involving a battered woman who strangled and stabbed her violent husband while he was sleeping, the New Zealand Court of Appeal stated:

In our view what is reasonable under the second limb of s 48 and having regard to society's concern for the sanctity of human life requires, where there has not been an assault but a threatened assault, that there must be immediacy of life-threatening violence to justify killing in self-defence or the defence of another.<sup>31</sup>

This approach seems to be based on a factual assumption by the court that if an attack is not imminent then it is always possible to avoid it by leaving the immediate situation, enlisting the help of friends or calling the police.<sup>32</sup> The requirement of 'imminence' is therefore seen as keeping accused persons alleging self-defence honest about the necessity of their defensive actions.<sup>33</sup> Unfortunately, while such an assumption might hold true in respect of one-off confrontational

<sup>24</sup> See *Osland v The Queen* (1998) 197 CLR 316, 382; *Zecevic v DPP* (1987) 162 CLR 645, 662 ('*Zecevic*'). ALRC and NSWLRC, above n 1, 623.

<sup>25</sup> See, eg, *R v Secretary* (1996) 86 A Crim R 119; *R v Stjernqvist* (Unreported, Queensland Supreme Court, Cairns Circuit Court, 19 June 1996); *R v Kontinnen* (Unreported, Supreme Court of South Australia, 20 March 1992).

<sup>26</sup> *R v Falls* (Unreported, Supreme Court of Queensland, Applegarth J, 2–3 June 2010) ('*Falls*').

<sup>27</sup> *Ibid* 12, 54–5.

<sup>28</sup> *Crimes Act 1961* (NZ) s 48.

<sup>29</sup> See, eg, Warren Brookbanks and A P Simester, *Principles of Criminal Law* (Brookers, 3<sup>rd</sup> ed, 2007) 476–81 for example: 'Under New Zealand law the courts, when considering the use of pre-emptive force by battered women who kill their abusers, seem to be more inclined to ask whether there was a crystallised, immediate danger that needed to be averted by instant action.'

<sup>30</sup> [1990] 2 NZLR 529 ('*Wang*').

<sup>31</sup> *Ibid* 539 (Richardson, Casey and Bisson JJ).

<sup>32</sup> *Ibid*. See also *R v Witika* [1993] 2 NZLR 424, 436.

<sup>33</sup> Brookbanks and Simester, above n 29, 478.

encounters, fuelled by high emotions, machismo or alcohol, where violence is threatened, it is *not* an assumption that is correct to make in the context of an ongoing and intimate violent relationship. Many battered women do seek aid, but the assumption that these efforts will necessarily resolve their endangerment is unfounded.<sup>34</sup> Although the need to relax the requirement of ‘imminence’ in cases involving battered women in New Zealand has been noted, the New Zealand Law Commission’s (‘NZLC’) recommendation in 2001 that ‘imminence’ be replaced with the need for an ‘inevitable’ attack<sup>35</sup> has not been enacted and New Zealand still awaits an authoritative judicial pronouncement on this point clarifying or overturning *Wang*.<sup>36</sup>

### *Objective and Subjective Tests*

In all the jurisdictions under examination, the legal test for self-defence is no longer a solely objective one. In some jurisdictions, including New Zealand, *all* the legal requirements for self-defence, *including* any determinations of reasonableness, must be assessed as though the accused’s subjective perception of her circumstances, even if mistaken, were true. Each jurisdiction has different combinations of objective determination and accommodation of the accused’s subjective beliefs for assessing the nature of the threat she faced, whether defensive force was necessary in response to that threat (ie what other resources were available to defuse it), and whether the accused used only that level of force that was needed to defend herself. For example, in measuring whether the accused’s defensive force meets the legal standards for self-defence, most jurisdictions either appraise its ‘reasonableness’ in the context of the ‘circumstances that the accused believes to exist’ (even if mistakenly) or require that the accused’s honest belief in the need for defensive force had ‘reasonable grounds’, — that is, *some* underlying rational justification.

In NSW,<sup>37</sup> Tasmania,<sup>38</sup> and New Zealand<sup>39</sup> there is no requirement that the accused be defending herself against ‘unlawful’ conduct, although it is likely that if

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<sup>34</sup> Point Research Ltd, *Report on Giving, Receiving and Seeking Help: The Campaign for Action on Family Violence* (Centre for Social Research and Evaluation, 2010) 35: ‘Most of the victims/survivors in this study had sought help from those in their informal networks at some point, but had not received it.’ Research demonstrates that police do not always respond effectively and that protection orders offer inadequate protection for many victims of domestic violence: Clare Connelly and Kate Cavanagh, ‘Domestic Abuse, Civil Protection Orders and the “New Criminologies”: Is There Any Value in Engaging with the Law?’ (2007) 15 *Feminist Legal Studies* 259; L Trimboli and R Bonney, *An Evaluation of the NSW Apprehended Violence Order Scheme* (NSW Bureau of Crime Statistics and Research, 1997); A R Klein, ‘Re-Abuse in a Population of Court-Restrained Male Batterers’ in Eve S Buzawa and Carl G Buzawa (eds), *Do Arrests and Restraining Orders Work?* (Sage, 1996) 192; J Stubbs and D Powell, *Domestic Abuse: Impact of Legal Reform in NSW* (NSW Bureau of Crime Statistics and Research, 1989); R Lewis et al, ‘Protection, Prevention, Rehabilitation or Justice? Women’s Use of the Law to Challenge Domestic Abuse’ (2000) 7 *International Review of Victimology* 170; R Lewis et al, ‘Law’s Progressive Potential: The Value of Engagement with the Law for Domestic Abuse’ (2001) 10 *Social and Legal Studies* 105.

<sup>35</sup> NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report 73 (2001) 9–12.

<sup>36</sup> [1990] 2 NZLR 529.

<sup>37</sup> *Crimes Act 1900* (NSW) s 422; see also *Crawford v The Queen* [2008] NSWCCA 166.

the deceased's actions were lawful, this will render defensive force on the part of the accused unreasonable on the facts. Similarly, Canada's law does not require that the force or threat of force be unlawful, but in assessing the reasonableness of the accused's act, the court is directed to consider 'whether the act committed was in response to a use or threat of force that the person knew was lawful.'<sup>40</sup> In Victoria,<sup>41</sup> WA,<sup>42</sup> NT,<sup>43</sup> SA<sup>44</sup> and the ACT<sup>45</sup> there is a requirement that the accused be defending herself against unlawful conduct. In Queensland this requirement is even stricter: in order to raise self-defence the accused must demonstrate that she was defending herself against an unlawful and unprovoked *assault* of such a nature 'as to cause reasonable apprehension of death or grievous bodily harm'.<sup>46</sup> Indeed, Queensland is the only Australian jurisdiction that retains the need to prove that the accused was in fact responding to a specific assault objectively determined to be dangerous.<sup>47</sup>

In a number of jurisdictions, measuring whether the defensive force used by the accused was legally permissible occurs in several stages. In NSW,<sup>48</sup> the ACT,<sup>49</sup> and NT<sup>50</sup> it must be first demonstrated that the accused had an honest belief that her conduct was necessary to defend herself or another, while in SA<sup>51</sup> the accused must, in addition, honestly believe that it is 'reasonable' for these purposes. For other jurisdictions, this first limb is not entirely subjective. Thus in WA<sup>52</sup> the accused must have reasonable grounds for an honest belief that her act was necessary to defend herself or another from a harmful act. In Queensland,<sup>53</sup> as well as responding to an assault of the nature described above, the accused must have reasonable grounds for an honest belief that she could not otherwise preserve herself or another from death or serious bodily harm.<sup>54</sup> Similarly in Canada the

<sup>38</sup> *Criminal Code 1924* (Tas) s 46.

<sup>39</sup> *Crimes Act 1961* (NZ), s 48.

<sup>40</sup> *Criminal Code*, RSC 1985 c 46, s 34(2)(h).

<sup>41</sup> *Criminal Act 1958* (Vic) s 9AF— although note that the accused must know that the conduct they are responding to is unlawful.

<sup>42</sup> *Criminal Code 1913* (WA) s 248(4).

<sup>43</sup> *Criminal Code 1913* (NT) s 43 BD(3)(b).

<sup>44</sup> *Criminal Law Consolidation Act 1935* (SA) s 15(4). Although note that the person will not lose the benefit of self-defence if they 'genuinely believe on reasonable grounds that the other person is acting unlawfully'.

<sup>45</sup> *Criminal Code 2002* (ACT) s 42(3)(b).

<sup>46</sup> The definition of assault is, however, quite wide and includes 'bodily acts or gestures' understood as a threat to apply force 'under such circumstances that the person making the .. threat has actually or apparently a present ability to effect the person's purpose.' *Criminal Code 1899* (Qld) s 245(1).

<sup>47</sup> *Criminal Code 1899* (Qld) s 271(2). Note that there are different legal requirements if the assault that the accused is responding to is 'provoked' as opposed to 'unprovoked': *Criminal Code 1899* (Qld) s 272.

<sup>48</sup> *Crimes Act 1900* (NSW) s 418(2)(a).

<sup>49</sup> *Criminal Code 2002* (ACT) s 42(2)(a).

<sup>50</sup> *Criminal Code 1983* (NT) s 29.

<sup>51</sup> *Criminal Law Consolidation Act 1935* (SA) s 15(1)(a).

<sup>52</sup> *Criminal Code 1913* (WA) s 248(4)(a) and (c).

<sup>53</sup> Section 271(2), *Criminal Code 1899* (Qld) s 271(2).

<sup>54</sup> In *R v Gray* (1998) 98 A Crim R 589, at 593, McPherson JA said of this provision that

[t]he defender must believe that what he is doing is the only way he can save himself or someone else from the assault. He must hold that belief 'on reasonable grounds'; but it is the existence of an actual belief to that effect that is the critical or decisive factor. There is no

accused must have 'reasonable grounds' for the belief that she could not otherwise preserve herself from death or grievous bodily harm.<sup>55</sup> Canada's self-defence law no longer qualifies the nature or severity of the harm that must be anticipated by requiring anticipation of death or grievous bodily injury. Case law interpreting the former provision held that, while an accused may be mistaken about whether she was faced with a threat, such a mistake must be reasonable to a person in those circumstances.<sup>56</sup> The defence is now available for an accused who believes on reasonable grounds that force or the threat of force is being used or made against them or another person.

For most of these jurisdictions, the second limb of the test for self-defence contains a subjective/objective appraisal. Thus in NSW,<sup>57</sup> NT,<sup>58</sup> and the ACT<sup>59</sup> the accused's conduct must also be a 'reasonable response in the circumstances as he or she perceives them', while in SA<sup>60</sup> the conduct must, 'in the circumstances as the defendant genuinely believed them to be, be reasonably proportionate to the threat that the defendant genuinely believed to exist'.<sup>61</sup> In WA,<sup>62</sup> the accused must have some rational basis for her belief in her circumstances if those circumstances are to frame the inquiry under this second limb. Thus the defensive act must be a reasonable response by the person in the circumstances as the person believes them to be, as long as she has reasonable grounds for her beliefs. Canada now uses an objective test for this branch of self-defence by requiring that 'the act committed be reasonable in the circumstances'.<sup>63</sup> The section goes on to provide a non-exhaustive list of factors for the court to use in determining reasonableness, which indicates that the objective test is modified by the 'relevant circumstances of the person, the other parties and the act'.<sup>64</sup> The factors include 'whether there were

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additional requirement that the force used to save himself or someone else must also be, objectively speaking, 'necessary' for the defence.

In *Julian v The Queen* (1998) 100 A Crim R 430, the Queensland Court of Appeal made it clear that only the grounds for the accused's honest belief need to be reasonable; there is no requirement to show that the reasonable person would have held the same belief in the circumstances: See the discussion in Michelle Edgely and Elena Marchetti, 'Women who kill their abusers: How Queensland's new abusive domestic relationships defence continues to ignore reality' (2011) 13 *Flinders Law Journal* 125, 135–7.

<sup>55</sup> *Criminal Code*, RSC 1985, c 46, s 34(2)(b).

<sup>56</sup> *R v Pétel*, [1994] 1 SCR 3 [21]. But see *R v Cinous*, [2002] 2 SCR 3 [130] (per Binnie and Gonthier JJ) where the Court set out an outer limit in a case that did not involve a battered woman: 'Here, however, the only way the defence could succeed is if the jury climbed into the skin of the respondent and accepted as reasonable a sociopathic view of appropriate dispute resolution. There is otherwise no air of reality, however broadly or narrowly defined, to the assertion that on February 3, 1994, in Montréal, the respondent believed on reasonable grounds that he could not otherwise preserve himself from death or grievous bodily harm, as required ... The objective reality of his situation would necessarily be altogether ignored, contrary to the intention of Parliament as interpreted in our jurisprudence.'

<sup>57</sup> *Crimes Act 1900* (NSW) s 418(2).

<sup>58</sup> *Criminal Code* (NT) s 43BD(2)(b).

<sup>59</sup> *Criminal Code 2002* (ACT).

<sup>60</sup> *Criminal Law Consolidation Act 1935* (SA) s 15(1)(b).

<sup>61</sup> Although note that under *Criminal Law Consolidation Act 1935* (SA) s 15B this does not imply that the force used by the defendant cannot exceed the force used against them.

<sup>62</sup> Under 248(4)(b) and (c), *Criminal Code 1913* (WA) s 248(4)(b)–(c).

<sup>63</sup> *Criminal Code*, RSC 1985 c 46, s 34(1)(c).

<sup>64</sup> *Criminal Code*, RSC 1985 c 46, s 34(2).



other means available to respond to the potential use of force', 'the size, age, gender and physical capabilities of the parties', 'the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat', and 'any history of interaction or communication between the parties to the incident',<sup>65</sup> thus clearly making a battered woman's experience of her batterer relevant.

In Victoria, self-defence in response to murder charges requires that the accused had an honest belief on reasonable grounds that it was necessary to defend herself or another from the infliction of death or really serious injury.<sup>66</sup> Tasmania<sup>67</sup> and New Zealand have almost identically worded requirements for self-defence. In both jurisdictions an accused 'is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use'.<sup>68</sup>

Although the wording of the statute is clear, leading commentary in New Zealand tends to downplay the subjective framework within which evaluations of what is reasonable defensive force are supposed to take place, emphasising the 'objective' appraisal needed to satisfy the test for self-defence. For example, Brookbanks and Simester comment:

Of course the court must still consider the circumstances believed by the accused to exist, when determining the reasonableness of the force used. Thus evidence that the accused suffered from BWS may be relevant to determining the imminence and degree of force that the accused might have anticipated, and also as part of a response to any suggestion that the accused should simply have left the victim. However, the question whether her response was reasonable remains ultimately objective. By continually relating the issue of the accused's subjective belief back to an objective evaluation of the reasonableness of the force used in light of that belief, New Zealand's judges have sought to give proper weight to the requirements of necessity and proportionality, while not ignoring the special claims presented by these cases.<sup>69</sup>

Indeed, some New Zealand commentators have argued cogently that the wording of the legislation clearly demands *more* emphasis than is currently given to the accused's subjective appraisal of the threat that she was under and also what resources she had to deal with it — including how effective *she* believed contacting the police or leaving the relationship would be in defusing the threat.<sup>70</sup> In other words, what is reasonable defensive force can only be appraised in light of her *actual beliefs* about those issues because the resources she had, with which to deal with the threat she faced, were part of her 'circumstances'. On this view, the court in *Wang*<sup>71</sup> was erroneous in deciding that there were objectively effective

<sup>65</sup> *Criminal Code*, RSC 1985 c 46, ss 34(2) (b), (c), (f), (f.1).

<sup>66</sup> *Crimes Act 1958* (Vic) s 9AC. Self-defence in relation to manslaughter is contained in s 9AD.

<sup>67</sup> *Criminal Code 1924* (Tas) s 46.

<sup>68</sup> *Criminal Code 1924* (Tas) s 46. *Crimes Act 1961* (NZ) s 48.

<sup>69</sup> Brookbanks and Simester, above n 29, 481.

<sup>70</sup> See, eg, Fran Wright, 'The Circumstances as She Believed Them to be: A Reappraisal of Section 48 of the Crimes Act 1966' (1998) 6 *Waikato Law Review* 109.

<sup>71</sup> [1990] 2 NZLR 529.

ways of dealing with the threat in that case. It should have instead investigated the accused's beliefs about whether her circumstances presented her with effective ways of addressing the threat that she faced. This subjective emphasis is particularly significant for Indigenous or immigrant (like Wang) working class women who might not perceive themselves as having ready access to mainstream institutions and resources — including the police.<sup>72</sup>

### *Preventing or Terminating the Unlawful Deprivation of Liberty*

In NSW,<sup>73</sup> Victoria,<sup>74</sup> SA,<sup>75</sup> NT<sup>76</sup> and the ACT<sup>77</sup> it is possible to argue self-defence in relation to conduct taken to 'prevent or terminate the unlawful deprivation of oneself or another's liberty'. In Victoria, however, self-defence to prevent or terminate the unlawful deprivation of liberty is only available in respect of manslaughter charges, not murder.<sup>78</sup> These provisions have the potential to exculpate a woman who was unable to leave her abusive relationship because of the deceased's threats and violence and unable to exercise autonomy within it because of his controlling and manipulative behaviour, where she employed lethal force in order to regain freedom and control of her life.<sup>79</sup> To date, however, there are no cases in which these provisions have been used in this manner.<sup>80</sup>

### *Defence of Others*

As noted above, in all the states and territories of Australia, and in New Zealand, self-defence is available in respect of the defence of 'another'. In Canada, until recently, the accused could only invoke self-defence for another who was 'under his protection'.<sup>81</sup> While this obviously included a woman's children, it did not necessarily include others threatened by a batterer.<sup>82</sup> The defence of others in

<sup>72</sup> See Julie Stubbs and Julia Tolmie, 'Race, Gender and the Battered Woman Syndrome: An Australian Case Study' (1995) 8 *Canadian Journal of Women and the Law* 122; Julia Tolmie, 'Pacific Asian Immigrant and Refugee Women Who Kill Their Batterers: Telling Stories that Illustrate the Significance of Specificity' (1997) 19 *Sydney Law Review* 473; Julia Tolmie and Julie Stubbs, 'Battered Women Charged with Homicide: Advancing the Interests of Indigenous Women' (2008) 41 *Australian and New Zealand Journal of Criminology* 138.

<sup>73</sup> *Crimes Act 1900* (NSW) s 418(2)(b).

<sup>74</sup> *Crimes Act 1958* (Vic) s 9AE(b).

<sup>75</sup> *Criminal Law Consolidation Act 1935* (SA) s 15(3)(b).

<sup>76</sup> *Criminal Code 1983* (NT) s 43BD(2)(a)(ii).

<sup>77</sup> *Criminal Code 2002* (ACT) s 42(2)(a)(i).

<sup>78</sup> *Crimes Act 1958* (Vic) ss 9AC and 9AE.

<sup>79</sup> See, eg, Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007) chs 7–9.

<sup>80</sup> Note that Edgely and Marchetti, above n 54, fn 229 suggest that the legislation defining self-defence in Western Australia (*Criminal Code 1913* (WA) s 248(1)) and Tasmania (*Criminal Code 1924* (Tas) s 46) is also broad enough to 'include preventing or terminating unlawful deprivation of liberty': at fn 229. The same reasoning could apply to the New Zealand provision (*Crimes Act 1961* (NZ) s 48) but not the self-defence provisions in either Canada or Queensland which both, as noted above, require that the accused be responding to an assault.

<sup>81</sup> *Criminal Code*, RSC 1985, c 46, s 37(1).

<sup>82</sup> See eg, *R v Whynot (Stafford)* (1983) 61 NSR (2d) 33 (CA) [40], where the deceased had threatened to burn out their neighbour in her trailer and to 'deal with' the accused's son. The Court

Canada also had stricter requirements, requiring the accused to use ‘no more force than is necessary to prevent the assault or the repetition of it’.<sup>83</sup> The new law of self-defence applies to defence of self and other persons without qualification, ensuring that the test is the same and that self-defence can be used to protect anyone — even strangers.

### *Proposed Reforms to the Law on Self-defence*

In 2001, the NZLC recommended the reform of laws on self-defence to better accommodate battered accused. But in 2007, it inexplicably reversed its position, commenting that:

[i]n its subsequent consideration of this issue, the Ministry of Justice concluded that the amendment to section 48 of the Crimes Act 1961 was not required to meet the needs of battered defendants, and might be undesirable in light of the fact that the section is generally regarded as working well. The Ministry reviewed recent case law, which tended to suggest that problems previously encountered were being ironed out in the courts; it thus concluded that the real problem previously was one of social awareness, rather than of law. The Ministry found that overwhelmingly stakeholders were comfortable with letting matters take their course.<sup>84</sup>

The Ministry of Justice report is not, however, publicly available and so one is left wondering which cases were reviewed by the Ministry? Were members of the public invited to make submissions to that body in respect of this reference, as they did to the Law Commission in respect of its 2001 report that *did* recommend law reform?<sup>85</sup> Exactly who is it who holds the body of opinion that self-defence is ‘working well’ in New Zealand? In other words, who are the ‘stakeholders’ referred to in this process? There is no material on the public record that provides answers to these questions.

While we agree that statutory reform is unlikely to be sufficient to ensure appropriate responses to cases involving homicide by battered women, we find it difficult to be similarly complacent about whether the current law in New Zealand is working well for such persons. This issue is discussed further in the next part of this paper. If self-defence is, in fact, being applied in a problematic fashion in cases involving accused battered women, then there is some benefit in addressing this slippage through legislative reform.

## **B Partial Defences**

Simply because a defendant is a battered woman does not, of course, mean that she was necessarily acting in self-defence when she killed her violent partner. We point out, however, that when a woman is trapped in a violent relationship, it is artificial to suggest self-defence is not implicated simply because the moment of

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commented that the only threat within s 37 was the one concerning her son, implying that the neighbour could not be characterised as under her protection.

<sup>83</sup> *Criminal Code*, RSC 1985, c 46, s 37(1).

<sup>84</sup> NZLC, *The Partial Defence of Provocation*, Report No 98 (2007) 57–8 [120].

<sup>85</sup> NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 35.

her homicidal act did not obviously involve a high risk of lethality.<sup>86</sup> A number of jurisdictions recognise defences that reduce a murder conviction to manslaughter where the defender used excessive force in defending herself, or where, while not acting to defend herself, she was reacting in an emotionally understandable manner to the violent situation in which she found herself. In fact, many jurisdictions had battered women in mind when they modified their range of partial defences to murder in the last two decades. These partial defences are particularly significant in those jurisdictions in which life imprisonment is mandatory or presumptive for murder,<sup>87</sup> but will be significant in all jurisdictions because murder generally attracts a higher starting point for sentencing purposes than the crime of manslaughter.<sup>88</sup> The defences that we will look at in this section are excessive self-defence, defensive homicide and provocation.<sup>89</sup>

### *Excessive Self-defence*

NSW,<sup>90</sup> SA<sup>91</sup> and WA<sup>92</sup> created<sup>93</sup> the defence of excessive self-defence as a partial defence to murder for those situations where the accused honestly believes that she needs to defend herself with lethal force but is not able to demonstrate reasonable grounds for that belief or that her response was reasonable in the circumstances that she believed to exist.

The Victorian Law Reform Commission ('VRLC') had recommended a similar approach, but instead, in 2005 the Victorian Parliament introduced a new offence of 'defensive homicide'.<sup>94</sup> This reconceptualised offence was intended as a safety net for those who kill in response to family violence but who do not meet the test for self-defence because their belief in the necessity to defend themselves did not have reasonable grounds.<sup>95</sup> It carries the same maximum penalty as manslaughter and is an alternative to a verdict of murder. It is said to offer advantages over manslaughter because the judge will gain a clear understanding of

<sup>86</sup> For example, expert witness Dr Patricia Neilson testified as follows in the case of *R v Kay*: 'battering creates a whole atmosphere, a whole kind of surrounding environment of fear and control. And then it's within that, that whatever happens. So it's not like you feel afraid today, but then the battering stops, so you don't fear for your life. The fear is pervasive. It's always there.' *R v Kay*, Transcript of Proceedings at Trial, Queen's Bench of Saskatchewan, Regina (QBC No 8 of 1994, vol 4, 6 June 1994), 914.

<sup>87</sup> Life imprisonment is mandatory in Queensland, the Northern Territory, South Australia and Canada, and presumptive in Western Australia and New Zealand: See below nn 163–67.

<sup>88</sup> See *R v Burke* [2000] NSWSC 356 and the discussion of this case in Julia Tolmie, 'Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation' [2005] *New Zealand Law Review* 25, 29–31.

<sup>89</sup> We will not look at diminished responsibility — now called substantial impairment in NSW — because it is a version of a mental disorder defence, rather than dealing with a mentally normal accused who is responding to violent circumstances. For that reason we do not view the defence as generally appropriate in cases involving battered defendants without further facts specific to a particular accused.

<sup>90</sup> *Crimes Act 1900* (NSW) s 421.

<sup>91</sup> *Criminal Law Consolidation Act 1935* (SA) s 15(2).

<sup>92</sup> *Criminal Code 1913* (WA) s 248(3).

<sup>93</sup> It was abolished at common law in *Zecevic* (1987) 162 CLR 645.

<sup>94</sup> See *Crimes Act 1958* (Vic) ss 9AC–AD.

<sup>95</sup> Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004).

the basis for the jury's verdict to rely on in sentencing.<sup>96</sup> However, the offence is not confined to cases involving family violence and the first review of the use of defensive homicide found that in 12 of the 13 cases in which it had been raised,<sup>97</sup> it had been used by men who had killed other men, while none of the cases reviewed involved female defendants.<sup>98</sup>

In contrast, the Supreme Court of Canada has ruled that the *Criminal Code* does not recognise 'excessive self-defence'.<sup>99</sup> Under the new law, 'the nature of the force or threat' and 'the nature and proportionality of the person's response to the use or threat of force'<sup>100</sup> are factors the court must consider in assessing whether the accused's act was reasonable, which suggests that the 'excessive force' limit will have continued relevance in the application of the law on self-defence. There is no doubt that some battered women have been disadvantaged by the 'excessive force' disqualifier,<sup>101</sup> but the proposal to introduce a new defence of 'excessive self-defence'<sup>102</sup> has been steadfastly resisted by women's groups who wish to avoid 'normalising' manslaughter as the appropriate legal outcome in battered women's self-defence cases.<sup>103</sup>

### *Killing for Preservation in an Abusive Relationship*

Queensland has gone further and introduced a new defence of 'killing for preservation in an abusive domestic relationship'.<sup>104</sup> This defence reduces a murder conviction to manslaughter if three conditions are satisfied:

- the deceased has committed acts of serious domestic violence against the accused in the course of an abusive domestic relationship;
- the accused believes that it is necessary for her preservation from death or grievous bodily harm to do the act or make the omission that causes the death;<sup>105</sup> and

<sup>96</sup> Ibid.

<sup>97</sup> Ten of the cases involved guilty pleas and three involved trials for murder where the jury found the defendants guilty of defensive homicide. Victoria, Department of Justice, *Review of Defensive Homicide*, Discussion Paper (2010) pt 3, 33–8.

<sup>98</sup> Ibid. Since that report there have been two cases involving female defendants: *R v Black* [2011] VSC 152 in which the defendant pleaded guilty to defensive homicide and *R v Creamer* [2011] VSC 196 in which the defendant offered to plead guilty to defensive homicide but the Crown proceeded with a trial for murder. The trials were conducted on the basis that the defendant was guilty either of manslaughter or defensive homicide. See the critique in Kate Fitz-Gibbon and Sharon Pickering, 'Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond' (2012) 52 *British Journal Criminology* 159.

<sup>99</sup> *R v Faid*, [1983] 1 SCR 265.

<sup>100</sup> *Criminal Code*, RSC 1985 c 46, s 34(2)(g).

<sup>101</sup> See, eg, Judge Ratushny, above n 10, 114. She referred to cases in her review where 'excessive force' was the barrier for self-defence for battered women.

<sup>102</sup> Canadian Bar Association Task Force, *Principles of Criminal Liability: Proposals for a New General Part of the Criminal Code* (Canadian Bar Association, 1993) 182; Tim Quigley, 'Proposals to Amend the Criminal Code (General Principles) — Defence of the Person — Section 37' (Paper prepared for the Department of Justice, Canada, 1994) 18–19.

<sup>103</sup> Elizabeth Sheehy, *What Would a Women's Law of Self-Defence Look Like?* (Status of Women Canada, 1995) 25–7.

<sup>104</sup> *Criminal Code 1899* (Qld) s 304B, introduced by *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010* (Qld) s 3.

- the accused has reasonable grounds for that belief having regard to the abusive domestic relationship and all the circumstances of the case.<sup>106</sup>

An abusive domestic relationship<sup>107</sup> is defined as a domestic relationship ‘in which there is a history of acts of serious domestic violence’, which ‘may include acts that appear minor or trivial when considered in isolation’.<sup>108</sup>

The idea behind this defence is that, unlike self-defence in Queensland, the accused can raise the defence even though she has killed in non-confrontational circumstances in response to the ongoing threat presented by the deceased rather than a specific attack. The defence has been criticised on the basis that it should attract a complete acquittal, as such circumstances would in many other Australian states, rather than a manslaughter verdict.<sup>109</sup> It is also at odds with *R v Stjernqvist*,<sup>110</sup> in which a jury in Queensland in 1996 took only 15 minutes to acquit the accused on the basis of self-defence after she shot her violent husband in the back as he walked away from her. The judge had directed the jury as though the threat that she was defending herself against could be found in the general nature of the relationship, rather than any specific action the deceased had taken on the day in question. However, an independent report, commissioned to advise the Queensland Government when it was proposing to enact the defence of killing for preservation in an abusive domestic relationship, suggested that the defence needed to be partial because the legal community did not support a complete acquittal in such circumstances.<sup>111</sup> Again we point out that reform recommendations based on the opinions of unidentified members of the legal profession, in the absence of hard evidence about the functioning of defences for battered women, are difficult to support. Without knowing the expertise of the lawyers consulted and their familiarity with the issues and literature on battered women’s murder trials, it is difficult to know what weight to assign their views and the soundness of any resulting recommendations.<sup>112</sup>

<sup>105</sup> The defence applies under *Criminal Code 1899* (Qld) s 304B (5) even when the accused was responding ‘to a particular act of domestic violence committed by the deceased that would not, if the history of acts of serious domestic violence were disregarded, warrant the response’, and under s 304B (6) is available even if the person claiming the defence has ‘sometimes committed acts of domestic violence in the relationship’.

<sup>106</sup> Note that the defence is not available to persons acting in the defence of third persons who are family violence victims, unlike self-defence.

<sup>107</sup> *Criminal Code 1899* (Qld) s 304B(3).

<sup>108</sup> *Ibid* s 304B(4).

<sup>109</sup> Patricia Easteal and Anthony Hopkins, ‘Walking in Her Shoes: Battered Women Who Kill in Victoria, Western Australia and Queensland’ (2010) 35(3) *Alternative Law Journal* 132, 135–6; Edgely and Marchetti, above n 54.

<sup>110</sup> (Unreported, Queensland Supreme Court, Cairns Circuit Court, Derrington J, 19 June 1996) (*‘Stjernqvist’*).

<sup>111</sup> Geraldine Mackenzie and Eric Colvin, *Homicide in Abusive Relationships: A Report on Defences* (Report prepared for the Attorney-General and Minister for Industrial Relations, Queensland, 6 July 2009) <[http://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0018/21618/homicide-in-abusive-relationships-report-on-defences.pdf](http://www.justice.qld.gov.au/_data/assets/pdf_file/0018/21618/homicide-in-abusive-relationships-report-on-defences.pdf)> [3.32]–[3.33].

<sup>112</sup> See Andrew Boe, ‘Domestic Violence in the Courts: re-victimising or protecting the victims?’ (Paper presented at National Access to Justice and Pro Bono Conference, Brisbane, 27–28 August 2010) <[https://wic041u.server-secure.com/vs155205\\_secure/CMS/files\\_cms/NA2JPBC2010-Boe.pdf](https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/NA2JPBC2010-Boe.pdf)> [14]: ‘I, and most others consulted about this proposal disagreed quite vehemently with

Ironically the new partial defence was argued in the case of *Falls*,<sup>113</sup> but the accused was acquitted completely on the basis of self-defence. In *Falls* the defendant drugged her abusive husband and then shot him twice in the head while he was unconscious. She acted in the face of a threat to her child, whom he was proposing to execute on a particular day in the near future. The jury's verdict of acquittal both in this case and *Stjernqvist* suggests that those enacting the partial defence of 'killing for self preservation in an abusive domestic relationship' may have failed to appreciate that jurors who are fully acquainted with the facts and who receive sensitive and informed directions from the trial judge may be far more generous in terms of what they are prepared to accept in these kinds of cases.

### *Provocation*

Queensland<sup>114</sup> and NSW<sup>115</sup> have also retained the defence of provocation, which is a partial defence for those who have understandably lost emotional control and responded with lethal force to provocative circumstances. The ACT<sup>116</sup> and NT<sup>117</sup> do not have excessive self-defence but do have the defence of provocation. Some of these jurisdictions have modified provocation in order to prevent it being used by perpetrators of domestic violence,<sup>118</sup> or to make it more accessible to those who are the targets of domestic abuse. For example, in 2006 NT abolished the requirement that there be a sudden reaction to the act of provocation before provocation could be relied on as a defence, on the basis that this requirement made the defence inaccessible to those who were responding to a history of serious abuse.<sup>119</sup> Interestingly, in 2010 in *Pollock v The Queen*,<sup>120</sup> the High Court of Australia clarified that the requirement for 'sudden provocation' contained in the *Criminal Code 1899* (Qld) s 304 did not mean that the accused's response to the provocation had to be 'immediate', potentially making the defence available in a larger range of cases.

In Canada, provocation is also available as a partial defence that reduces murder to manslaughter.<sup>121</sup> The Crown must be able to prove that the accused

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the terms of the amendment. We were collectively ignored, as were the raft of women's organizations that were also consulted.'

<sup>113</sup> (Unreported, Supreme Court of Queensland, Applegarth J, 2–3 June 2010).

<sup>114</sup> *Criminal Code 1899* (Qld) s 302. Note that this provision requires 'sudden provocation' but is couched without reference to the ordinary person. The requirement is that the accused does the act which causes death 'in the heat of passion caused by sudden provocation and before there is time for the person's passion to cool'.

<sup>115</sup> *Crimes Act 1900* (NSW) s 23.

<sup>116</sup> *Crimes Act 1900* (ACT) s 13.

<sup>117</sup> *Criminal Code 1983* (NT) s 158.

<sup>118</sup> In Queensland, for example, provocation cannot be based on words alone or things done to end or change the nature of a relationship 'other than in circumstances of a most extreme and exceptional nature': *Criminal Code 1899* (Qld) s 304(2) and (3). For proof of circumstances of an extreme and exceptional nature, regard may be had to any history of violence that is relevant in the circumstances: *Criminal Code 1899* (Qld) s 304(6).

<sup>119</sup> *Criminal Code 1983* (NT) ss 158(4) and 158(6)(a). See also, *Crimes Act 1900* (NSW) s 23(2), *Crimes Act 1900* (ACT) and s 13(4)(b). New South Wales has allowed cumulative provocation for some time; see *R v Mui Ky Chhay* (1994) 72 A Crim R 1.

<sup>120</sup> (2010) 242 CLR 233.

<sup>121</sup> *Criminal Code*, RSC 1985, c 46, s 232.

intended to kill before this defence becomes a live issue. Then, the accused must be able to point to a ‘wrongful act or insult sufficient to cause an ordinary person to lose the power of self-control’. Although it seems clear that an ordinary person for these purposes would include a battered woman,<sup>122</sup> no courts have addressed whether this would include one who experiences BWS.<sup>123</sup> In addition, the accused must be able to raise a doubt that she actually lost self-control — a purely subjective issue — and that she acted ‘on the sudden and before there was time for... passion to cool’. Canada does not have any clear jurisprudence that permits a longer gap between the act or insult and the accused’s reaction, on the basis that a battered woman may react more slowly.<sup>124</sup> However, there are certainly jury verdicts<sup>125</sup> and guilty pleas entered by battered women in which provocation seems to have been implicated.<sup>126</sup>

### *Jurisdictions without Relevant Partial Defences*

Tasmania does not have the defence of excessive self-defence, and provocation was abolished there in 2003.<sup>127</sup> New Zealand has no partial defences to murder at all. Provocation was abolished after the NZLC recommended its abolition twice — once in 2001<sup>128</sup> and again in 2007.<sup>129</sup> In 2001, the NZLC was asked to examine how the criminal defences were working for battered defendants, but its recommendations, which included the reform of self-defence to better accommodate battered women defendants and the abolition of provocation, were not acted on. It is ironic that, in part as a consequence of a reference intended to better the position of battered women, there have been no changes to the law on self-defence and, instead, the only partial defence that could have been used by battered defendants was eventually abolished. In its 2007 report, the NZLC said:

For a majority of battered defendants, self-defence will tactically offer a preferable alternative to provocation, because it results in an acquittal...

<sup>122</sup> See *R v Malott* (1996) 30 OR (3d) 609 (CA) [67] (*‘Malott’*).

<sup>123</sup> In New Zealand see Elias CJ in *Rongonui* [2002] 2 NZLR 385.

<sup>124</sup> The Court in *Malott* (1996) 30 OR (3d) 609 (CA) [66] seemed to reject this argument. Malott had argued that her husband had choked and threatened her in the vehicle just before she got out and went to check whether the chemist was open. She returned to the car and opened fire moments, or at most minutes, later when she discovered the shop closed and saw her husband’s car door begin to open and he began to heave himself out of the car. The Court rejected the provocation claim as follows: ‘The argument and the choking were relatively distant in time from the shooting, which cannot be said to have followed “on the sudden”.’

<sup>125</sup> *R v Getkate* Transcript of Proceedings at Trial (Court File #95-20433, Ontario Court of Justice (General Division), Ottawa vol 12, 4 October 1998) 1364. (Note, this was a jury verdict.)

<sup>126</sup> *R v Gladue* (1997), 98 BCAC 120. (Note, this was a guilty plea.)

<sup>127</sup> *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas). The Tasmanian approach, which removed provocation without introducing other reforms, has been subject to criticism for potentially making things worse for battered women: R Bradfield, ‘Comment: The demise of provocation in Tasmania’ (2003) 27 *Criminal Law Journal* 322; Carolyn Ramsey, ‘Provoking change: Comparative insights from feminist homicide law reform’ (2010) 100 *Journal of Criminal Law & Criminology* 33.

<sup>128</sup> NZLC, above n 35.

<sup>129</sup> NZLC, above n 84.



[P]rovocation is not benefiting battered defendants sufficiently to warrant its retention, and our review of case law confirms this.<sup>130</sup>

Problematically, given the rarity of such cases,<sup>131</sup> the Commission supported its position by reviewing homicide trials in Auckland and Wellington between 2001 and 2005 and identifying only one case in which a battered defendant had successfully relied on provocation during that time.<sup>132</sup> In fact, if one expands the time span and the number of courts under review, there are more New Zealand cases in which battered defendants have relied on provocation.<sup>133</sup>

### C *Expanding the Evidential Inquiry*

Victoria has gone further than any other jurisdiction in enacting legislation in 2005 to make it clear that in cases where family violence is alleged, a wide range of evidence is relevant to the subjective and objective aspects of the self-defence requirements.<sup>134</sup> This includes evidence about:

- the history of the relationship and violence within it;
- the cumulative effect, including the psychological effects, of the violence on the victim;
- social, cultural and economic factors that impact on a person who has been affected by violence;
- the general nature and dynamics of relationships affected by family violence, including the possible consequences of separating from the abuser;
- the psychological effect of violence on people in such relationships; and
- the social or economic factors that impact on people in such relationships.

<sup>130</sup> Ibid 58 [121].

<sup>131</sup> As noted, we found only 10 in the period from 2000 to 2010.

<sup>132</sup> NZLC, above n 84, 58 [121] and Appendix A.

<sup>133</sup> Of the 20 New Zealand cases involving battered defendants for which we have records, there appear to be three in which provocation was successfully raised: *R v King* (Unreported, High Court of New Zealand, 7 April 2005, Robertson, Goddard and Gendall JJ), *R v Suluape* (2002) 19 CRNZ 492 (Anderson, Williams and Baragwanath JJ) and *R v Wang* [1990] 2 NZLR 529 (Richardson, Casey and Bisson JJ); and two in which it may have been the basis of a manslaughter conviction: *R v Mahari* (Unreported, High Court of New Zealand, 14 November 2007, Winkelmann J) and *R v Stone* (Unreported, High Court of New Zealand, 9 December 2005, Young J). Provocation was unsuccessfully argued in a further four of these cases: *The Queen v Ranger* (Unreported, New Zealand Court of Appeal, 2 November 1988, Cooke P); *The Queen v Brown* (Unreported, New Zealand Court of Appeal, 11 April 1995, Cooke P, Casey and Heron JJ); *R v Oakes* [1995] 2 NZLR 673 (Cooke P, Hardie Boys and Heron JJ) and *R v Reti* [2009] NZCA 271 (Arnold, Priestley and Winkelmann JJ), which might suggest that it was not appropriate on the facts of those cases or might suggest a need for reform so that the defence is better accessible to battered defendants. Furthermore, we found an additional two cases involving battered children, both of whom were successful in defending themselves against murder charges in respect of killing their father and stepfather on the basis of provocation: *R v Raivaru* (Unreported, High Court of New Zealand, 5 August 2005, Heath J) and *R v Erstich* (2002) 19 CRNZ 419 (Elias CJ, Gault P and Hansen J).

<sup>134</sup> *Crimes Act 1958* (Vic) s 9AH(3)(a)–(f).

The legislation also makes it clear that violence includes not only physical and sexual abuse, but also psychological abuse, intimidation, harassment, damage to property, threats and allowing a child to see, or putting them at risk of seeing, their parent being abused.<sup>135</sup> It specifies that violence can comprise a single act or a pattern of behaviour, which can include, in turn, acts that in isolation might appear trivial.

In Queensland, 'relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed' is similarly admissible in criminal proceedings against a person for a range of offences, including homicide.<sup>136</sup>

Such provisions are helpful in making it clear that the range of evidence traditionally considered relevant needs to be greatly expanded in these kinds of cases.<sup>137</sup> Evan Stark analyses cases of serious domestic abuse not in terms of the incidence and severity of the physical abuse,<sup>138</sup> but in terms of the degree of coercive control the perpetrator seeks to exercise over the victim using a range of psychological, social and economic tactics specifically tailored to the individual victim, backed up by some degree of physical abuse, which in turn have a cumulative and compounding effect over time. To fully explain the nature of such a phenomenon to a jury clearly necessitates introducing a wide range of evidence about the details and history of the defendant's relationship with the deceased, his violence towards other people, and the broader social context in which the relationship played out, as well as expert evidence assisting the jury to interpret this information through the lens of contemporary knowledge about the phenomenon of domestic violence.

Without legislative guidance there is no reason why such evidence should not be admissible, but the onus is on individual lawyers and judges to recognise its relevance and significance. This level of expertise cannot be guaranteed. In *R v Dzuiba*,<sup>139</sup> for example, the trial judge clearly struggled to understand how the deceased's past convictions for violence against other people were relevant to the defendant's fear of him. The judge finally, and reluctantly, accepted that the rule against admitting propensity evidence did not apply to the deceased only because there was binding authority on the subject.<sup>140</sup> The judge also drew legalistic

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<sup>135</sup> *Crimes Act 1958* (Vic) s 9AH(4).

<sup>136</sup> *Evidence Act 1977* (Qld) s 132B.

<sup>137</sup> Victorian Law Reform Commission, above n 95; see also US Department of Justice and US Department of Health and Human Services, above n 6.

<sup>138</sup> Stark, above n 79 at 198–227. He and many others (see, eg, Rebecca Bradfield, 'Understanding the Battered Woman Who Kills Her Violent Partner — The Admissibility of Expert Evidence of Domestic Violence in Australia' (2002) 9 *Psychiatry, Psychology and Law* 177) argue that it is a mistake to conceptualise domestic violence in terms of physical violence or analyse it as incidents of physical violence.

<sup>139</sup> Unreported, Supreme Court of Western Australia, 27 November 2006.

<sup>140</sup> *R v Dzuiba* (Unreported, Supreme Court of Western Australia, 27 November 2006). Note that the judge also thought that a police officer questioning Dzuiba about her relationship with the deceased did not have to be video-taped because it was conversation, as opposed to questioning her about the offence, which would require video-taping: at 149. This indicates a limited understanding of the significance of the relationship between the defendant and the deceased to her offending, and disregard for the inherently coercive context in which she responded to the officer's questions.

distinctions between intimate partner violence and other kinds of violence, and between common assault and assault using a weapon, and assault using a gun and assault using a knife (a conviction for one ‘doesn’t shed light on’ the likelihood of the deceased committing the other) for the purposes of deciding what kinds of evidence would be admissible.<sup>141</sup>

In 2001 the NZLC provided clear guidance that:

[e]vidence concerning the behaviour of battered women, patterns of violence in battering relationships, social and economic factors, the psychological effects of battering, separation violence, and evidence concerning the battered defendant’s appraisal of the danger she is in may all be relevant and substantially helpful to the fact-finder.<sup>142</sup>

However, the absence of an authoritative judicial pronouncement or clear legislative directive means that cases are still being conducted without such expert evidence, and without the broader context of the violent relationship history and the deceased’s propensity to use violence in relationship being introduced into the trial process.<sup>143</sup>

Canada has not legislated to expand the range of evidence that may be led in such cases, but there, unlike in New Zealand, decisions such as *Lavallee*<sup>144</sup> and *Malott*<sup>145</sup> laid the groundwork for the reception of such evidence. While prosecutors may still successfully resist the introduction of evidence of a man’s past violence where, for instance, the woman was not aware of her partner’s violence towards others or it is characterised as too distant in time,<sup>146</sup> much of this evidence is clearly relevant and admissible.

### III Resolution of Homicide Cases Involving Battered Defendants in Australia, Canada and New Zealand, 2000–10

In this section we briefly describe general trends in how the defences are being used in practice, based on data drawn from reported and unreported decisions in legal databases and from media sources in all three countries. We acknowledge the limitations of this data since it excludes cases that are not publicly recorded.<sup>147</sup> It is likely that most cases are recorded in some manner because homicide cases tend to attract a high level of public resources and scrutiny, and cases in which women kill their husbands or partners tend to be characterised as ‘newsworthy’. Nonetheless, contrary to expectation, we found fewer cases for

<sup>141</sup> *R v Dzuiba* (Unreported, Supreme Court of Western Australia, 27 November 2006) 370–80, 491–551.

<sup>142</sup> NZLC, above n 35, 15–17.

<sup>143</sup> See, eg, *R v Mahari* (Unreported, New Zealand High Court, 14 November 2007).

<sup>144</sup> [1990] 1 SCR 852.

<sup>145</sup> [1998] 1 SCR 123.

<sup>146</sup> *R v Craig* (Unreported, Ontario Supreme Court, 2008).

<sup>147</sup> Possible reasons for this are that legal and media databases are selective. Media databases do not pick up all newspapers or news sources, and cases which are resolved by guilty pleas to manslaughter may not attract media coverage. In some cases a history of abuse may not be visible in the trial process or in media accounts.

Canada than Australia over the relevant time, suggesting that our case list for Canada is incomplete.<sup>148</sup>

For the period 2000–10, we identified 67 cases in Australia, 36 cases in Canada and 10 in New Zealand. In all three countries, by far the majority of trials were proceeded with on the basis of an indictment for murder: Australia 85 per cent; Canada 72 per cent (80 per cent of these were second degree murder)<sup>149</sup>; New Zealand 90 per cent. There was little variation across Australia, although WA differed from this pattern in that 50 per cent of cases there proceeded on the basis of manslaughter. It is not clear why this is so.

**Table 1: Outcomes for battered women’s homicide cases in Australia, Canada and New Zealand, 2000–10**

	Basis	Aust	%	Canada	%	NZ	%
<b>Did not proceed to trial</b>		2	3	1	2.8		
<b>Trial</b>							
Acquittal	SD	11	16.4	11	30.6	1	10
Manslaughter	UDA	4	6				
	provocation/ excessive SD	6	9				
	not known	1	1.5	3	8.3	4	40
Murder		1	1.5	1	2.8	4	40
<b>Guilty Plea</b>							
Lesser offences		2	3				
Manslaughter	UDA	16	24				
	provocation/ excessive SD	13	19.4				
	not known	10	14.9	19	52.8	1	10
Murder		1	1.5	1	2.8		
<b>Total</b>		<b>67</b>	<b>100</b>	<b>36</b>	<b>100</b>	<b>10</b>	<b>100</b>

Key: SD – self defence; UDA – lacked mens rea for murder, but convicted of manslaughter on the basis of an unlawful and dangerous act.

<sup>148</sup> Our analysis is based on the best available data. We cannot account for the unexpectedly low number of Canadian cases. Statistics Canada’s annual report, *Homicide in Canada*, indicates that in the years 2000–10, 168 women killed their spouses or former spouses in Canada: Tina Hotton Mahony, *Homicide in Canada, 2010* (2011) Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11561-eng.htm>>. Not all of these women would have had a viable self-defence claim, but nonetheless we would have expected to find more than the 36 cases our newswire and legal database searches uncovered. However, to the extent that this produces a bias in the sample, it is likely to be in favour of convictions due to the large number of defence appeals, and the omission of acquittals except where there is a Crown appeal; see Isabel Grant, ‘Intimate Femicide: A Study of Sentencing Trends for Men who Kill Their Intimate Partners’ (2009) 47 *Alberta Law Review* 779, 783–4.

<sup>149</sup> Note that in Canada the difference between first and second degree murder is the element of planning and deliberation, or the use of contract killer (*Criminal Code*, RSC 1985, c 46, s 234). Both carry a mandatory life sentence but second degree murder has more favourable parole ineligibility conditions and likely outcomes.

Table 1 presents the outcomes of cases. There were few murder convictions in Australia or Canada; in each country there were two murder convictions, of which one resulted from a guilty plea. New Zealand, by way of contrast, had four convictions for murder (40 per cent of all cases, 44 per cent of cases that went to trial), all of which resulted from proceeding to trial.

Most cases in Australia (63 per cent) and Canada (56 per cent) were resolved by guilty pleas, typically to manslaughter in exchange for murder charges being dropped. However, in New Zealand only one case (10 per cent) resulted in a plea of guilty to manslaughter. The proportion of guilty pleas was lower in Victoria (42 per cent) than elsewhere in Australia, but this does not appear to be related to the 2005 reforms in that state because most of the cases were dealt with prior to the reforms.

Canada had the highest proportion of cases that did not result in a conviction (33.4 per cent acquitted or did not proceed to trial), and New Zealand had the lowest (10 per cent acquitted), with approximately one-fifth of Australian cases resulting in no conviction (19.4 per cent). Within Australia, NSW and Victoria had the highest percentage of cases resulting in no conviction (25 per cent), while Queensland and WA had the lowest (10 per cent).

Partial defences were commonly relied on in Australian cases that went to trial and frequently formed the basis of guilty pleas.<sup>150</sup> Of the 10 manslaughter convictions after trial for which we have the relevant information, six (60 per cent) were made on the basis of one of the partial defences — either provocation or excessive self-defence — while four (40 per cent) were made on the basis of a lack of mens rea for murder but an unlawful and dangerous act. Of 39 cases where pleas to manslaughter were accepted by the prosecution, we have information about the basis for the manslaughter plea in 29 cases. In 13 cases, (45 per cent) a guilty plea was based on a partial defence — in all instances either provocation or excessive self-defence — while in 16 cases (55 per cent) the defendant pleaded guilty to manslaughter on the basis of a lack of mens rea for murder but an unlawful and dangerous act.

The proportion of cases that resulted in no conviction did not reflect the existing laws of self-defence in a given jurisdiction in any straightforward way, which should serve to remind us of the many factors that mediate between the text of the law and how it is given effect. For instance, the lower percentage of acquittals in Queensland might be thought to reflect the stricter requirements for self-defence in that state compared to elsewhere in Australia. However, contrary to expectations, the one acquittal recorded in Queensland occurred in the case of *Falls*,<sup>151</sup> which involved a non-traditional scenario for self-defence, suggesting that the jury applied a liberal interpretation to the self-defence requirements.<sup>152</sup> The reforms to self-defence in Victoria have not yet been tested as no battered

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<sup>150</sup> New Zealand and Tasmania no longer have partial defences, and we do not have sufficient information from the Canadian cases to examine the use of partial defences.

<sup>151</sup> *Falls* (Unreported, Supreme Court of Queensland, Applegarth J, 2–3 June 2010).

<sup>152</sup> The case may also provide some support for the value of legislative direction on the relevance of context evidence because a wide range of such evidence was introduced by defence counsel in that case which may have given the jury a realistic factual appreciation of the desperate nature of the accused's circumstances.

women went to trial there since those reforms in the time period of this study. While a recent review by the Department of Justice suggested that the reforms to self-defence had been influential in the decision of a magistrate not to commit a case to trial,<sup>153</sup> the facts of that case were consistent with traditional understandings of self-defence in that the accused acted against an immediate attack. Thus the same decision may have been reached without the reforms.

Canada, with a higher proportion of cases resulting in no conviction, seems much better able to accommodate battered women's self-defence claims than Australia or especially New Zealand, but, during the period under examination, had a complex set of requirements for self-defence; these set a high threshold for the accused who must be acting in response to an unlawful assault that causes 'reasonable apprehension of death or grievous bodily harm'.<sup>154</sup> However, Canadian jurisprudence has also placed strong emphasis on the subjective elements of self-defence, and decisions of the Canadian Supreme Court such as *Lavallee* and *Malott* have articulated both a clear understanding of domestic violence and the relevance of evidence concerning the context in which battered women might need to resort to lethal self-help.<sup>155</sup>

In small jurisdictions like New Zealand the number of cases resolved in the period in question is so small that we cannot say with certainty that any observed trends are reliable. However, the pattern of New Zealand cases both in the low percentage of acquittals and the high percentage of murder convictions is distinctive as compared to Australia and Canada, suggesting that contrary to the NZLC's findings,<sup>156</sup> battered women defendants are not well served by the available defences in that country. The only New Zealand case<sup>157</sup> in the last 10 years that resulted in an acquittal involved a traditional self-defence scenario, in which the accused grabbed a knife and stabbed her husband who was beating her around the head at the time. Furthermore, in five of the nine New Zealand cases that resulted in convictions for murder or manslaughter, the facts suggest that defensive force had been used in response to a violent threat or attack. In some of these cases it is not apparent, given the generously subjective nature of the statutory definition of self-defence and the existing burden of proof, why the accused was not successful in raising the defence.

In *Wickham*,<sup>158</sup> for example, the accused made an emergency call to the police after her husband threw a bottle at her and tried to throttle her. She shot him moments before they arrived. She alleged that making the call had aggravated him and he had threatened to bash her with a brick and put her in the pool with the

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<sup>153</sup> Victoria, Department of Justice, above n 97, 32; *R v Dimitrovski* (Unreported, Shepparton Magistrates Court, 6 May 2009). The Report also relies on a second case to bolster this claim — however, as that case did not involve intimate partner homicide, it has been excluded from the current analysis.

<sup>154</sup> At face value the Canadian provisions parallel in certain key respects (but not all) the restrictive requirements of the Queensland provisions.

<sup>155</sup> *Lavallee* [1990] 1 SCR 852; *Malott* [1998] 1 SCR 123.

<sup>156</sup> NZLC, above n 84.

<sup>157</sup> *R v Stephens* (Unreported, New Zealand High Court, 12 April 2002).

<sup>158</sup> 'Detention for Wife Who Killed Husband', *New Zealand Herald* (online), 21 December 2010, <[http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10695705](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10695705)>.

cover on. She was 62 years old with no criminal record and had suffered from multiple sclerosis for 20 years, thus lacking the ability to ‘fight back’. She had a number of weapons concealed in her bedroom and the police and a women’s refuge had assisted her on previous occasions. Further, her husband had told friends that he planned to help her commit suicide when her condition got worse even though she had expressed no desire to commit suicide. She was convicted of manslaughter but given a sentence of 12 months of home detention. The sentencing judge acknowledged that although the jury had rejected her self-defence case, ‘the killing came about because of the abusive nature of the couple’s relationship and her fear for her safety’.<sup>159</sup> The judge was reported as saying, ‘There is no denying that pointing a loaded gun at someone is an act of extreme recklessness, but I accept that you were very scared’.<sup>160</sup> The judge also noted that the accused’s advanced debilitating illness in this case ‘made her feel she had few options available to her in dealing with the confrontation with her husband’.<sup>161</sup>

Given the relative infrequency of battered women’s homicide cases, it is too soon to determine the effects of the abolition of provocation on case outcomes and sentencing in any of the jurisdictions in which provocation has been abolished. However, the absence of any relevant partial defences in New Zealand and Tasmania is of some concern given the evidence from Australia that such defences are still being heavily relied on in those cases that result in manslaughter convictions. In the absence of clear empirical evidence that the defence of self-defence is yet operating effectively in such cases, particularly those involving non-traditional self-defence scenarios, the unavailability of partial defences is more worrisome still. The sentencing of battered women convicted of murder in New Zealand compounds these concerns. The judge overturned the statutory presumption in favour of a life sentence in only one of the four New Zealand cases that resulted in a murder conviction. An unintended side effect of the abolition of the defence of provocation and the lack of other relevant partial defences is the potential for a greater number of battered defendants to be convicted of murder and the imposition of harsher sentences for those who are convicted.

Our analysis indicates that the question of plea bargaining, particularly in Australia and Canada, requires greater scrutiny. There are substantial pressures on battered defendants who are facing murder charges to plead guilty to manslaughter rather than proceed to trial in order to run self-defence.<sup>162</sup> For example, life sentences are mandatory for murder in Queensland,<sup>163</sup> NT,<sup>164</sup> SA<sup>165</sup> and Canada, while WA,<sup>166</sup> like New Zealand,<sup>167</sup> has a presumption of life imprisonment. Even in those jurisdictions where life is not mandatory or presumptive, a conviction for murder will still carry a sentencing tariff that is

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<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> Elizabeth Sheehy ‘Battered Women and Mandatory Minimum Sentencing’ (2001) 39 *Osgoode Hall Law Journal* 529; see also Victorian Law Reform Commission, above n 95 106–9.

<sup>163</sup> *Criminal Code 1899* (Qld) s 305(1).

<sup>164</sup> *Criminal Code 1983* (NT) s 157.

<sup>165</sup> *Criminal Law Consolidation Act 1935* (SA) s 11.

<sup>166</sup> *Criminal Code 1913* (WA), s 279(4).

<sup>167</sup> *Sentencing Act 2002* (NZ).

higher than that for manslaughter<sup>168</sup> and this fact, combined with the discount available for an early guilty plea, will put pressure on defendants not to risk running a defence that, if unsuccessful, could see them convicted of murder. In Canada the legal difference between first and second degree murder is the element of ‘planning and deliberation’ or the use of a contract killer.<sup>169</sup> Both first degree murder and second degree murder carry a mandatory life sentence but the difference in outcome affects parole eligibility: for first degree murder there is a minimum parole ineligibility period of 25 years; for second degree murder the period of ineligibility is between 10 and 25 years, set by the trial judge, on a recommendation from the jury.<sup>170</sup>

In Australia and Canada murder convictions of battered women occurred infrequently yet murder was charged in most cases, even though in the majority of Australian cases and in half of the Canadian cases where charges of murder had been laid, the prosecution was ultimately willing to accept a plea to manslaughter. Furthermore, in both countries there were cases involving guilty pleas to manslaughter which, on the facts, demonstrated strong defensive elements, suggesting that self-defence may have been successful had the case proceeded to trial.<sup>171</sup> For instance, among NSW cases, nine of the 15 cases in which a plea of guilty to manslaughter was accepted to a charge of murder, the defendant’s account indicated that she had responded to a physical attack or threat from her partner.<sup>172</sup> In several of these cases the sentencing judge effectively acknowledged that, had the case proceeded to trial, the accused may have had a realistic chance of being acquitted on the basis of self-defence or described the facts in a manner which

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<sup>168</sup> Victorian Law Reform Commission, above n 95.

<sup>169</sup> *Criminal Code*, RSC 1985, c 46, s 234. This section provides for other ways in which murder can be classified as first degree murder, but these — for example killing a police officer in the execution of duty — are not relevant to battered women who kill.

<sup>170</sup> *Criminal Code*, RSC 1985, c 46, ss 745, 745(4).

<sup>171</sup> Defence counsel may have made strategic decisions in many of these cases not to proceed to trial and to accept a plea bargain on the basis that, even though their case had strong defensive elements, the jury was unlikely to be sympathetic to their client when she testified. This raises further issues about the need for support for the recovery of witnesses suffering post-traumatic stress disorder prior to and during trial, as well as the need for expert testimony to assist in the interpretation by the jury of the emotional responses of such witnesses.

<sup>172</sup> See *R v Kennedy* [2000] NSWSC 109; *R v Trevenna* [2003] NSWSC 463 below. In *R v Duncan* [2010] NSWSC 1241, the accused stabbed her de facto once while he was assaulting her. In *R v Russell* [2006] NSWSC 722, the accused stabbed the deceased once with a kitchen knife after he hit her, flashed a knife in her face and said he would kill her. He had been classified by police as a high-risk offender of domestic violence and had a number of convictions for violence, and complaints to the police recorded, for serious domestic violence against the accused and his previous partners. In *R v Mercy* [2004] NSWSC 472 the accused stabbed her partner once under the apprehension, based on his physical and verbal abuse, that she was ‘in for a flogging’. In *R v Scott* [2003] NSWSC 627 the deceased came at the accused with a knife and she hit him on the head with an iron. In *R v Mabbott* [2002] NSWSC 502 the accused had stabbed the deceased once when he attacked her. In *R v Melrose* [2001] NSWSC 847 the accused was trapped in a very violent relationship, which the expert testified ‘would have been almost impossible’ for her to leave. The deceased had badly assaulted her and she had armed herself with a knife after unsuccessfully seeking help from the police. He had physically confronted her and continued his aggressive behaviour and she had stabbed him once. In *R v Kirkwood* [2000] NSWSC 184, the deceased attacked the accused and threatened her with a knife. She took it from him by the blade, cutting her hand, and stabbed him once.



suggested that the accused was acting in self-defence. For example, in *Kennedy*<sup>173</sup> the sentencing judge commented:

I think that when she realised she was coming under yet another violent attack she took hold of whatever was close at hand in an attempt in some way to make the deceased modify his behaviour, short of an intention to do him really serious injury.<sup>174</sup>

In *R v Trevenna*<sup>175</sup> the sentencing judge commented that a jury may not have been persuaded in the circumstances that the Crown had negated self-defence, and may have acquitted the defendant altogether.<sup>176</sup> In *R v Yeoman*<sup>177</sup> the sentencing judge considered that the Crown may have ‘struggled’ to make out manslaughter if she had contested it, as opposed to pleading guilty.<sup>178</sup> Disturbingly, in the one case where the accused pleaded guilty to murder,<sup>179</sup> the sentencing judge acknowledged that there were ‘few, very few indeed’ cases ‘remotely similar where there has been a plea of guilty to murder’, but ‘many cases’ of manslaughter that gave ‘some indications of an appropriate range of sentence’. Even though he considered himself ‘required to sentence the prisoner for murder, not for manslaughter’ he still derived guidance from a manslaughter case in setting the sentence.<sup>180</sup>

We have grave concerns about the integrity of a justice system in which the prosecution appears to be overcharging and then accepting guilty pleas in circumstances where there is reasonable doubt as to the defendant’s guilt.<sup>181</sup> In fact the VLRC recommended that excessive self-defence be reintroduced for several reasons, including encouraging the prosecution in appropriate cases to lay charges of manslaughter on the basis of excessive self-defence, thereby removing the risk of a murder conviction for the accused going to trial, and limiting the number of issues at trial.<sup>182</sup>

Professor Sheehy has urged adoption of the recommendations of Judge Ratushny, who conducted the Canadian Self-Defence Review. She recommended that Crown prosecutors should be governed by guidelines that instruct them to exercise caution in plea negotiations where there is some evidence of self-defence. They should attempt to determine whether a proposed guilty plea is ‘equivocal’ or

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<sup>173</sup> [2000] NSWSC 109.

<sup>174</sup> *R v Kennedy* [2000] NSWSC 109, [4] (Barr J).

<sup>175</sup> *R v Trevenna* [2003] NSWSC 463.

<sup>176</sup> *Ibid* [40].

<sup>177</sup> *R v Yeoman* [2003] NSWSC 194.

<sup>178</sup> *Ibid* [10]. The case is also notable in that the judge, Buddin J, quotes at length from a psychological report prepared by a case worker who sets out in detail the characteristics of domestic violence and its effects upon the defendant.

<sup>179</sup> *R v Burke* [2000] NSWSC 356.

<sup>180</sup> *Ibid* [4]. In this case the Crown rejected the offer of the defendant to plead guilty to manslaughter and proceeded to trial on murder charges. The trial was aborted after 12 days through no fault of the defendant when events occurred that required the judge to discharge the jury. At that point the Crown agreed to accept a guilty plea to murder on the basis that she had committed murder with intention to cause grievous bodily harm but without intention or recklessness as to death.

<sup>181</sup> See also Lucian Dervan, ‘Overcriminalisation 2.0: The Symbiotic Relationship between Plea Bargaining and Overcriminalisation’ (2011) 7 *Journal of Law, Economics & Policy* 645.

<sup>182</sup> Victorian Law Reform Commission, above n 95, 3.126.

rather a true expression of the woman's acceptance of her guilt. If the former, the Crown should consider proceeding to trial on manslaughter instead of murder so as to reduce the pressure on the woman to plead guilty and thus allow the self-defence evidence to be heard by the trier of fact.<sup>183</sup>

The VLRC has also recognised the need for prosecutorial guidelines and professional legal education to assist prosecutors and defence lawyers to arrive at appropriate charges and pleas, to identify available defences and to assist clients to make informed choices about their cases.<sup>184</sup>

## IV Conclusion

Our review reveals a disparate array of potentially relevant defences with different technical requirements across the jurisdictions under scrutiny. While some jurisdictions appear to be more responsive to the defence claims of accused battered women in terms of case outcomes, our review does not reveal a straightforward relationship between the strictness of the statutory legal requirements of the various defences in any particular jurisdiction and the manner in which these cases are resolved. New Zealand, for example, has had one of the more liberal statutory definitions of self-defence throughout the period under scrutiny (2000–10) and yet has the highest conviction rate for murder and the lowest acquittal rate over that period of time. The converse appears to be true for Canada.

How judges and juries interpret and apply the legal requirements for defences when battered women are on trial, and how they assess the factual context in which they do so is clearly influential in these outcomes. The significant role played by the social context in which a battered woman is tried — the social and political assumptions and understandings of her jury and the community from which it is drawn, the gender and cultural competence of her counsel, the position taken by Crown counsel, the evidentiary rulings and attitude expressed by the presiding judge — is a critical but difficult aspect to explore. Law reform in Australia, Canada and New Zealand may thus be outstripped or undercut by the rate of social change in the broader society as well as within the legal profession. What is also of concern is that many women are still not testing their self-defence cases on the facts. The charging practices of prosecutors and the sentencing implications of a murder conviction mean that a significant proportion of these defendants in Australia and Canada during the time period under examination appear to have responded to the pressure to plead guilty to manslaughter in exchange for murder charges being dropped. Battered women's guilty pleas in this context not only risk compromising their innocence, but also make assessment of law reforms in the area incomplete and tentative.

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<sup>183</sup> Ratushny, above n 10, 180.

<sup>184</sup> Victorian Law Reform Commission, above n 95, 3.126.