Battered women charged with homicide in Australia, Canada and New Zealand: How do they fare?

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Battered women charged with homicide in Australia, Canada and New Zealand: How do they fare?

Elizabeth Sheehy*, Julie Stubbs**, and Julia Tolmie***

Abstract

This article examines trends in the resolution of homicide cases involving battered women defendants from 2000 to 2010 in Australia, Canada and New Zealand. Australia and Canada appear to have some commonalities in their treatment of such cases with higher acquittal rates and a greater reliance on plea bargaining to produce manslaughter verdicts, as compared with New Zealand. Although New Zealand’s small number of cases makes it difficult to generalise, its overall trends appear to be different from those observed in Australia and Canada, in both the high proportion of cases proceeding to trial and those resulting in conviction for murder. The authors conclude that there is a need to re-examine prosecutorial practices of proceeding to trial on murder rather than manslaughter charges even when manslaughter would be ultimately satisfactory to the prosecution, and of accepting guilty pleas to manslaughter verdicts in circumstances where the battered woman appears to have a strong self-defence case.

Keywords: Homicide, battered women, plea bargaining, domestic violence, defences

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A great deal of advocacy and law reform in recent decades has focused on homicide cases arising in circumstances of domestic violence. It has been widely acknowledged that battered women who kill an abusive partner have faced significant obstacles in having their resort to violence understood and appraised fairly within the legal system. Obstacles to fair treatment have included limitations in substantive law and its application, rules of evidence, and extra-legal factors that shape how law and legal argument is interpreted and given effect (Bradfield, 1998; Seuffert, 1997, Stubbs and Tolmie, 2005). Developments in common law and statutory reforms have sought to make the law more able to accommodate the claims of battered women who have killed in response to the violence they have experienced, but have done so in different ways such that the legal position across Australia is complex, with a disparate array of defences and partial defences, with different technical requirements (Sheehy et al., forthcoming; Guz and McMahon, 2011).

The recent review of family violence-related legislation jointly undertaken by the Australian Law Reform Commission and the New South Wales Law Reform Commission (ALRC/NSWLRC, 2010) documented the diversity of legal rules related to homicide across the states and territories. They called for empirical research to examine 'how the relevant defences are being used, ...by whom and with what results,' along with 'the impact of rules of evidence and sentencing laws and policies on the operation of defences' for victims of family violence who commit homicide (ALRC/NWSLRC, 2010, rec.14-2: 27). This article makes a contribution to that task. It takes a comparative approach, analysing the outcomes of battered women's homicide cases in Australia, Canada and New Zealand, over the decade 2000-2010. By drawing on experience across three countries with somewhat similar legal traditions, the study offers an insight into current practice, and into how formal legal requirements are given effect. It challenges the notion that there is any simple correspondence between legal rules and the case outcomes and it demonstrates the importance of prosecutorial discretion. When outcomes are compared with the historical resolution of such cases (where comparison is possible) there is evidence of some improvement in the legal system's response. However, New Zealand appears to remain out of line with apparent trends in Australia and Canada. Furthermore, prosecutorial charging practices across the three jurisdictions appear to have been impervious to change and may be contrary to the public interest in just outcomes in cases of battered women defendants.

Battered Women Defendants: Outcomes of Homicide Cases in Australia, Canada and New Zealand

Web and data base searches of media articles and reported and unreported cases were undertaken in Australia, Canada and New Zealand in order to compile information about the resolution of all such cases within the period 2000-2010. There are obvious limitations to this study, which we acknowledge. Since there is no comprehensive listing of homicide cases (as distinct from aggregate statistics) in any of the three countries, we were necessarily reliant on cases being reported publicly. Thus, our data are based on cases in which sufficient information exists in the public domain – either in the media or in legal databases. Cases that are not publicly recorded, for example because the Crown decided not to proceed with charges, or because the media was not alerted to the case
or chose not to report it, are not included. Media databases are selective and do not pick up all newspapers or news sources. It is also possible that we have omitted relevant cases because the history of abuse was not adequately presented in court or was not recorded in media accounts. Furthermore, cases where women have not undergone trial but pleaded guilty to manslaughter, or where the Crown has chosen not to press charges, are less likely to receive media attention. However, we would expect that the majority of these types of cases are likely to be recorded in some manner. This is because homicide cases tend to attract a high level of public resources and scrutiny, and these types of homicide cases – women who kill their husbands or partners – are seen as particularly sensational and/or controversial.

Contrary to expectation, the number of cases we have found for Canada is significantly less than those we have found in Australia – suggesting that our case list for Canada is incomplete. We are unsure of the reasons for this. This may be because a murder conviction in Canada results in a mandatory life sentence, and, as there is no argument over sentence (although parole ineligibility may be in issue), such cases are less likely to be reported in legal databases unless there is an appeal. However, we would expect that some of these cases would be reported by media, and thus we cannot be sure whether such cases are omitted in a way that represents a systematic bias in our data.

We also need to be cautious in the conclusions that we draw from these data because battered women's homicide cases are relatively rare. As a consequence, 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, as demonstrated below, the pattern of New Zealand cases is distinctive as compared to Australia and Canada, suggesting that battered women defendants are not well served by the way in which the available defences are used within that country.

**Australia**

The homicide rate in Australia is at an historically low level (1.2 per 100,000), and there has been a marked reduction in the rate of homicides over the past decade, especially for homicides by men who killed friends or acquaintance; women rarely kill in such circumstances. However, the trend in domestic homicides is distinctive in that unlike other categories of homicide, the number has not declined. In 2008-09, the most recent year for which data have been reported, more than half of all Australian homicides were ‘domestic’ (52%), that is involved family members and/or others in a domestic relationship; among domestic homicides, intimate partner homicides made up the largest category (60%) (Virueda and Payne, 2010:9). Consistent with the unchanged trend in domestic homicides, the rate of homicides by women offenders has not declined (Virueda and Payne, 2010, p.26). Indigenous women are over-represented as both victims and offenders. It is notable that Indigenous women ‘in almost all cases kill someone in a family or domestic relationship’, while Indigenous men killed in more varied circumstances. While the rate of homicide offences is higher for Indigenous men (15 per 100,000) than Indigenous women (5 per 100,000), Indigenous women’s offence rates are 25 times that for non-Indigenous women (0.2 per 100,000) while Indigenous men’s were only 8 times the rate of non-Indigenous men (Virueda and Payne, 2010:28).
In Australia from 2000-2010 we located 67 finalised cases involving battered women defendants facing homicide charges in respect of their violent partner. Indigenous women were greatly over-represented - at least 19 of the 67 cases (28%) involved an Indigenous defendant - yet Indigenous people make up only 2.5 percent of the Australian population (Australian Bureau of Statistics, 2010). The number and percentage of cases involving Indigenous women offenders differed across Australia; NSW had nine cases (36% of the cases in that state), Western Australia (WA) five cases (50%) and there was one case in each of Victoria (8%), and Queensland (8%). In Northern Territory information is incomplete but suggests that there were possibly 3 cases (60%). There were no Indigenous cases elsewhere.

Overwhelmingly, cases were commenced by way of a murder charge even though, in the majority of these cases, a plea was accepted to manslaughter. Of the 60 cases for which we have information, murder charges were brought in 51 cases (85%) and manslaughter in nine cases (15%). Western Australia was the only State that did not overwhelmingly charge defendants with murder although it is not clear why this is so; 50 percent of WA cases were charged as manslaughter (this accounted for 5 of the 9 Australian cases in which manslaughter was the original charge).

Most cases did not go to trial but were resolved by a plea of guilty (n=42, 63%). These cases generally involved a plea of guilty to manslaughter in exchange for murder charges being dropped by the prosecution, although one case involved a guilty plea to murder less than intentional murder, and two others involved guilty pleas to offences less serious than manslaughter. This demonstrates the importance of prosecutorial discretion. Manslaughter pleas were commonly based on a lack of mens rea for murder (‘lack of intent’) but the commission of an unlawful and dangerous act that resulted in death (n=16; 55% of the 29 cases for which we know the basis of the plea) or one of two partial defences, excessive self defence or provocation (n=13, 45%). A study by Rebecca Bradfield based on NSW cases from 1985-2000 also found that ‘lack of intent’ was a common basis on which women pleaded guilty to manslaughter and suggested that it may be emerging as a ‘de facto domestic violence defence’ (2001:151). While she found that this trend may demonstrate compassion in the exercise of prosecutorial discretion, it also had the undesirable effect of obscuring the violent context that the accused had been facing and the necessity of their ‘self preservation’ (Bradfield 2001:156).

Indigenous women were even more over-represented among cases involving a guilty plea: just over 40 percent of all guilty pleas in the sample were entered by Indigenous women. It is striking that 17 (89%) of the 19 cases involving Indigenous women were resolved by guilty pleas – only two went to trial – illustrating the additional pressures to plea bargain that Indigenous women may be under (see further Stubbs and Tolmie, 2008).

Just over half of the 23 cases that went to trial resulted in a conviction; 11 resulted in a manslaughter conviction (47.5% of cases tried; 16% of overall cases;) and one resulted in a murder conviction (5% of cases tried; 1.5% of overall cases). Of the 10 manslaughter convictions after trial for which we have information, four (40%) were
based on a lack of \textit{mens rea} for murder but the commission of an unlawful and dangerous act which caused death, whilst six (60\%) were based on the partial defence of provocation or excessive self-defence.

Overall, almost one in five of the cases did not result in a conviction (n=13, 19\%; 52\% of the 25 cases that were not plea bargained). Eleven of these cases were acquitted at trial, in one case the Crown withdrew charges and the remaining case was dismissed at committal.

These findings are summarised in Table 1. Of the 67 Australian cases finalised from 2000-2010, only two resulted in a murder conviction (3\%), and one of these was the result of a guilty plea. The overwhelming majority - 50 cases (75\%) - resulted in a manslaughter conviction, whilst two (3\%) resulted in convictions for a less serious offence and 13 (19\%) resulted in no conviction at all. In all 11 instances of acquittal, self-defence had been successfully raised at trial.

\begin{table}
\centering
\begin{tabular}{|c|c|c|c|c|c|c|c|c|c|c|c|c|}
\hline
\textbf{Outcome} & \textbf{NSW} & \textbf{Vic} & \textbf{QLD} & \textbf{WA} & \textbf{SA} & \textbf{NT} & \textbf{ACT} & \textbf{Tas} & \textbf{Aust} & \textbf{\%} \\
\hline
Withdrawn & 1 & 1 & 1 & 1 & 1 & 1 & 1 & 1 & 1 & 1 & 1.5 \\
Dismissed at committal & 1 & 1 & 1 & 1 & 1 & 1 & 1 & 1 & 1 & 1.5 \\
\hline
\textbf{Trials} & & & & & & & & & & & \\
\hline
Acquittal (self-defence) & 5 & 2 & 1 & 1 & 1 & 1 & 1 & 1 & 11 & 16.4 \\
Manslaughter conviction & 2 & 4 & 2 & 2 & 1 & 1 & 1 & 1 & 11 & 16.4 \\
Murder conviction & 1 & 1 & 1 & 1 & 1 & 1 & 1 & 1 & 1 & 1.5 \\
\hline
\textbf{Guilty Pleas} & & & & & & & & & & & \\
\hline
Other offences & 1 & 1 & 1 & 1 & 1 & 1 & 1 & 1 & 2 & 3.0 \\
Manslaughter & 15 & 5 & 7 & 6 & 1 & 3 & 2 & 39 & 58.2 \\
Murder & 1 & 1 & 1 & 1 & 1 & 1 & 1 & 1 & 1 & 1.5 \\
\hline
Total & 24 & 12 & 10 & 10 & 4 & 4 & 4 & 4 & 67 & 100 \\
\hline
\end{tabular}
\caption{Homicide Prosecutions of Battered Women 2000-2010, Australia: Outcomes by State}
\end{table}

The picture differed slightly by State. Four states had ten or more cases; the others had too few cases to suggest any patterns. In NSW (67\%), Queensland (70\%) and WA (70\%), the majority of cases were resolved by guilty pleas – in all but two cases this was
to manslaughter. By contrast, in Victoria a much lower percentage was resolved by plea bargaining to manslaughter (5 cases, 42%), 50 percent of cases went to trial, and a higher percentage of cases resulted in a manslaughter conviction following trial (33%) than other states. However, the different pattern of outcomes in Victoria is not attributable to the 2005 reforms there since most cases predated the reforms. The percentage of cases resulting in no conviction was highest in NSW and Victoria (25% in each state). It is notable that one of the two murder convictions occurred in South Australia (R v Dunn, 2007) where there is a mandatory life sentence for murder. The other murder conviction occurred in NSW where sentencing is discretionary, and resulted in an aggregate sentence of 9 years (R v Burke, 2000).

If these figures accurately reflect what is happening in practice, murder convictions of battered women appear to have become rare in Australia. By comparison, Bradfield’s study of 1980-2000 found 7 murder convictions (9%) and 10 acquittals (13%) from 76 cases (2002). This suggests that, over the past decade, greater recognition has been given to the context of domestic violence in cases involving battered women defendants for the purposes of assessing criminal liability and applying the legal defences. It also seems that in the majority of homicide cases involving battered women defendants, the prosecution accepted guilty pleas to charges less than murder - sparing the defendant, witnesses and society the costs involved in going to trial. In slightly less than half of these cases, it did so on the basis of one of the partial defences to murder. While we worry about women’s abandonment of their self-defence claims in favour of accepting a manslaughter plea, we recognize these verdicts are an improvement over murder convictions.

Finally, we note that in a sizeable minority of cases (19% Australia wide; 25% in Victoria and NSW) battered women defendants are now successful in avoiding conviction altogether, mostly on the basis that their lethal self-help was a reasonable defensive response to the violent threat that they faced. This suggests that there is now some recognition, for the purposes of applying the law on self-defence, of both the dangerous nature of intimate partner violence and the limited resources available to some battered women to achieve safety. Most women who were exonerated had proceeded to trial, although in one case, atypically, the prosecution dropped homicide charges once it became apparent that there was a strong case for self-defence.

Of even greater importance is that self-defence has been successful in cases where the defendants used lethal defensive force in non-traditional self-defence circumstances. In the past such circumstances were not usually understood as providing the context for self-defence, despite being the kinds of circumstances in which battered women might need to defend themselves and/or their children from an abusive partner. For example, of the 11 Australian cases resulting in acquittals on the basis of self-defence, three (27% of acquittals; 4% of all resolved cases) involved non-traditional self-defence scenarios, in that the deceased was attacking the accused when she killed him.

In R v Spurr (2005) the accused shot the deceased whilst he was sleeping. This was one of six NSW cases that resulted in an acquittal, but the only one arising from a non-traditional self-defence context. In the Victorian case R v MacDonald (2006), the deceased had raped the accused on the night of his death and she later lay in wait for 90
minutes for him to return home and then shot him. The prosecution argued, unsuccessfully, that self-defence was not available because the accused did not face an immediate threat. This case has been presented as illustrating the failings of traditional understandings of self-defence and the need for the 2005 reforms in s9AH of the Crimes Act (Vic), which confirm that a lack of immediacy in the attack being responded to does not mean that self-defence is not available (Vict Dept of Justice, 2011: 29). 4 In the only Queensland acquittal, R v Falls (2010), the accused sedated her abuser and then shot him in the head at point blank range after he had threatened to kill their youngest child and specified the date on which he would carry out the treat. This case is especially noteworthy because Queensland has the strictest legal requirements for self-defence (see Sheehy et al forthcoming; Guz and McMahon, 2011).

However, despite these positive developments, acquittals on the basis of self-defence are still not common (the percentage of acquittals appears to be considerably lower than in Canada, see below), and those in non-traditional self-defence scenarios even rarer. What is of concern about this observation is that a number of the 39 cases involving guilty pleas to manslaughter demonstrate strong defensive components on the facts, suggesting that an acquittal on the basis of self-defence may have been justified in at least some of these cases. This raises questions about the prosecutorial practice of indicting the defendant for murder when a guilty plea to manslaughter is subsequently accepted; is it in the public interest to charge murder and to accept a guilty plea to manslaughter when there are serious doubts about the defendant’s guilt?

To illustrate this point with respect to NSW, 16 of the 24 cases were resolved by guilty pleas. In all instances the accused had been indicted on murder charges. The accused pleaded guilty to manslaughter in 15 cases and the murder charges were dropped, and in nine (60%) of those cases she had, on her account, inflicted the lethal violence while being physically attacked or threatened by her violent partner. 5 In a further two (13%) of these cases she was responding to the general threat posed to her by the deceased rather than a specific attack. 6 In several 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 consistent with self-defence. For example, in R v Kennedy (2000) the accused did not remember stabbing the deceased with a knife from the kitchen. However, there was a history of him administering savage beatings, raping her and exercising extreme levels of control over her, she had a current apprehended violence order against him, and friends had warned her that he would kill her. On the night in question the last thing she remembered was him starting to punch and kick her. The furniture in the house was overturned as though there had been a violent struggle. The sentencing judge commented:

I think that when she realized 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 behavior, short of an intention to do him really serious injury (R v Kennedy, 2000: para 36).

In R v Trevanna (2003) the accused grabbed the deceased’s shot gun and shot him in the back of the head after he had choked her and threatened her with a cricket bat and with
death. She was under the apprehension that he was going to bash her very badly or kill her. The sentencing judge commented that a jury may not have been persuaded that the Crown had negatived self-defence and may have acquitted the defendant altogether (para 40). In R v Yeoman (2003) the accused was trapped in an extremely violent relationship without the means to leave and believed that ‘to survive she had to adopt a position of complete surrender’. The deceased man’s sister and father were afraid of him and supported the accused. The sentencing judge said that the Crown may have ‘struggled’ to make out manslaughter if she had contested it, as opposed to pleading guilty (p.10). Disturbingly, in R v Burke (2000), the one case where the accused pleaded guilty to murder, the sentencing judge acknowledged that the case was essentially one of manslaughter and used a manslaughter case as a guide in setting the sentence (p.4). However, the sentence, an aggregate of 9 years imprisonment with a non-parole period of 5 years, is the longest sentence among the NSW cases.

Elizabeth Sheehy has documented the pressures on battered women defendants who are facing murder charges to plead guilty to manslaughter rather than proceed to trial (2001; see also VLRC, 2004: 106-109). For example, life sentences are mandatory for murder in Queensland (s 305(1), Criminal Code (Qld)), the Northern Territory (s 157, Criminal Code (NT)), and South Australia (s 11, Criminal Law Consolidation Act 1935 (SA)), whilst Western Australia (s 279(4), Criminal Code (WA)), like New Zealand (s 102, Sentencing Act 2002 (NZ)), has a presumption of life imprisonment. Even in jurisdictions where life is not mandatory or presumptive, a conviction for murder carries a sentencing tariff higher than that for manslaughter. 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 (Bradfield, 2002). Sheehy has argued, in line with the recommendations of Judge Lynn Ratushny (1997: 180) from the Canadian Self-Defence Review, that Crown prosecutors should be governed by guidelines that instruct them to exercise caution in plea negotiations involving battered women where there is some evidence of self-defence. They should attempt to determine whether a proposed guilty plea is “equivocal” or 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 in order to reduce the pressure on the woman to plead guilty and thus encourage the case to go to trial so that the self-defence evidence can be heard by the trier of fact (Sheehy, 2001).

Clearly this is not yet happening in Australia. In the overwhelming majority (85%) of cases murder charges were laid, even though in most (58%) cases pleas of guilty to manslaughter were eventually accepted. There must also be 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 evidence of self-defence that may raise a reasonable doubt as to the defendant’s guilt. In fact the Victoria Law Reform Commission recommended that excessive self-defence be reintroduced for several reasons, including to encourage 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 to limit the number of issues at trial (VLRC, 2004: 3.126). It 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 (VLRC, 2004: 3.126).

Canada
As in Australia, the rate of homicides in Canada (1.62 per 100,000 as at 2010) has fallen in recent years, and after a long term decline in the rate of intimate partner homicide, the recent trend in that category has been stable. There were 89 victims of intimate partner homicide in Canada in 2010, 26 of them men (Mahony, 2011:2, 12).

In Canada we identified 36 cases resolved during 2000-2010 involving battered women defendants who had killed their violent partners and were charged with homicide. Of these 17 (47%) involved Indigenous women. The 2006 Canadian Census found that 3.8 percent of Canada's population was Indigenous, making Indigenous women's over-representation among battered women charged with homicide staggering.

Most women were charged with murder (72%). In more than half of all cases (n=21, 58%), the women were charged with second degree murder which, like first degree murder, carries a mandatory life sentence of imprisonment. In Canada the relevant legal difference between first and second degree murder for cases involving battered women who kill is the element of ‘planning and deliberation’ or the use of a contract killer (s 234 Criminal Code (Can)). 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 (ss 745, 745.4 Criminal Code (Can)). Of the remaining cases, five women were charged with first degree murder, eight were charged with manslaughter, and in two cases it is unknown what the original charges were.

Just over half of the cases (n= 20, 56%) were resolved by plea bargaining; 19 (53% of total cases) were resolved by a guilty plea to manslaughter and one case (3%) ended in a guilty plea to murder (Fraser, 2009). Thirteen of the manslaughter guilty pleas were made in response to murder charges, four to manslaughter charges, and in two cases the original charges were unknown. One woman (3%) did not proceed to trial because her charges were stayed (Rupert, 2003).

Of the 15 remaining cases (42% of the overall cases) that proceeded to trial, 11 went to trial on murder charges and four on manslaughter. Three (8% of the overall cases) proceeded to trial on murder charges and resulted in a verdict of manslaughter, one murder trial resulted in a murder conviction (3% of the overall cases), whilst 11 (30.5% of the overall cases) proceeded to trial (4 on manslaughter and 7 on murder) and resulted in an acquittal.

Overall, as in Australia, the most common outcome was a conviction for manslaughter (n=22, 61%). There were two murder convictions (5.5%), one prosecutorial stay (3%), and 11 (30.5%) cases resulted in an acquittal, usually on the basis of self-defence.

Despite the fact that only a minority of cases resulted in an acquittal on the basis of self-defence, most cases appear to have had strong defensive elements on the facts. Tellingly, in only seven cases was the accused not under attack from the deceased at the
time she used lethal force against him. Five of these cases resulted in manslaughter convictions, either as a result of a guilty plea or after proceeding to trial; and two resulted in an acquittal that possibly implicated self-defence. (In Micheline Veilleux's case, news reports suggest that her acquittal appeared to have been based on the Crown's inability to prove that Veilleux's act caused death, although self-defence was also urged (Nouvelles Télé-Radio, 2003). In Rita Graveline's case the defence advanced was sane automatism: she experienced dissociation and had no memory of what precipitated her act of loading and shooting a gun at her sleeping husband. The defence had introduced evidence regarding her experience of abuse by her husband, but it was the trial judge who put an alternate defence of self-defence to the jury, even though Graveline did not provide an evidentiary basis (R v Graveline (2006)). In three other cases it cannot be ascertained whether or not there was a struggle at the time of the homicide.

The Canadian cases therefore reveal a broadly similar pattern to the Australian cases. However, overall the approach in Canada appears somewhat more accommodating of battered defendant's self-defence claims. In both countries most cases were plea bargained, although Australia - at 63 percent – had a slightly higher level of plea bargaining than Canada (56%). The overwhelming majority of cases in both jurisdictions resulted in a manslaughter conviction – 75 percent in Australia, and 61 percent in Canada. However, and most interestingly, close to one-third of battered women's homicide cases (30.5%) ended in acquittal in Canada. This is certainly much higher than Australia at 16 percent, although some of the larger Australian States, like NSW, were higher (21%).

Notably, where the prosecution pressed manslaughter rather than murder charges, 100 percent of women who went to trial were acquitted. Half of the eight women charged with manslaughter pleaded guilty, which may reassure prosecutors that trials will not be inevitable where battered women defendants are facing manslaughter charges. Yet even some of these women gave up what appear to be self-defence claims. Annie Turbide, for example, shot her boyfriend who had taken control over her money and her life, sexually assaulted her and tried to force her into prostitution. He had a drug addiction and had just ended another violent relationship during which he had been charged for his threats and violence. In what was described as 'drug-crazed' rant, he terrorized Turbide and her six-year-old daughter, screaming that he was fed up with women, especially his ex-girlfriend and Turbide, and that her daughter deserved to be raped. Turbide stabbed him, stating that she did not remember anything after hearing that threat 'But I thought, if I can't save myself I have to save my little girl' (Cherry, 2004: A6). It is possible, however, that guilty pleas like Turbide's more closely resemble the ideal of the unequivocal guilty plea discussed by Judge Ratushny because at least these women were not negotiating in the shadow of the mandatory life sentence for murder.

In the remaining four cases involving manslaughter charges, the women argued self-defence at trial successfully. In Rain in the context of a physical struggle witnessed by her daughter and a friend, the defendant picked up a knife from the counter behind her as her ex-partner pressed against her. The medical evidence was that 'not much force would be involved in inflicting this particular wound... ....It was just a very unlucky stab'
(R v Rain (2000): 97). Virginia Balico Hernando stabbed her husband with a small paring knife that she kept by her bed to ward him off when he came to sexually assault and beat her in the night when he was ‘drunk and mad’. The Crown relied upon the predicate offence of possession of a weapon for an unlawful purpose to prove manslaughter and arguably to preclude self-defence. The judge found that Hernando’s purpose in possessing the knife was to deter an attack and thus to abate, not endanger, the public peace, but emphasized that her case was unique: ‘I am in no way intending to endorse, sanction or otherwise justify a general practice of possessing a weapon for the purpose of deterring an abusive spouse, not matter how violent.’ (R v Hernando (2009): para 97).

While murder convictions appear to be rare in Canada in these types of cases, the prosecution is still proceeding with murder charges in the majority of instances (72% - less than the 85% in Australia) - even when there is evidence that the accused was using defensive force and the Crown is ultimately prepared to accept a guilty plea to manslaughter. Furthermore, Canadian prosecutors continue to pursue first degree murder charges against a small but significant percentage (14%) of battered women even though there were no such convictions in the time period under study.

Of perhaps even greater concern is that, as in Australia, Indigenous women are highly over-represented among those cases resolved by guilty pleas. Of the 20 guilty pleas, 14 (70%) were entered by Indigenous women. While there may be complicating factors that weigh in favour of guilty pleas in many of these cases, all of them killed in the context of a confrontation, underlining a serious concern about access to justice for Indigenous women in Canada. For example, at Bernice Byrd’s sentencing for manslaughter, the judge reviewed the deceased’s ‘propensity for violence’ ‘on many occasions,’ against her and described the facts as follows: ‘An argument erupted between yourself and Mr Fisher which escalated into a physical altercation. Mr Fisher grabbed you by the throat, and began strangling you. There was a struggle which resulted in Mr Fisher receiving a single stab wound from which he died’ (R v Byrd (2005): 3, 1-2).

**New Zealand**

Homicide rates in New Zealand have also fallen since the early 1990s (Statistics NZ 2008). Although data on family homicides are limited, the number of family homicides between 2002 and 2006 has remained stable. In this time there were 291 homicides, of which 141 (48%) were family homicides, and 77 (54%) of the domestic homicides were couple related homicides – only 9 of these latter homicides involved female perpetrators (Martin and Pritchard 2008; FVDRC 2011). From 2007-2008 there were an additional 23 family violence homicides involving couples and an additional three female perpetrators. Note, however, that four of the female perpetrators from 2002-2008 were acting in combination with a male perpetrator (FVDRC 2011).

In New Zealand we identified 10 cases involving battered women defendants charged with homicide in respect of their violent partners that were resolved from 2000-2010. Once again Indigenous women were over-represented: four defendants (40%) were Maori, although Maori women comprise only around 15% of the NZ female population.
In a further case (10%) the defendant was Samoan, and thus 50 percent of the defendants in our New Zealand cases were Polynesian women.

Only one case (10%) was resolved by a guilty plea (to manslaughter). The remaining nine cases (90%) proceeded to trial on charges of murder (in one of these manslaughter was also charged in the alternative).

The overwhelming majority of cases resulted in a conviction. Of the nine cases that went to trial, four (44%) resulted in a murder verdict, four (44%) in a manslaughter verdict (in 2 of these cases the accused had offered to plead guilty to manslaughter but the Crown proceeded to trial on murder charges) and there was one (10%) acquittal on the basis of self-defence.

As in Canada and Australia, New Zealand cases that resulted in convictions commonly had fact situations evidencing the accused's use of defensive force in response to a violent or threatened attack on her. This was apparent in five cases (R v Wickham (2010); R v Neale (2009); R v Reti (2009); R v Mahari (2007); R v King (2005)). For example, in Wickham (2010) the accused made an emergency call to the police but shot her partner before they arrived. She said that calling the police had aggravated him and he had threatened to bash her with a brick and put her in the pool with the cover on. Whilst she was convicted of manslaughter, 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” (New Zealand Herald, 2010). 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” (New Zealand Herald, 2010). The judge also noted that the accused's advanced debilitative illness in this case “made her feel she had few options available to her in dealing with the confrontation with her husband” (New Zealand Herald, 2010).

Finally, the only New Zealand case 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 (R v Stephens, (2002)).

The resolution of New Zealand cases seems markedly out of alignment with Australia and Canada, as is evident from Table 2. Guilty pleas were offered and accepted in 10 percent of New Zealand cases, compared to 63 percent of Australian and 56 percent of Canadian cases, with the result that 90 percent of cases proceeded to trial in New Zealand, as compared to 34 percent in Australia and 42 percent in Canada— all on charges of murder. Murder convictions occurred in 40 percent of New Zealand cases, as opposed to only 3 percent of Australian cases and 5.5 percent of Canadian cases. Only one New Zealand case (10%) resulted in acquittal compared with 16 percent of Australian and 30.6 percent of Canadian cases. If we include cases that were stayed or dropped, then no convictions occurred in 19 percent of cases in Australia, 33.5 percent in Canada and 10 percent in New Zealand.
Table 2: Outcomes for battered women’s homicide cases,
Australia, Canada & New Zealand

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Basis*</th>
<th>Aust</th>
<th>%</th>
<th>Can.</th>
<th>%</th>
<th>NZ</th>
<th>%</th>
</tr>
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<tbody>
<tr>
<td>Did not proceed</td>
<td></td>
<td>2</td>
<td>3.0</td>
<td>1</td>
<td>2.8</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trial</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>acquittal</td>
<td>Self-defence</td>
<td>11</td>
<td>16.4</td>
<td>11</td>
<td>30.6</td>
<td>1</td>
<td>10.0</td>
</tr>
<tr>
<td>manslaughter</td>
<td>UDA</td>
<td>4</td>
<td>6.0</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>prov/ESD</td>
<td></td>
<td>6</td>
<td>9.0</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>not known</td>
<td></td>
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<td>3</td>
<td>8.3</td>
<td>4</td>
<td>40.0</td>
</tr>
<tr>
<td>murder</td>
<td></td>
<td>1</td>
<td>1.5</td>
<td>1</td>
<td>2.8</td>
<td>4</td>
<td>40.0</td>
</tr>
<tr>
<td>Guilty Plea</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>lesser offences</td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>manslaughter</td>
<td>UDA</td>
<td>16</td>
<td>23.9</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>prov/ESD</td>
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<td>13</td>
<td>19.4</td>
<td></td>
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</tr>
<tr>
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<td>1</td>
<td>1.5</td>
<td>1</td>
<td>2.8</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>67</td>
<td>100</td>
<td>36</td>
<td>100</td>
<td>10</td>
<td>100</td>
</tr>
</tbody>
</table>

*UDA – lacked mens rea for murder but convicted of manslaughter on the basis of an unlawful and dangerous act; prov – provocation; ESD – excessive self defence.

Although, as noted above, we cannot draw definite conclusions because of the small number of cases that have occurred in New Zealand in this period, the data raise the disturbing possibility that the New Zealand criminal justice system is considerably more punitive in its response to battered women defendants who have killed their violent abusers. Furthermore, the data may suggest that the legal profession in New Zealand, including lawyers acting on behalf of the Crown, have been impervious to recent international developments, particularly contemporary social science understandings about how the phenomenon of domestic violence operates in cases that escalate to homicide and the “social entrapment” of the targets of domestic violence (see Stark, 2007; US Department of Justice and US Department of Health and Human Services, 1996).

Whilst the percentage of acquittals in New Zealand appears to be lower than it should be (if it includes cases such as Wickham), one could argue that it is consistent with smaller Australian states such as Queensland and WA, which have similarly small numbers of cases. However, New Zealand differs from comparable jurisdictions in the prosecutorial practice of refusing to accept guilty pleas, instead proceeding to trial on murder charges, and in the number of murder convictions that result. New Zealand had four murder convictions (of 10 cases), which is the same number of murder convictions as all the states of Australia combined with Canada (from a total of 103 cases).

Conclusion
Elsewhere we have juxta-posed an overview of the requirements for self-defence and other relevant partial defences to homicide, in the three jurisdictions under examination with the data we have set out here (Sheehy et al, forthcoming). Consistent with Holly Maguigan’s (1991) findings in her study of US outcomes in battered women’s homicide trials, we found that there is no simple correlation between how liberal or restrictive the legal requirements for the various defences are in each jurisdiction and the general outcomes of such cases. For example, Canada appears to have one of the more restrictive legislative frameworks for self-defence and yet appears to have been the most successful in accommodating battered women’s self-defence claims. Conversely New Zealand has a statutory framework on self-defence that at face value appears to be quite liberal but which has, unfortunately, been read down by the judiciary and appears to be lagging behind comparable jurisdictions in its treatment of such cases.

This point illustrates the importance and the influence of the legal fraternity and the broader community, from which the jury is drawn, charged with the responsibility of conducting, presiding over, and deciding the facts of such cases. Some jurisdictions, like Victoria, have been assiduous in removing possible obstacles to such defendants successfully raising self-defence, as well as leading the way in directly addressing potential evidentiary problems. However, the 2005 Victorian reforms also made very explicit the need to change both law and legal culture (Victorian Department of Justice, 2010, at p.3).

Even in Canada, which is the jurisdiction that appears to have been the most successful in accommodating battered women’s self-defence claims, the data here suggest that prosecutors are not paying heed to Judge Ratushny’s recommendations and continue to charge murder, even first degree murder, in circumstances where self-defence for battered women is clearly at issue. The data raise the question of whether prosecutors are exercising their public office in a manner that serves the interests of justice. In making this point we recognise that charging for murder may be standard prosecutorial practise in some of the jurisdictions under examination and thus may also operate unfairly in respect of other classes of defendants. And of course, the choices made by trial judges and defence counsel are likely to be as influential in the resolution of homicide cases involving battered women defendants, but are not as visible in the data examined in this article.

Our data indicate that the partial defences are still being heavily relied on by prosecutors, defence counsel and juries in either bargaining guilty pleas to manslaughter or arriving at manslaughter convictions after trial. This raises concerns about the lack of partial defences in Tasmania and particularly in New Zealand which retains a presumption in favour of life imprisonment for murder (Sheehy et al, forthcoming). This is a difficult issue because reliance on the partial defences in cases involving battered women defendants risks cementing the current normalisation of manslaughter convictions in such cases, and may work against arguing self defence. However, in the absence of partial defences, New Zealand has more murder convictions and fewer acquittals than one might expect by comparison with Australia and Canada. Also discouraging is the fact that the presumption in favour of life imprisonment for
murder was overturned in only one of the four New Zealand cases that resulted in a murder conviction (s 102, Sentencing Act 2002 (NZ)).

Finally, it remains a cause of grave concern that Indigenous women are grossly over-represented as both victims and perpetrators in spousal homicide cases. This over-representation is likely to reflect the elevated levels of violence such women navigate in their personal lives, shaped by past and ongoing practices of colonisation, and the manner in which the women are constructed and responded to by agents of the criminal justice process in the course of homicide investigations and prosecutions (Aboriginal & Torres Strait Islander Women’s Taskforce on Violence, 2000). The fact that Indigenous women are even more over-represented among those women who forego their trial rights and instead plead guilty to manslaughter in both Australia (see also Stubbs and Tolmie 2005) and Canada also raises the question of whether they receive equal access to quality legal representation, as well as equal access to justice.

Our research indicates the need for future reform efforts that are designed to improve the legal response to battered women defendants charged with homicide to broaden in focus from the formal legal requirements, and defences available, in such cases to the manner in which these cases are charged, conducted and directed in practice. In particular, there appears to be a pressing need for the development of appropriate guidelines governing the prosecutorial charging practices in, and conduct of, such cases. It would seem appropriate, for example, given the typical manner in which such cases are currently resolved in Canada and Australia, for manslaughter rather than murder charges to be laid in the majority of homicide cases involving battered women defendants. Such developments will also require a change to legal culture, and much remains to be done to achieve that end.
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*R v Lavallee*, [1990] 1 SCR 852

*R v MacDonald* (2006), unreported, VSC, 3 March 2006, Nettle J
This article draws in part on Sheehy, E, Stubbs J and Tolmie J (forthcoming) ‘Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand’ Sydney Law Review which provides a description of the legal requirements of the relevant statutory defences to homicide across the three jurisdictions under examination and key cases involving battered women defendants.

During the period of this study Tasmania, Victoria and WA abolished provocation, while NSW, SA and WA re-introduced excessive self defence and Victoria introduced a new offence of defensive homicide. Given the relative infrequency of battered women’s homicide cases, it is too soon to examine the specific effects of these changes.

The others were R v Cloughessy (2008); R v Morgan (2005); R v Kelly (2003); R v Wright (2002); R v Kennedy (2001).
The other Victorian acquittal involved traditional self-defence facts (R v Besim (2004); see also R v Dimitrovski (2009), also involving a traditional self-defence scenario but dismissed at committal rather than proceeding to trial.

R v Kennedy (2000); R v Trevanna (2003); R v Duncan (2010); R v Russell (2006); R v Mercy (2004); R v Mabbott (2002); R v Scott (2003); R v Melrose (2001); R v Kirkwood (2000).

R v Yeoman (2003); R v Ferguson (2008).

For the purposes of this comparison, cases in which the prosecution did not proceed (2 in Australia and 1 in Canada) have been excluded and thus these percentages differ from those in Table 2.