An Argument for Diminished Culpability Manslaughter: Responding to Gaps in Victorian Homicide Law

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Abstract

The complexity and diversity of unlawful killings – particularly those involving mentally impaired offenders – does not fit neatly across the binary distinction of offence/defence that structures criminal law. This is demonstrated in the Australian State of Victoria, where cognitively impaired homicide offenders who fail to meet the strict remit of the mental impairment defence have no (partial) defence or offence available to them which adequately captures their levels of criminal responsibility, moral agency and culpability. This makes the sentencing of such offenders not only particularly complex, but means that the only stage in which both moral and legal culpability can be considered is in mitigation. This article argues that a progressive framework is needed to permit a small minority of (mentally impaired) homicide offenders to be simultaneously inculpated and (partially) exculpated. Accordingly, we propose introducing a model of diminished *culpability* manslaughter in Victoria, drawing from Loughnan's seminal reconceptualisation of 'diminished responsibility manslaughter' as an offence-cum-defence, which renders the diminished accused *differently liable*. Informed by a study of all homicide cases (*n*=647) sentenced in Victoria between 1 January 2000 and 31 July 2017, we argue that this model would not revoke legal capacity and would instead enhance the legitimacy and coherence of criminal law procedures, allowing a wider range of more legitimate convictions and reflective sentencing dispositions.

Key words: homicide, mental impairment, diminished responsibility, partial defences, law reform

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Introduction

Mental impairment occupies a prominent, yet contentious position in criminal law scholarship and debate. In particular, questions of how and more recently if, mental impairment should factor into homicide law have received attention both nationally and internationally.[1] A consistent theme running across these debates has been the role and need for a partial defence of diminished responsibility. According to Loughnan, diminished responsibility 'has been operating in an important yet hitherto now unappreciated way'.[2] She argues that diminished responsibility provides an avenue to reflect the 'diverse and dynamic social meanings around unlawful killing – which do not fall neatly across the divisions between offences and defences, and liability and responsibility'.[3] Charting an alternative course through this complex legal terrain, Loughnan reconceptualises the diminished responsibility accused as *differently liable*, meaning s/he is both inculpated and partially exculpated.[4] It is this issue of taxonomy involving the labelling, classification and grading of offences – specifically in relation to cognitively impaired homicide offenders – that is the focus of this article.

In Victoria,[5] the now abolished intermediate offence of defensive homicide previously operated in a similar way to Loughnan's 'diminished responsibility manslaughter', offering a way to accommodate 'diverse and dynamic social meanings around unlawful killing'.[6] Defensive homicide offered a halfway house between murder and manslaughter, recognising a reduced level of culpability and responsibility in select circumstances.[7] Specifically, the

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[1] Debates have predominantly been in relation to Article 12 of the United Nations' *Convention on the Rights of Persons with Disabilities* (CRPD), which recommends that defences based on negation of responsibility, because of a mental or intellectual disability, be abolished and replaced by disability-neutral doctrines. Scholars in favour of this approach include, for example, Tina Minkowitz, 'Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond' (2014) *23(3) Griffith Law Review* and Christopher Slobogin, 'An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases' (2000) *86 Virginia Law Review* 1199. However, we concur with Craigie, who argues that Article 12 permits degrees of asymmetry in the approach to legal capacity at criminal law. See Jillian Craigie, 'Against a Singular Understanding of Legal Capacity: Criminal Responsibility and the Convention on the Rights of Persons with Disabilities' (2015) *40 International Journal of Law and Psychiatry* 20-21. See also, Piers Gooding and Tova Bennett, 'The Abolition of the Insanity Defence in Sweden and the United Nations Convention on the Rights of Persons with Disabilities: Human Rights Brinksmanship or Evidence It Does Not Work?' (forthcoming) *New Criminal Law Review*.

[2] Arlie Loughnan 'From Carpetbag to Crucible: Reconceptualising Diminished Responsibility Manslaughter' in Ben Livings, Alan Reed and Nicola Wake (eds) *Mental Condition Defences and the Criminal Justice System* (2015) Newcastle Upon Tyne: Cambridge Scholars Publishing 344; Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (2012) London: Oxford University Press.

[3] Loughnan, 'From Carpet Bag to Crucible', above n 2.

[4] Ibid.

[5] S 9AD of the *Crimes (Homicide) Act 2005* (Vic)

[6] Loughnan, 'From Carpet Bag to Crucible', above n 2.

[7] During its 10-year operation, there were 34 convictions for defensive homicide in Victoria. Of these, 21 involved offenders who presented evidence of experiencing a history of mental health problems – ranging from formal

offence was available in situations where a person killed with a genuine, but unreasonable belief that his/her actions were necessary in order to defend him/herself (or another) (akin to excessive self-defence). In this regard, it provided a safety net for mentally impaired offenders who did not meet the strict remit of the *Crimes (Mental Impairment and Unfitness To Be Tried) Act 1957* (Vic) (CMIA)[8] and also for abused women who killed in response to prolonged family violence, but in a situation in which they were not in immediate danger.[9]

In 2014, contentiously, defensive homicide was abolished following a widely held (mis)perception that it was being abused by violent men.[10] In recommending its abolition, the Victorian Department of Justice (DOJ) suggested the offence 'inappropriately condones or excuses male violence … [and] supports a culture of blaming the victim'.[11] These comments were made despite concerns raised by family violence stakeholders – including a submission made to the DOJ endorsed by 17 community and family violence organisations, women's services and academics[12] – that this would 'be a backward step in legal responses to victims of family violence'.[13] Further to negatively impacting abused women who killed in response to prolonged family violence, Ulbrick et al have explored the implications of defensive homicide's abolition on cognitively impaired offenders who commit unlawful killings, claiming:

> The abolition of defensive homicide was largely premature and insufficient attention was given to the fact that its abolition, combined with the restrictive operation of the *CMIA*, would result in situations where individuals with mental conditions insufficient to form the basis of the mental impairment defence would have no defence or appropriate alternative homicide offence available to them in Victorian law.[14]

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diagnoses of schizophrenia, bipolar disorder, paranoia and trauma-related mental illness, to cognitive impairments and intellectual disabilities. Fifteen pleaded guilty; six were found guilty at trial. See Madeleine Ulbrick, Asher Flynn and Danielle Tyson, 'The Abolition of Defensive Homicide: A Step Towards Populist Punitivism at the Expense of Mentally Impaired Offenders', (2016) *40(1) Melbourne University Law Review*.

[8] Ulbrick et al, above n 7.

[9] Ibid.

[10] Ibid.

[11] Criminal Law Review, DOJ (Vic), 'Defensive Homicide: Proposals for Legislative Reform', (Consultation Paper, DOJ (Vic), September 2013), 29-30.

[12] Danielle Tyson, Sarah Capper and Debbie Kirkwood, 'Submission to DOJ' (Vic), Defensive Homicide: Proposals for Legislative Reform – Consultation Paper, 27 November 2013.

[13] Domestic Violence Resource Centre Victoria, 'Defensive Homicide an Essential Safety Net for Victims' on Domestic Violence Resource Centre Victoria, *Domestic Violence Resource Centre Victoria* (23 July 2014) http://www.dvrcv.org.au/knowledge-centre/our-blog/defensive-homicide-essential-safety-net-victims.

[14] Ulbrick et al, above n 7, 329.

The current state of play in Victorian homicide law is that no partial defence or offence exists to recognise diminished culpability in unlawful killings and there has been little consideration given to how this gap will impact mentally and cognitively impaired homicide offenders. In this article, we argue that the current binary, and minimally disaggregated murder/manslaughter distinction, is not sophisticated or subtle enough to deal with the complexity and diversity of unlawful killings. As a response, we contend that a model of diminished culpability manslaughter, based on Loughnan's 'diminished responsibility manslaughter' is needed to more appropriately reflect reductions in offender culpability, when justified.[15] We acknowledge that this is a procedurally complex area of criminal law without a simple remedy. Culpability 'is not an all or nothing quality',[16] and just as mental impairment ranges on a continuum, there are varied situations in which people kill, but their culpability is, for some reason, reduced. We also recognise the criticisms of the partial defence of diminished responsibility, particularly in potentially providing a defence for lethal male violence in intimate homicide cases. However, drawing on recent research conducted across Australia and the United Kingdom ('UK') showing a sharp decline in diminished responsibility being successfully used by males killing their female (ex)partners,[17] we contend the most appropriate structure for the law of homicide in Victoria is one that recognises different *kinds* of culpability through a diminished culpability manslaughter model.

This article begins by briefly outlining the methodology of the study informing the discussion and the current framework for determining responsibility and non-responsibility in unlawful killings in Victoria. We then present the empirical data from the study, before discussing whether sentencing is the most appropriate and, as occurs in Victoria, *only* place to take levels of culpability, moral agency and criminal responsibility into account in unlawful killings. We conclude by presenting our proposed model of diminished culpability manslaughter, informed by the pioneering work of Loughnan.

Methodology

[15] Loughnan, *Manifest Madness*, above n 2, 41-42.
[16] Mark Gannage, 'The Defence of Diminished Responsibility in Canadian Criminal Law' (1981) *19 Osgoode Hall Law Journal* 301-320.
[17] Kirkwood et al, above n 9; NSWLRC, People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences, Report No 138 (2013), 98; Law Commission, Partial Defences to Murder – No. 290 (2004) United Kingdom Law Commission, 91; Ulbrick et al, above n 7.

This article draws on data from a study of all homicide cases sentenced in the Victorian Supreme Court between 1 January 2000 and 31 July 2017 (*n*=647), with a primary focus on cases where the accused presented psychiatric evidence relating to an established mental illness and/or cognitive impairment (*n*=397 or 57 percent). This period was selected to examine how mental impairment has been dealt with over time in relation to unlawful killings. It also captured the time period where the now abolished partial defence of provocation,[18] and offence of defensive homicide, operated, allowing the study to examine the extent to which the absence of defensive homicide has impacted on cases involving mentally impaired offenders.

The sentencing decisions were accessed through the Australian Legal Information Institute ('AustLII') database. Using an embedded design involving 'multiple levels of analysis within a single study',[19] we performed a systemic analysis of all cases to identify instances where the accused presented psychiatric evidence of an established mental illness and/or cognitive impairment (*n*=397). This inductive approach allowed the data to emerge and for theories to be developed without influence or bias.[20] We then undertook a thematic analysis of the sentencing transcripts to identify the ways in which mental impairment mitigated the sentence imposed and specifically, how cognitive impairment (e.g. intellectual disability and acquired or traumatic brain injury) was understood by the sentencing judge in relation to the mitigation of offending behaviour.[21] This included 'paying close, critical attention to the judicial reasoning, including the language and concepts used, the way the argument is constructed, and what might be absent from or excluded by the text'.[22] Additionally, we sought to 'identify what understanding/s [on a particular issue] are invoked or constructed by the judgment, to place the judgment within the context of wider legal and non-legal discourses around [the particular issue], and to consider the potential socio-legal effects of the judgment'.[23] In this regard, the sentencing reasons were analysed according to understandings of cognitive impairment and the various effects on capacity, and how this was considered by the sentencing judge.

[18] Provocation was not used to capture cases involving offenders with substantial mental impairments.
[19] Kathleen Eisenhardt, 'Building Theories from Case Study Research' 14 (1989) *Academy of Management Review* 532-550, 534.
[20] Ibid.
[21] Mark Hall and Ronald Wright, 'Systematic Content Analysis of Judicial Opinions' 96 (2008) *California Law Review* 63; Rosemary Hunter, 'Analysing Judgments from a Feminist Perspective' 15 (2014) *Legal Information Management* 8-11.
[22] Hunter, above n 21, 2.
[23] Ibid.

For the purpose of this article, our discussion focuses on the thematic analysis of the sentencing judgments, as well as the statistical analysis of the cases, in order to enable us to compare and contrast the case outcomes and decisions made relating to mental illness, cognitive impairment and reduced moral culpability.

Victoria's Current Legal Framework for Dealing with Unlawful Killings

In Victoria, the *Crimes Act 1958* (Vic) governs the determination of a broad range of unlawful killings including: murder; unintentional killing in the course of furtherance of a crime of violence (murder); manslaughter; single punch or strike (manslaughter); child homicide; infanticide; and survivor of suicide pact who kills deceased party (akin to 'mercy killing' (manslaughter).[24] Victoria is unique in comparison to other Australian (and international) jurisdictions in that it has never had a discrete mental condition or capacity-based partial defence for unlawful killings. This is by no means accidental. The possibility of introducing a partial defence of diminished responsibility was expressly considered in the Victorian Law Reform Commission's (VLRC) comprehensive review of defences to homicide in 2004, but was not supported. Instead, the offence of defensive homicide, which had a wider exculpatory reach and was disability neutral, was introduced. It has been argued that the introduction of defensive homicide was a genuinely progressive attempt to accommodate the complexity and diversity of unlawful killings in Victoria. [25] Indeed, the offence was imbued with substantive moral context, and was found to appropriately deal with unlawful killings involving offenders with complex co-morbid mental and cognitive impairments.[26] Arguably, its most intractable issue prior to its abolition in 2014, was that the offence was haunted by the spectre of provocation.[27]

Currently in cases where mental impairment is a material issue, the only exculpatory defence in Victoria is the complete defence of mental impairment through the CMIA. The CMIA prescribes procedures for criminal matters heard in the Supreme Court involving persons with

[24] *Crimes Act 1958* (Vic), s 3 Murder; s 3A Unintentional killing in the course or furtherance of a crime of violence; s 4A Manslaughter-single punch or strike taken to be dangerous act; s 5 Manslaughter; s 5A Child homicide; s 6 Infanticide; s 6B Survivor of suicide pact who kills deceased party (manslaughter).
[25] Kirkwood et al, above n 9; Tyson et al, above n 12; Ulbrick et al, above n 7.
[26] Ulbrick et al, above n 7.
[27] See, eg, Kate Fitz-Gibbon, 'Defensive Homicide Law Akin to Getting Away with Murder', *The Australian* (Sydney), 3 March 2012, 21; Kate Fitz-Gibbon, 'Abolishing Defensive Homicide Offence Essential', *The Age* (online), 4 October 2013 http://www.theage.com.au/comment/abolishing-defensive-homicide-offence-essential-20131004-2uyya.html.

mental impairments, including an acquittal on the basis of not guilty by reason of mental impairment ('NGMI').

A *The CMIA*

The ancient legal concept of 'insanity' has formed the basis for exemption from criminal responsibility since at least the 6th century.[28] However, it was not until the early 14th century that the defence appeared in English law. Since then, it has encountered various revisions until the most recent iteration following the Daniel M'Naghten case (*'M'Naghten'*) in 1843 (England). In Victoria, the modern 'mental impairment defence' was introduced in s 20 of the CMIA. While drawn from the elements of *M'Naghten*, it is a modernised version of the former 'insanity' defence, based upon the widely accepted legal principle that a person must not be found guilty of a criminal act where they lack the mental capacity or reasoning to understand that what they were doing was wrong. To establish the defence, it must be proved, on the balance of probabilities, that:

> At the time of engaging in conduct constituting the offence, the person was suffering from a mental impairment that had the effect that –
> (a) he or she did not know the nature and quality of the conduct; or
> (b) he or she did not know that the conduct was wrong (that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).

Persons who satisfy either element are entitled to a verdict of NGMI.

B *Reforms to the CMIA*

The narrow ambit of the legal test for a finding of NGMI means it is only accessible to a small minority of mentally impaired accused persons. In Victoria, the defence is used, on average, in approximately one percent of all higher court cases.[29] This is consistent with its use in other Australian jurisdictions.[30] Despite the 'overwhelming [stakeholder] view' that the defence is operating 'well in practice' and is 'well understood and appropriately applied',[31] criticisms have focused on the defence's 'restrictive scope' and the tendency for it to be interpreted with

[28] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001), Sydney: LBC Information Services, 209.
[29] VLRC, Review of the Crimes (Mental Impairment and Unfitness to Be Tries) Act 1997, Final Report (2014), 15.
[30] Ibid.
[31] Ibid, 118.

reference to the expressly abolished common law defence of 'insanity' and the 'disease of the mind' notion.[32] Specifically, concerns exist around the lack of a clear definition of 'mental impairment' or guiding principles pursuant to the defence, which, some have argued, has inadvertently created a system of exclusion that limits the population who can claim non-responsibility, including those with acute mental impairments without psychotic features, such as acquired or traumatic brain injury, dementia, and foetal alcohol spectrum disorder.[33] A clear issue is thus the suitability of the CMIA for persons with cognitive impairments; a concern that is perhaps unsurprising given the *M'Naghten* test is based on the paradigmatic model of psychosis that is ostensibly incompatible with the range and modes of cognitive and other forms of (non-psychotic) mental impairment.[34]

In August 2014, the VLRC tabled its comprehensive review of the CMIA and made 107 recommendations for reform, including a proposal to insert a statutory definition of mental impairment which 'includes, but is not limited to, mental illness, intellectual disability and cognitive impairment'.[35] This recommendation sought to reflect contemporary psychological and psychiatric understandings of mental impairment by adopting more respectful terminology, as well as seeking to 'clarify the current uncertainty in this area of the law' by broadening the application of mental impairment under the CMIA.[36] The inclusion of cognitive impairment in the statutory definition would theoretically capture a wider range of mental and cognitive conditions, such as intellectual disability, and therefore, would provide an avenue to better recognise the culpability of accused persons with a mental condition who commit a serious offence.

In December 2016, 45 of the VLRC recommendations were put forward in the Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016 (Vic); changes Victorian Attorney-General Martin Pakula claimed would 'streamline processes, modernise legal tests and make systemic improvements to the CMIA, enhancing the operation of the Act'.[37] In

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[32] VLRC, *Defences to Homicide*, Final Report (2004), 203-25.
[33] Ibid, 206-27; Meron Wondemaghen, 'Depressed but not Legally Mentally Impaired' 37 (2014) *International Journal of Law and Psychiatry* 160-167; Arlie Loughnan 'How the Insanity Defence Against a Murder Charge Works' *The Conversation* (online) 6 November 2015 https://theconversation.com/how-the-insanity-defence-against-a-murder-charge-works-50188.
[34] Ulbrick et al, above n 7.
[35] VLRC, above n 29, 110-113.
[36] Ibid, xxvii.
[37] Victoria, *Parliamentary Debates*, Legislative Assembly, 7 December 2016, 4813 (Martin Pakula). The proposed change of primary relevance to this article involved introducing an inclusive definition of mental

commending the bill to the house, the Attorney-General claimed, it 'reflects a continuing evolution in our understanding of mental impairment'.[38]

Despite being passed (without amendment) in the lower house, in March 2017, the bill encountered significant opposition in the upper house (Senate).[39] The concerns raised related primarily to the widening of the definition of mental impairment and allowing judges rather than juries to decide if an offender is mentally unfit to stand trial.[40] It was argued that these changes 'would allow' more people to be classified as unfit to stand trial, avoiding full criminal responsibility. It was also claimed it would make the scheme far easier to access, resulting in the earlier release of violent offenders.[41] These criticisms are reflective of the role populist punitivism plays in criminal justice policy more generally,[42] and were raised despite evidence showing that 'a significant number of people remain on [supervision] orders [long] after the expiration of the 25-year nominal term'.[43] While those opposed to the bill recognised safeguards were in place, they expressed doubt 'those safeguards will be strong enough'.[44] These criticisms were made even though it was the former Attorney-General from the previous Parliament (now the Opposition) who gave 'the reference to the VLRC to make these necessary changes'.[45] The bill was ultimately withdrawn and redrafted to '(1) take into account further consultation about the substantive matters of the bill'.[46]

While, at the time of writing, the bill is subject to further review, we acknowledge the significant contribution of the VLRC in developing recommendations that would represent a significant step towards enhancing the procedural protection and treatment of accused people with cognitive disabilities.[47] However, it is important to note that the legal test underlying the

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impairment, which makes it clear for the purposes of the CMIA that mental impairment includes both mental illness (such as schizophrenia) and cognitive impairment (such as intellectual disability).

[38] Ibid.

[39] Ibid, 305.

[40] Ibid, 305-317.

[41] Ibid.

[42] See Asher Flynn, Mark Halsey & Murray Lee, 'Emblematic Violence and Aetiological Cul-De-Sacs: On the Discourse of "One-Punch" (Non) Fatalities' (2016) 56(1) *British Journal of Criminology* 179-195; Ulbrick et al, above n 7.

[43] VLRC, above n 32, 221; VLRC, above n 29. It is important to note that a NGMI verdict can include an outcome of indefinite detention. We are not advocating that NGMI verdict is necessarily the best outcome for mentally impaired accused persons. Rather, we are highlighting that accuseds with cognitive impairments are not accessing this outcome.

[44] Victoria Legislative Assembly, above n 37, 305.

[45] Ibid, 323.

[46] Ibid, 449.

[47] VLRC, above n 29.

mental impairment defence will (in any event) remain unchanged, and necessarily strict, meaning it will continue to apply in very few cases. In our view, the proposed changes are unlikely to radically improve access to the mental impairment defence in homicide cases for persons with cognitive impairment, because the test requires an accused to either not understand the nature and quality of their conduct, or to not understand that their conduct was wrong. Criticism of this high legal threshold has been well documented.[48] In particular, Loughnan observes that:

> requiring people to be so profoundly affected that they don't know the nature and quality of their act or that it is wrong sets the bar too high. The vast majority of people with serious mental illness would fail this test.[49]

Similar arguments about the accessibility of capacity-based defences have likewise been advanced in international jurisdictions. For example, in the UK, it has recently been argued that:

> there is a minimum mental and physical capacity a person must possess if they are to be subjected to criminal liability, which [Hart] called 'capacity responsibility'. … The current criminal law is inconsistent in setting such a minimum standard, lacks subtlety and flies in the face of medical understanding of the effect of certain conditions. … The cognitive basis of the current law makes it so narrow that a person with impaired (rather than absent) reasoning is unlikely to be able to argue the defence successfully, since they will probably know the two relevant pieces of information [i.e. the nature/quality of the conduct, or that the conduct was wrong].[50]

In our study, we found that although accused persons with cognitive impairment had significant deficits across all domains of cognition (inter alia, in adaptive and executive functioning – which were the most disabling features), they *were able* to understand the nature and quality of their conduct, *and* that the conduct was wrong, which automatically precluded them from accessing the CMIA. An example to illustrate this is the final case resulting in a defensive homicide conviction, in which the accused was ordered to kill the victim by her abusive boyfriend, who threatened he would murder her family if she did not do as he said.[51] While

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[48] Wondemaghen, above n 33.
[49] Loughnan, above n 33.
[50] Cited in Claire De Than and Jesse Elvin, 'How should the criminal law deal with people who have "partial capacity"?' in Ben Livings, Alan Reed and Nicola Wake (eds) *Mental Condition Defences and the Criminal Justice System – Perspectives from Law and Medicine* (2015), Newcastle Upon Tyne: Cambridge Scholars Publishing, 299.
[51] *The Queen v Sawyer-Thompson* [2016] VSC 767 (20 April 2017) ('*Sawyer-Thompson*') [2] (Croucher J).

evidence of cumulative family violence provided the basis for establishing defensive homicide in this case, psychological evidence was also presented showing the accused had a full-scale IQ of 70, which is just one point above a diagnosis of mild intellectual disability (a very significant disability). The evidence suggested the accused had acute deficits across various domains of cognition, including deficits in autonomy, executive functioning (responsible for reasoning and planning), and maladaptive self-regulation and consequential thinking.[52] The accused was also assessed as moderately to severely depressed, and moderately anxious with a history of depression, including a previous suicide attempt. In addition, she had a diagnosis of post-traumatic stress disorder resulting from childhood sexual abuse and family violence, and consequently, a dependent personality style.[53] At the time of committing the offence, the accused was in receipt of a disability support pension due to her intellectual disability.

This case is illustrative of the 'hard cases' that do not fit neatly between the binary and minimally disaggregated distinction of murder and manslaughter. The accused had a range of co-morbid conditions at the time of the killing, affecting her capacity and culpability. Even with the offence of defensive homicide still available (which was possible because the offence existed at the time that the unlawful killing occurred), this case was deemed complex by the judge, who in sentencing the accused to a maximum of 10 years' imprisonment, remarked, 'those [her history of mental impairment] and other competing considerations make this a particularly difficult sentencing task'.[54]

This case also exemplifies another tension in dealing with complex unlawful killings without the existence of a partial defence, whereby '*prima facie*, the defendant satisfies both the *actus reus* and *mens rea* for murder, but … an alternative verdict with a wider range of disposal powers would be more appropriate'.[55] In *Sawyer-Thompson*, both the actus reus and mens rea for murder were clearly present given the deceased received approximately 70 separate injuries, many of them incised. In reviewing the forensic evidence, Croucher J remarked, 'plainly, she meant to kill him, and she did'.[56] Yet the severity of the accused's disability,

[52] Ibid [177].
[53] Ibid [174].
[54] Ibid [39].
[55] Alan Reed, 'Quasi-Involuntary Actions and Moral Capacity: The Narrative of Emotional Excuse and Psychological-Blow Automatism' in Ben Livings, Alan Reed and Nicola Wake (eds) *Mental Condition Defences and the Criminal Justice System – Perspectives from Law and Medicine* (2015), Newcastle Upon Tyne: Cambridge Scholars Publishing, 191 (emphasis in original).
[56] *Sawyer-Thompson*, above n 51, [4].

combined with the situation in which she killed, contrasts sharply with a murder conviction, which requires the highest level of criminal responsibility, moral agency and culpability.

While De Than and Elvin argue that 'the "hard cases" … [can] be resolved without over-extending the existing insanity defence in an attempt to encompass them',[57] because Victoria has no alternative defences relevant for a cognitively impaired accused person and no intermediate outcome between manslaughter and murder (which previously existed in defensive homicide), there is limited scope to recognise reduced levels of culpability in homicide cases involving individuals with a mental condition insufficient to meet the strict requirements of the mental impairment defence, but strong enough to reduce some of their culpability. This is perhaps best demonstrated by the finding from our study (discussed in more detail below) that the CMIA defence is being used exclusively in cases involving psychosis. Across the 16-year time period, no accused with only a cognitive impairment was acquitted under the CMIA.

To further demonstrate these issues, we now turn to discussing the empirical dataset, outlining information about the relationships between the parties, the circumstances surrounding the unlawful killings and the available diagnosis of accused persons. In doing so, we aim to highlight the diversity of circumstances in which homicide occurs and the need for a partial defence that better recognises the differences in culpability, criminal responsibility and moral agency in some unlawful killings involving mentally impaired offenders.

Victorian Homicide Cases (2000-17)

More than half (*n* = 397 or 57 percent) of all homicide cases heard in the Victorian Supreme Court between 1 January 2000 and 31 July 2017 (*n* = 647) involved an accused raising psychiatric evidence of mental illness and/or cognitive impairment. Of the 397 cases involving mental impairment, 87 involved cognitive impairment (22 percent), which represents 13.4 percent of all homicide cases in the 16-year period. This figure is significantly higher than prevalence rates recorded in the general population (approximately three percent),[58] but

[57] Jesse Elvin and Claire De Than, 'The Boundaries of the Insanity Defence: The Legal Approach Where the Defendant Did Not "Know That What He Was Doing Was Wrong" in Ben Livings, Alan Reed and Nicola Wake (eds) *Mental Condition Defences and the Criminal Justice System – Perspectives from Law and Medicine* (2015), Newcastle Upon Tyne: Cambridge Scholars Publishing, 103.

[58] Australia Bureau of Statistics (ABS) (2014), http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4433.0.55.003main+features102012.

reflects research documenting the disproportionate prevalence of cognitive impairment in Victoria's prison system.[59]

Generally, all characteristics of the mentally impaired accused person/s (and their victim/s) drew a parallel with those presented in the most recent National Homicide Monitoring Program (NHMP) study, which provides data on all homicide cases in Australia between 2012 and 2014.[60] Just over two thirds of homicides in our sample took place in a residential setting. As Table 1 shows, the most common circumstances or motives included: killing precipitated by alcohol/drug consumption (*n* = 71, 18 percent); argument/fight with known person (*n* = 71, or 18 percent); relationship disintegration (*n* = 53, or 13.4 percent); and other (*n* = 46; or 11.6 percent).

(Table 1 here).

The majority of offenders in the current study were male (*n* = 350 or 88 percent), 'consistent with historical trends'.[61] The median age was 36.6 years, with the youngest offender aged 15 years, and the oldest aged 80 years (the median age in the NHMP study was 36 years).[62] Significantly, males were overrepresented as victims in both datasets, comprising 66 percent (*n* = 263) of victims in our study, and 64 percent (*n* = 328) in the NHMP study.[63] As evidenced by Table 1, most victims were known to the accused. The largest group was friend/acquaintance (39.8 percent), followed by intimate partners (24.4 percent).

The findings of recent longitudinal research provide a possible explanation for this trend:

> Violent acts committed by offenders with a major mental disorder are more likely to occur in a residence rather than a public place and, accordingly, between 50% and 60% of the victims are family members. Simpson and colleagues, in a retrospective study of homicide, found that all but two of the victims killed by a person with a mental illness … during a 30 year period … were killed by people they knew.[64]

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[59] Ombudsman (Vic), *Investigation into Deaths and Harm in Custody* (2014).
[60] Willow Bryant and Sam Bricknell, 'Homicide in Australia: 2012-13 to 2013-14: National Homicide Monitoring Program report' (2017) *Monitoring Reports* 23, Australian Institute of Criminology.
[61] Ibid, 31.
[62] Ibid, 21.
[63] Ibid, ii.
[64] Debra Bennett, An Investigation of 435 Sequential Homicides in Victoria: The Implication of Psychosis, Motive for Offending, Substance Abuse and Gender (DPsych Thesis, Monash University, 2010) 41.

Knowledge of the 'precise relationship' between cognitive (and other mental) impairment/s and homicide 'remains actively debated, largely unknown and regarded as an extremely difficult endeavour'.[65] The current study provides some insight into the nature of this relationship. Sixty-nine percent (n = 60) of the cases involving cognitive impairment had a clinical presentation of serious impairment within the borderline to extremely low end of cognitive functioning. The contribution that such impairments can have towards offending conduct was outlined by the neuropsychologist in *The Queen v Wilson* ([2015] VSC 394 (17 July 2015) ('*Wilson*') in which the offender, with a mild intellectual disability – functioning within the bottom one percent of adults, with no demonstrable capacity for functional numeracy or literacy – killed a 14-year old boy with autism:

> [The offender] considers only a small number of options and rapidly forecloses on a solution without exploring either a comprehensive set of alternatives or giving sufficient time for the implications of a course of action to come to mind. Therefore, he tends to be impulsive. He often makes poor decisions and frequently chooses his course of action based on short term considerations, such as anger or excitement, rather than on their long term consequences. He learns poorly and slowly from negative consequences.[66]

Across our sample, the neuropsychological evidence revealed that the offenders had limited capacity and insight, and significant deficits in planning, impulse control and regulating behaviour. These deficits manifested in: disorganised, concrete and inflexible thinking; slow information processing, with an inability to process two tasks simultaneously; limited attention and concentration; verbal and communication limitations; minimal perspective taking; negligible memory and learning skills; vulnerability to influences within his/her immediate environment; and inability to properly foresee consequences of behaviour. Moreover, the offenders often displayed impulsivity and difficulties reading social situations.

(Table 2 here).

NGMI acquittals occurred exclusively in cases where the primary diagnosis was schizophrenia. It is significant given the inaccessibility of the CMIA to cognitively impaired accused persons, that the cases involving cognitively impaired accused persons were disproportionately resolved as either jury verdicts (n = 27, or 31 percent) or guilty pleas (n = 23, or 26.4 percent) to murder

[65] Ibid, 39.
[66] *The Queen v Wilson* [2015] VSC 394 (17 July 2015) [36] (King J) ('*Wilson*').

(a total of 50 out of 87 cases, or 57.4 percent) – the most serious offence in Victorian criminal law.

The dataset reveals the complexity and diversity of unlawful killings in Victoria. For this reason, we contend it is *degrees* of impairment that should be primarily considered by the judiciary in sentencing the accused. But this presents a significant challenge. The relationship between mental impairment, criminal responsibility and sentencing is a complex and difficult one. When the VLRC contemplated introducing the partial defence of diminished responsibility, many stakeholders agreed that when the fundamental elements of murder are made out, the sentencing stage is the most appropriate forum to take mental impairment into consideration.[67] However, as we discuss in more detail in the next section, our findings suggest there are several concerns surrounding the principles governing the sentencing of mentally impaired offenders, which raise questions as to whether it is the most appropriate (and only) stage to consider the culpability of mentally impaired offenders who fall short of a mental impairment defence.

Determining Diminished Culpability at Sentencing

In Victoria, the sentencing of offenders with mental impairment is governed by the *R v Verdins* ('*Verdins*') principles, which constitute 'Australia's most sophisticated and subtle analysis of the relationship between impaired mental functioning and sentencing' and are applicable to sentencing in 'at least' six ways:

> (1) May reduce moral culpability as distinct from legal responsibility;
> (2) May impact on the type of sentence imposed and the conditions in which it should be served;
> (3) May moderate or eliminate the need for general deterrence;
> (4) May moderate or eliminate the need for specific deterrence;
> (5) May mean that a given sentence will weigh more heavily on the offender; and
> (6) Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health.[68]

[67] VLRC, above n 32.

[68] *R v Verdins, Buckley and Vo* [2007] VSCA 102; (2007) 169 A Crim R 581. The *Verdins* principles may apply in the following six ways. Although we note that following *DPP v O'Neill* [2015] VSCA 325, *Verdins* principles do not apply to personality disorders and that for principles 1-4 of *Verdins* to apply, mental impairment must have 'caused or contributed to' or have 'some realistic connection' to offending (per Warren CJ, Redlich, Kaye JJA, para 68, 74).

The principles also complicate sentencing, making it 'the sentencer's most challenging task'.[69] Our data supports this contention, with several judges expressly noting this difficulty in their sentencing judgments, stating, for example, that the 'current sentencing practices' provide 'limited assistance' due to the unique features of each case and the differing levels of severity of impairment.[70] The absence of guidance provided in existing case law has also resulted in limited uniformity and consistency in the application of *Verdins*, thereby reducing the effectiveness of the principles, particularly as a way to adequately respond to offences committed by cognitively impaired offenders.[71] As Walvisch argues, while the restatement of the *Verdins* principles 'went a substantial distance towards clarifying the law, it also left a number of issues unresolved' and as such, there are 'gaps which still exist and need to be addressed'.[72]

One such gap is that courts apply the same sentencing principles for offenders with cognitive impairments as they do for those with a psychiatric illness. The application of principles that were drafted to address severe mental illness in cases involving offenders with cognitive impairment, has been described as a 'strange anomaly'.[73] This is demonstrated, for example, in *R v Mailes* ([2001] 53 NSWLR 251), which was described as 'a failure of the courts and legislation to comprehensively address the key differences between offenders with intellectual disability and those suffering mental illness'.[74] In our study, this was evident in numerous cases where there was a lack of understanding around the terminology for the spectrum of intellectual disability.[75] This nomenclature of the varying degrees of disability, from borderline, to mild, moderate, and profound – whereby most people are assessed within the borderline or mild range – has recently been criticised by the Australian High Court in *Muldrock v The Queen* ([2011] HCA 39 (5 October 2011)) ('*Muldrock*') as 'misleading':

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[69] Michelle Edgely, 'Common Law Sentencing of Mentally Impaired Offenders in Australian Courts: A Call for Coherence and Consistency', *Psychiatry, Psychology and Law* (2009) 240-261.
[70] See, e.g. *The Queen v Chen* ([2013] VSC 296 (11 June 2013) [34] (Bell J); see also *R v* Curtis ([2006] VSC 377 (19 October 2006) [23] (Kellam J).
[71] Ulbrick et al, above n 7.
[72] Jamie Walvisch, 'Sentencing Offenders with Impaired Mental Functioning: Developing Australia's "Most Sophisticated and Subtle" Analysis' (2010) 17 *Psychiatry, Psychology and Law*, 187-201. Further guidance has been provided in *DPP v O'Neill* [2015] VSCA 325 (Warren CJ, Redlich, Kaye JJA). The *Verdins* principles have recently been held in *DPP (Vic) v O'Neill* [2015] VSCA 325 (2 December 2015) not to include personality disorders.
[73] Sally Traynor, 'Sentencing Mentally Disordered Offenders: The Causal Link' (2002) 23 *Sentencing Trends and Issues*, http:/www.judcom.nsw.gov.au/publications/st/st23/index.html.
[74] Ibid.
[75] See, e.g. *The Queen v Coulter* ([2014] VSC 42 (27 February 2014) [17] (Hollingworth J); *R v Williams* ([2012] VSC 643 (21 December 2012) [24-35] (Macaulay J)) (*Williams*').

> The assessment that the appellant suffers from a 'mild intellectual disability' should not obscure the fact that he is mentally retarded. The condition of mental retardation is classified according to its severity as mild, moderate, severe or profound. … A further category, 'borderline', is also used to indicate people just above the mild range in terms of intellectual functioning. … These classifications have limited utility and can sometimes be misleading. For example, such terms may suggest … that a 'mild' intellectual disability is inconsequential. … Someone with a borderline or mild intellectual disability may have 'only a superficial awareness' of the wrongfulness of [his or her] conduct.[76]

The complications of these terms can be observed in our dataset in the judge's evaluation of the psychiatric evidence in *Wilson*,[77] where King J remarked:

> I do not care how intellectually disabled you are, you had lived 35 years in the community without being before the courts, all the experts agree that you understood then, and you understand now, right from wrong. You knew that what you were doing was wrong, but you allowed your anger towards this child to overcome that knowledge of right and wrong.[78]

These comments appear to overlook the accused's impaired ability for consequential thinking (attendant to his mild range intellectual disability) and how this 'can dramatically affect a person's behaviour'.[79] This points again to the perpetual focus on exculpation as 'mental capacity's chief relevance in criminal law',[80] which requires a person to be *wholly* lacking the capacity to understand right from wrong, in the strict legal sense.

A similar example is provided in *The Queen v Williams* ([2012] VSC 643 (21 December 2012)),[81] in which the accused had a mild intellectual disability 'with general intellectual capacity in the lowest two percent of the population'. Despite this, Macaulay J remarked, 'your intellectual disability, while real and by no means to be disregarded, is not profound in nature'.[82] These examples indicate that substantial deficits related to intellectual disability may not be sufficiently understood by the court. While King J accepted in *Wilson* that 'there is no

[76] *Muldrock v The Queen* [2011] HCA 39 (5 October 2011) [50-52] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) ('*Muldrock*').
[77] *The Queen v Wilson* [2015] VSC 394 (17 July 2015) [23] (King J) ('*Wilson*').
[78] Ibid [27].
[79] VLRC, above n 29, xii.
[80] Loughnan, *Manifest Madness*, above n 2, 1.
[81] *Williams* [2012] VSC 643 (21 December 2012) [24-35] (Macaulay J).
[82] Ibid.

doubt' the offender has a 'significant cognitive impairment', she expressed the opinion that such disability: 'does not render you incapable of functioning in the normal world, it does mean that you have a dull intellect, your reasoning is unsophisticated and you think in relatively concrete terms'.[83] Describing the offender's mild intellectual disability as 'a dull intellect' highlights the High Court's concerns in *Muldrock* that using the term 'mild' reduces the extent of intellectual disability and the various significant deficits in executive and adaptive functioning associated with this level of disability.

The apparent lack of judicial understanding as to the effects of cognitive impairment undoubtedly have a negative impact on mitigation at sentencing, particularly in relation to moral culpability. Any reduction in moral culpability is based on a rigorous evaluation, one that requires a realistic causal connection or nexus between the mental impairment and the offending conduct, and the extent of any such impact. Determining such a link with any precision is nuanced and technical – and in the context of cognitive impairment, this task is extremely difficult.[84] As mentioned, this is because even where a cognitive impairment is extremely severe, the effects may not *wholly* impair the accused's capacity to understand the wrongfulness element of his/her conduct.[85] In our dataset, we found that the question of understanding wrongfulness (to the *M'Naghten* threshold) not only precludes access to the mental impairment defence, but also negatively influences the *Verdins* principles. As a result, those with cognitive impairment are not well served by the current *Verdins* approach because the principles rely on 'the diagnostic specificity and the rigour of clinical assessment',[86] and problematically, as Gee and Ogloff contend, are still 'not well understood by clinicians'.[87]

Our analysis reveals that in unlawful killings involving cognitive impairment, even where a (quasi) causal link is established, the reduction in moral culpability, as well as the other

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[83] *Wilson* [2015] VSC 394 (17 July 2015) [36] (King J); see also, *Leeder v The Queen* ([2010] VSCA 98 (23 April 2010) [23] (Maxwell P and Buchanan JA).

[84] Sally Traynor, 'Sentencing Mentally Disordered Offenders: The Causal Link' (2002) 23 *Sentencing Trends and Issues* http://www.judcom.nsw.gov.au/publications/st/st23/index.html; Ulbrick et al, above n 7.

[85] A clear discussion on this issue can be found in the recent manslaughter by criminal negligence case of *The Queen v Naddaf* ([2018] VSC 429 (20 July 2018) ('*Naddaf*'). In this case, although the offender had a limited ability to reason with and understand basic verbal information, difficulty monitoring behaviour, and a lack of fundamental and emotional and behaviour controls to function effectively in society, Champion J found that, despite the severity of the effects of the offender's cognitive impairment, it fell short of providing a cogent reason as to why he committed the offending. As such, Champion J was 'unable to conclude that [his] particular disabilities are causally linked to [his] offending' and thus, did not moderate moral culpability [88].

[86] Dion G Gee and James R P Ogloff, 'Sentencing Offenders with Impaired Mental Functioning: *R v Verdins, Buckley and Vo* [2007] at the Clinical Coalface' (2014) 21 *Psychiatry, Psychology and Law* 46-66, 46.

[87] Ibid, 46.

subjective factors such as general and specific deterrence, is typically only modest, and it appears that sentencing judges have insufficient discretion to depart significantly from the general sentencing patterns – for both murder and manslaughter – where the accused has a substantial cognitive impairment. Leaving the issue of moral culpability to only the sentencing stage in the context of mental impairment also raises another problem; it overlooks the fundamental importance of fair or representative labelling in criminal law and process.[88] We submit that a taxonomy that labels, categorises and grades offences in a way that accurately reflects the culpability of such accused persons is crucial to the fair adjudication of unlawful killings.

It is important to note that during the period in which defensive homicide was available, establishing reduced moral culpability in the context of cognitive impairment was somewhat more amenable, due to the judicial guidance set out in the early defensive homicide decision of *R v Martin* ([2011] VSC 217 (20 May 2011)). In this case, the Crown submitted that the reduction in the accused's legal and moral culpability 'has been reflected in the acceptance of a plea to defensive homicide as opposed to murder with which you were originally charged, and that to further take account of a reduction in your moral responsibility would amount to double counting'.[89] Rejecting the Crown's submission, Curtain J stated:

> the decision of the Director to file an indictment alleging one count of defensive homicide and to accept a plea to that charge in resolution of the matter does not eliminate or obviate the necessity to give due weight to your moral and legal responsibility as enunciated in Verdins' case in the sentencing process. … I am satisfied that the principles of Verdins and Tsiaras' case are here applicable and operate to reduce your moral culpability. By reason of your intellectual disability, your ability to exercise appropriate judgment and to make calm and rational choices, or to think clearly, must have been affected.[90]

Arguably, there appears to have been greater precision in applying *Verdins* when defensive homicide was still in operation, presumably because it recognised that both the act and excuse were inextricably linked, rendering the accused *differently liable*.[91] The risk now, in the absence of defensive homicide or any alternative partial defence, is that those cases that would (or ought to) be considered within the partially exculpatory reach of defensive homicide will receive longer sentences. This is a fact borne out in our empirical data, in particular, through

[88] Andrew Ashworth, *Principles of Criminal Law* (2006) London: Oxford University Press.
[89] *R v Martin* [2011] VSC 217 (20 May 2011) [22] (Curtain J).
[90] Ibid [27]-[28].
[91] Loughnan, *Manifest Madness*, above n 2. See also, Ulbrick et al, above n 7.

the final case of defensive homicide, in which the accused received a substantially longer term of imprisonment than other comparable cases of defensive homicide.[92]

While acknowledging Victoria's broad sentencing discretion, we argue that leaving the evaluation of reduced moral culpability to sentencing generates significant problems and does little to resolve the inescapable fact that the boundary between the mental impairment defence and a murder conviction is often too extreme. As outlined by the NSWLRC in their report on the operation of the partial defence of substantial impairment:

> Supporters of the retention of the substantial impairment defence argue that mitigation of cognitive or mental health impairments in sentencing is an adequate legal response. Cognitive and mental health impairments are complex and have a range of impacts on criminal behaviour, and it is therefore appropriate for the criminal justice system to have a corresponding range of responses.[93]

In this way, there are strong grounds for introducing a partial defence of diminished culpability manslaughter, and indeed, this has been progressively recognised internationally for several decades.[94]

As we have outlined, over the past 16 years, a NGMI verdict has not been directed in a homicide case involving a cognitively impaired offender. Leaving this matter to be dealt with only in sentencing does not resolve the fact that such offenders will face a murder conviction and are consequently liable to a significantly more severe punishment than they would receive, had a partial defence that better recognised their level of culpability, and subsequent reduction of the offence to manslaughter, been available. Likewise, considering reduced culpability only at the sentencing stage is not sufficient to capture the unique circumstances and backgrounds of cognitively impaired homicide offenders. As has been observed in the international context, 'given the difficulty of showing a basis of blameworthiness of an actor whose mental illness

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[92] *Sawyer-Thompson*, above n 51. Kirkwood et al also found that women who pleaded guilty to defensive homicide received longer sentences, above n 9, 48.

[93] NSWLRC, above n 17, 95.

[94] Helen Howard, 'Diminished Responsibility, Culpability and Moral Agency: The Importance of Distinguishing the Terms', in Ben Livings, Alan Reed, and Nicola Wake (eds) *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine* (2015) New Castle Upon Tyne: Cambridge Scholars Publishing, 334. Howard argues, for the purposes of fair labelling, the defence of diminished responsibility is 'still essential even in the absence of the mandatory life sentence [attached to murder]. If [diminished responsibility] were to be abolished, mentally disordered individuals falling short of "insane' might be labelled murderers, even though "their *culpability* is diminished". Given that murder is the most serious of criminal offences, fair labelling should be paramount' (2015: 334, emphasis in original). See also, George Fletcher, *Rethinking Criminal Law* (2000) London: Oxford University Press, 250.

negates [or heavily mitigates] a culpability element, imputation of the negated element seems unwise'.[95] The NSWLRC also gave weight to 'the need for "flexibility" to determine responsibility according to degrees of mental impairment, rather than according to a strict contrast between sanity and "insanity"'.[96] We concur, and argue that a graduated approach to deciding culpability in the form of diminished culpability manslaughter is required to deal with this 'matter of degree', rather than relying solely on the sentencing stage. Providing a distinct legal category would ameliorate some of this difficulty.

A Partial Defence of Diminished Responsibility

The Scottish doctrine of diminished responsibility was developed in common law during the 19th century as a plea in mitigation to the charge of murder, which attracted the death penalty. It was available to accused persons with impaired mental states insufficient to form the basis of the 'insanity' defence, and where successful, allowed for a verdict of manslaughter.[97] It later formalised into a discrete partial defence to murder under s 2(1) of the *Homicide Act 1957* (England). Diminished responsibility has been incorporated in some form into almost every western jurisdiction. It was first imported into Australian law in Queensland in 1961, followed by NSW, the Australian Capital Territory and the Northern Territory. In NSW, the defence was further revised in 1997, whereby it was renamed 'substantial impairment', and a stricter test was created (although the overall spirit of the defence was retained). A review of the operation of substantial impairment by the NSWLRC between 2005 and 2011, found that it was more difficult to raise and even more difficult to successfully rely on, making the 1997 revisions more restrictive than its previous formulation.[98] In their 2013 review of mental capacity-related defences, the NSWLRC conceded that difficulties remain regarding the scope of the partial defence – insofar as the concept of 'substantial impairment' can be confusing and that 'courts [provide] quite vague guidance: "the impairment need not be total but it must be more than trivial or minimal"'.[99]

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[95] Paul H Robinson 'Abnormal Mental State Mitigations of Murder: The U.S. Perspective' in A. Reed and M. Bohlander (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (2011) UK: Taylor and Francis, 303.
[96] Ibid, 95.
[97] Scottish Law Reform Commission, *Discussion Paper on Insanity and Diminished Responsibility: No 122*, Scotland, 30.
[98] NSWLRC above n 17, 87.
[99] Ibid.

In the UK, a 'new diminished responsibility plea was introduced into English law by s. 52 of the Coroners and Justice Act 2009';[100] the reformed plea was based on 'the version proposed by the New South Wales Law Reform Commission', which the UK Ministry of Justice considered to be 'an appropriate vehicle for reform'.[101] The reforms in the UK were intended merely to modernise the diminished responsibility plea. Despite this, the revised plea in the UK is 'more rigorous in its requirements',[102] with the effect that it is now even more restrictive than the NSW model.[103] While concern has been expressed in relation to the conceptual difficulties arising from the revised plea (and the introduction of a causal element),[104] it is acknowledged that the partial defence continues to serve 'an important practical function', and '[t]here appears to be no great dissatisfaction with the operation of the defence … in practice'.[105]

The partial defence of diminished responsibility has been the subject of intense criticism, however, no issues have been identified so intractable as to warrant its abolition. The defence has predominantly been criticised on the basis of its breadth insofar as it accommodates various different types of killings, which make it difficult to constrain and that in the modern era, it is considered 'unmoored' to murder.[106] Indeed, with the mandatory minimum penalty of life no longer attached to murder, diminished responsibility has been considered by some as obsolete.[107] A more recent criticism relates to discussions around the *United Nations Committee on the Rights of Persons with Disabilities* ('CRPD'), specifically Article 12, which requires universal capacity, and that all mental condition defences be abolished. While a detailed discussion on this is beyond the scope of this article, we concur with Barnett who argues that:

> the requirement that criminal law move away from engagement with mental disability [and abolish all mental condition defences, including the 'insanity' defence] is counter-

[100] Ronnie Mackay, 'The New Diminished Responsibility Plea: More than Mere Modernisation?', in A. Reed and M. Bohlander (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (2011) UK: Taylor and Francis, 9.
[101] Ibid, 11-12.
[102] Ibid, 16.
[103] Ibid, 11-12.
[104] Ibid.
[105] Scottish Law Reform Commission, above n 98, 32; see also Ronnie Mackay and Barry Mitchell, 'The New Diminished Responsibility Plea in Operation – Some Initial Findings' 1 (2017) *Criminal Law Review* 18-35.
[106] Loughnan, 'From Carpet Bag to Crucible', above n 2.
[107] See Law Commission, *Partial Defences to Murder* (No 173, 2003); Law Commission, *A New Homicide Act for England and Wales* (No 177, 2005); Law Commission, *Murder, Manslaughter and Infanticide: Project 6 of the Ninth Programmes of Law Reform: Homicide* (No 304, 2006).

> intuitive – particularly in the absence of an equally extensive alternative. … [Furthermore, in the international context] amendments to the law of diminished responsibility in 2009 have endeavoured to engage more closely with the provisions of modern medicine but there has been no movement away from diminished responsibility.[108]

Another significant criticism of the partial defence is that it may provide an avenue through which depressed men can have their culpability reduced in intimate homicides.[109] Prior to 1997, there was some evidence that showed diminished responsibility was being relied upon in situations where a depressed male killed a female intimate partner, often in the context of separation or jealousy.[110] However, more recent research has shown that not only are the modern formulations of the partial defence more restrictive, but in the context of male-perpetrated intimate homicide, diminished responsibility is significantly less likely to be successfully used, and is often rejected.[111] Since the 1998 reforms, 'only two offenders have successfully relied on mood disorders following an intimate partner killing. One of the offenders was female'.[112] In the UK, in cases where a female perpetrator kills an abusive male partner, the rates of acceptance of the partial defence are slightly higher,[113] albeit this use of the defence has been criticised as pathologising women's responses to intimate partner violence and 'entrench[ing] misleading stereotypes of women'.[114] Most recently, Ulbrick et al found that although common mental illnesses such as depression and anxiety arose frequently in male-perpetrated intimate homicides, these conditions were not assumed to automatically reduce an offender's sentence – and often did not.[115] These recent findings provide some cautious optimism that a partial defence which contains a robust theoretical underpinning and rigorous safeguards would not automatically provide a partial excuse for violent men who kill a female (ex)partner. In the international context, Horder argues that there is a moral case for extending the exculpatory reach of 'diminished capacity' to include survivors of long-term family violence.[116]

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[108] Peter Barnett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law' (2012) 75(5) *Modern Law Review* 775-776.
[109] Kirkwood et al above n 9; Tyson et al, above n 12.
[110] See VLRC, above n 32, 240.
[111] NSWLRC, above n 17, 98; Law Commission, above n 17, 91.
[112] Sam Indyk, Hugh Donnelly and Jason Keane, *Partial Defences to Murder in New South Wales 1990-2004* (Judicial Commission of NSW, 2006), 25.
[113] Law Commission, above n 17, 91.
[114] VLRC, above n 32, 239.
[115] Ulbrick et al, above n 7. Our data reflected statistics on intimate partner homicides more broadly; they were not more common in our study.
[116] Jeremy Horder, *Homicide and the Politics of Law Reform* (Oxford University Press, 2012), 178-182; See also, Jeremy Horder, *Excusing Crime* (Oxford University Press, 2004).

In broad terms, Loughnan argues that the scholarly approaches have been 'orientated towards subsuming diminished responsibility into existing understandings of either criminal defences or factors in mitigation' and in doing so, 'something important [has been] lost'.[117] She contends that such criticisms do not 'take diminished responsibility seriously, on its own terms'.[118] But diminished responsibility manslaughter is a distinct legal construct; one that is 'Janus-faced', because rather than having culpability completely annulled, it inculpates the accused to a certain degree, rendering them *'differently* liable'.[119] As Loughnan explains:

> diminished responsibility manslaughter … should be conceptualised as an offence-cum-defence. Conceptualising diminished responsibility manslaughter in this way means that its capacity to accommodate diverse and dynamic social meanings around unlawful killing – which do not fall neatly across the divisions between offences and defences, and liability and responsibility – becomes apparent. The omnibus nature of manslaughter, and faith in the formal divisions that structure criminal law practices and, crucially, scholarly thinking about them, has obscured the significance of diminished responsibility in this regard. … [This reconceptualisation has] broader potential … for sustaining criminal responsibility ascription practices under changing social conditions.[120]

She further observes that as a legal construct:

> the diminished defendant [is] *differently* liable, on the basis of his/her abnormality. … Recognising this characteristic of diminished responsibility manslaughter means that we should approach it as a particular legal construct ('diminished responsibility manslaughter'), rather than as manslaughter on the basis of diminished responsibility. … [In this way] the wrongdoing and the excuse, liability and responsibility, are inextricably enmeshed.[121]

Loughnan's work informs the conceptual contours of this complex legal terrain, and as we argue in the conclusion below, there is an opportunity in Victoria to implement a similar model of diminished culpability manslaughter.

Beyond mentally impaired offenders, we argue that this partial defence could apply in situations where a woman kills an abusive partner but was not in immediate danger. In our

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[117] Loughnan, 'From Carpet Bag to Crucible', above n 2, 343.
[118] Ibid.
[119] Loughnan, 'From Carpet Bag to Crucible', above n 2, 256 (emphasis in original).
[120] Ibid, 344.
[121] Ibid, 344-357.

view, it is again axiomatic that the actus reus and mens rea elements will be present in some cases where women kill an abusive male partner. That is, some women, despite the nature and severity of abuse experienced, will fail to establish their conduct as self-defence, yet the justice of the circumstances warrants a conviction less than murder. Diminished culpability manslaughter could capture these cases, and when framed as diminished culpability, arguments about the partial defence pathologising women's conduct become less relevant, as their responsibility is instead construed as *different-in-kind*. The longstanding legal defence of infanticide illustrates this. As Loughnan explains:

> Like diminished responsibility manslaughter, infanticide relies on mental incapacity … to provide a partial excuse for the wrongdoing. … It is restricted to particular defendants and victims (women and their biological children) and requires a particular combination of wrongdoing and excuse, in which the two are enmeshed together.[122]

Conclusions: An Argument for Diminished Culpability Manslaughter

The current monolithic approach to determining culpability in homicide cases in Victoria unjustly deprives cognitively impaired accused persons of an accessible defence to murder. The system for dealing with cognitively impaired offenders is not only binary, but inadequate, insofar as it 'lacks the subtlety and sophistication necessary to provide appropriate defences which deal with the reality of such conditions'.[123] In light of this, we contend the law requires greater flexibility to deal appropriately with those who have significant mental and cognitive impairments. Informed by Loughnan's differently liable legal construct of 'diminished responsibility manslaughter', we specifically advocate for a well-developed framework that does not limit legal capacity, which would take the form of diminished culpability manslaughter. In the context of mental impairment, it is not *responsibility* that should be diminished, but *culpability*.

Howard argues that 'a more robust theoretical rationale for the [partial] defence [of diminished responsibility] is needed for the future'.[124] She further claims that 'a clearer distinction must be made between the terms "culpability" and "responsibility" and, while an individual may be partially culpable, correct usage of the phrase "criminal responsibility" should dictate that he [sic] is nevertheless held fully responsible'. Howard contends:

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[122] Ibid, 351.
[123] De Than and Elvan, above n 50, 297.
[124] Howard, above n 95, 319.

> [1] Responsibility = attribution for the act; [2] Culpability = [offender's] level of blameworthiness; [3] Criminal responsibility = responsibility + moral agency + culpability. It is the phrase 'diminished culpability' that best describes [the offender's] reduced liability for punishment. In essence, it will be argued that neither [the offender's] moral agency, nor his [sic] criminal responsibility can be diminished, whereas levels of culpability may vary dramatically. Thus, an individual may be a full moral agent and fully criminally responsible, yet have reduced culpability and, accordingly, reduced liability for punishment.[125]

We suggest that this formulation, which respects moral agency and criminal responsibility allows the law to recognise that some individuals have difficulty making decisions and/or adhering to criminal prohibitions. Howard further explains that:

> As most individuals will have a minimal level of rationality, the *potential* exists for them to be held blameworthy and therefore criminally responsible. However, when considering the innumerable types of mental capacity, there is clearly a sliding scale of rationality, above the minimum threshold for rationality, which ought to have the effect of reducing culpability … [and reducing] liability for punishment.[126]

The current legal framework in Victoria obscures the reality that mental impairments range on a spectrum of severity, and overlooks how degrees of mental capacity and culpability will vary depending on the seriousness of the individual's condition and the extent of the nexus between that condition and the offending behaviour. Gannage argues that 'there is not always a clear demarcation between total responsibility for one's acts and no responsibility at all'.[127] Thus, in acknowledging 'responsibility is not, by nature, an all or nothing quality, and that the statutory definition of insanity does not encompass a significant number of mental illnesses',[128] we contend there is a demonstrable need to introduce diminished culpability manslaughter.

With relevant safeguards to prevent misuse (as can be observed in NSW,[129] and the UK[130]), diminished culpability serves a fundamental purpose: it permits a small minority of mentally impaired offenders (and potentially abused women) to be simultaneously exculpated and inculpated, acknowledging that the boundary between exculpation (through the CMIA) and total inculpation (murder) is too extreme. Under this model, the role of assessing culpability

[125] Ibid, 321-322.
[126] Ibid, 330 (emphasis in original).
[127] Gannage, above n 16, 315.
[128] Ibid.
[129] Ibid.
[130] Law Commission, above n 17; Mackay, above n 101, 102.

does not lie solely with the judge in sentencing, which may reduce some of the complexities and problems associated with this process as it currently applies to mentally impaired offenders who unlawfully kill. Additionally, this offence-cum-defence would not revoke legal capacity and having a range of options and dispositions will allow the legal system to direct fair and individualised treatment towards cognitively impaired homicide offenders.

Relationship	**Number**	**Percent**	**Circumstances/Motive**	**Number**	**Percent**
Friend or Acquaintance	158	39.8	*Argument/fight with known person*	71	17.9
			Argument/fight with unknown person	6	1.5
Neighbour	18	4.5	*Relationship separation, and/or history of intimate partner violence (current/former), or family violence*	53	13.4
Stranger	45	11.3	*Jealousy (sexual and non-sexual)*	29	7.3
Intimate partner (current/former)	97	24.4	*Precipitated by mental impairment (but not within the meaning of s 20 of the CMIA)*	20	5.0
Family	53	13.4	*Psychosis*	29	7.3
Former/new partner of offender's ex-partner	8	2.0	*Alcohol/drug precipitated or related*	71	17.9
Infant/child (female offender)	3	0.8	*Drug (debt) related*	20	5.0
Infant/child (male offender)	11	2.8	*During the commission of another offence*	12	3.0
Not specified	4	1.0	*Motiveless/motive unclear/not specified*	40	10.1
Other	0	0.0	*Other*	46	11.6
Totals	*397*	*100.0*	*Totals*	*397*	*100.0*

Table 1: Relationships between parties and the circumstances of the homicide events

Primary Diagnosis	**Plea**	**Conviction Type**					**Totals**	
		Murder	**Manslaughter**	**Provocation**	**Defensive Homicide**	**NGMI**	**Number**	**Percent**
Paranoid Schizophrenia/ Schizo-affective Disorder	G	8	9	-	3	-	20	5.0
	NG	15	-	-	-	28	43	10.8
Bipolar Disorder	G	5	3	-	1	-	9	2.3
	NG	4	1	-	-	-	5	1.3
Psychosis	G	3	1	-	1	-	5	1.3
	NG	4	1	-	-	-	5	1.3
Depression (with/out psychotic features)	G	42	32	-	3	-	77	19.4
	NG	32	20	3	3	-	58	14.6
PTSD	G	11	6	-	2	-	19	4.8
	NG	4	4	-	2	-	10	2.5
Cognitive Impairment	G	23	22	1	4	-	50	12.6

	NG	27	9	-	1	1	38	9.6
Personality Disorder (with/out psychotic features)	G	15	4	-	-	-	19	4.8
	NG	10	-	-	-	-	10	2.5
Adjustment Disorder	G	4	7	-	1	-	12	3.0
	NG	7	2	1	-	-	10	2.5
Other	G	5	2	-	-	-	7	1.7
	NG	-	-	-	-	-	-	-
Totals							*396*	*100.0**

*Includes one count of infanticide and one count of child homicide

Table 2: Outcomes in relation to primary diagnosis in the homicide events