

GROWING ENLIGHTENMENT: SENTENCING OFFENDERS WITH AUTISM SPECTRUM DISORDER IN AUSTRALIA

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The number of defendants raising an Autism Spectrum Disorder ('ASD') diagnosis in criminal proceedings is increasing. Australian courts treat this neurodevelopmental disorder as a mental impairment that they may take into account in sentencing. A few studies nonetheless exposed deficiencies in judicial officers' understanding of ASD symptoms and their potential forensic relevance. Courts' willingness to rely on expert evidence did not always lead to them sentencing offenders with ASD in a consistent or enlightened manner. Building on those investigations and drawing on research into ASD, this article examines sentencing decisions involving eight offenders with ASD in various Australian jurisdictions between 2014 and 2020. This analysis demonstrates that judicial officers' knowledge about ASD and appreciation of its possible relevance to sentencing considerations are growing, but there remain gaps in both respects. The article speculates on possible reasons for this and proposes reforms to improve courts' approaches to sentencing offenders with ASD.

I INTRODUCTION

A few individuals diagnosed with Autism Spectrum Disorder ('ASD') have attracted public attention for their convictions for brutal crimes.¹ Most prominent recently is Jaymes Todd, who pleaded guilty to raping and fatally strangling Eurydice Dixon in Melbourne's Princes Park.² Research suggests they are unrepresentative of people with this neurodevelopmental disorder, many of whom are law-abiding possibly because they have conventional moral views and adhere rigidly to learnt

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1 For instance, Martin Bryant, who killed 35 people in Tasmania, was diagnosed with Asperger's Syndrome ('AS'): Ian Freckelton and David List, 'Asperger's Disorder, Criminal Responsibility and Criminal Culpability' (2009) 16(1) *Psychiatry, Psychology and Law* 16, 20; Tony Attwood, *The Complete Guide to Asperger's Syndrome* (Jessica Kingsley Publishers, rev ed, 2015) 347.

2 *DPP (Vic) v Todd* [2019] VSC 585, [1]–[2], [69] (Kaye JA) ('Todd').

rules.³ Nevertheless, diagnoses of ASD, the number of accused raising this diagnosis in criminal proceedings, and investigations into ASD and its links with criminality, are growing.⁴ Further, some typical ASD symptoms, including difficulties with social interaction, communication and recognition of other people's feelings and intentions, impulsive responses to stressful circumstances, and a focus on narrow 'special interests',⁵ may have relevance for sentencing considerations where people with this diagnosis commit criminal offences.

A handful of studies exposed deficiencies in judicial officers' understanding of ASD symptoms and their potential forensic relevance.⁶ Courts' willingness to rely on expert evidence did not always guarantee that they sentenced offenders with ASD in a consistent or enlightened manner.⁷ Building on those investigations and drawing on research into ASD, this article explores how Australian courts approached sentencing eight offenders with ASD between 2014 and 2020 ('the examined cases').

The examined cases were selected for analysis because they were identified as constituting a representative sample of Australian sentencing decisions during this timeframe regarding offenders diagnosed with ASD. Those decisions were located through a systematic search of: the legal databases of Lexis Advance and Westlaw AU, using combinations of the terms, 'autism', 'autistic', 'Asperger's' – people deemed to have high-functioning autism were previously diagnosed with Asperger's Syndrome ('AS')⁸ – 'sentencing' and 'offender'; online resources, including the sentencing materials of the Judicial College of Victoria; and relevant scholarly work. The examined cases reflect approaches taken in different Australian jurisdictions (New South Wales ('NSW'), South Australia ('SA') and Victoria), by a range of courts (District, County and Supreme), and in matters

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- 3 Lorna Wing, *The Autistic Spectrum: A Guide for Parents and Professionals* (Robinson, 1996) 175; Attwood (n 1) 347; Neil Brewer and Robyn Young, *Crime and Autism Spectrum Disorder: Myths and Mechanisms* (Jessica Kingsley Publishers, 2015) 20, 39; Kathrin Hippler et al, 'Brief Report: No Increase in Criminal Convictions in Hans Asperger's Original Cohort' (2010) 40(6) *Journal of Autism and Developmental Disorders* 774, 777.
 - 4 Caitlin Eve Robertson, 'Autism Spectrum Disorder: Forensic Aspects and Sentencing Considerations' (PhD Thesis, Deakin University, 2017) xviii, ch 6.1; Colleen Berryessa, 'Brief Report: Judicial Attitudes Regarding the Sentencing of Offenders with High Functioning Autism' (2016) 46(8) *Journal of Autism and Developmental Disorders* 2770, 2770 ('Brief Report'); Tessa Grant et al, 'Criminal Responsibility in Autism Spectrum Disorder: A Critical Review Examining Empathy and Moral Reasoning' (2018) 59(1) *Canadian Psychology* 65, 65.
 - 5 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Publishing, 5th ed, 2013) 25, 31, 50, 54 ('*DSM-5*'); Attwood (n 1) 124, 184, 246.
 - 6 Robertson (n 4) chs 6.4, 6.4.3; Freckelton and List (n 1) 35; Ian Freckelton, 'Asperger's Disorder and the Criminal Law' (2011) 18(4) *Journal of Law and Medicine* 677, 680 ('Asperger's'); Ian Freckelton, 'Autism Spectrum Disorder: Forensic Issues and Challenges for Mental Health Professionals and Courts' (2013) 26(5) *Journal of Applied Research in Intellectual Disabilities* 420, 432 ('Autism'); Colleen Berryessa, 'Judiciary Views on Criminal Behaviour and Intention of Offenders with High-Functioning Autism' (2014) 5(2) *Journal of Intellectual Disabilities and Offending Behaviour* 97, 104 ('Judiciary').
 - 7 Robertson (n 4) ch 6.3.6.2; Freckelton, 'Autism' (n 6) 429, 431; Clare Allely, Sally Kennedy and Ian Warren, 'A Legal Analysis of Australian Criminal Cases Involving Defendants with Autism Spectrum Disorder Charged with Online Sexual Offending' (2019) 66 *International Journal of Law and Psychiatry* 1, 8; Berryessa, 'Judiciary' (n 6) 104.
 - 8 Attwood (n 1) 48, 56–7.

involving a variety of offences. The year 2014 was chosen as the start date for this study because the last legal analysis of decisions, including by Australian courts, involving offenders diagnosed with ASD who had committed diverse crimes was published in 2013.⁹ The present study relies on sentencing remarks or reasons for sentence and decisions of courts of appeal. These documents may not discuss all of the matters that were addressed in court or expert evidence, but they are still a rich resource, as they reflect the major factors that influenced sentencing decisions.

Sentencing courts must take into account offenders' personal circumstances, including any impaired mental functioning.¹⁰ Each of the courts in the examined cases contemplated whether the offender's ASD should affect his sentence. All Australian jurisdictions follow the Victorian Court of Appeal's clarification of the relevance of 'impaired mental functioning' to sentencing in *R v Verdins* ('*Verdins*').¹¹ For some time, courts have acknowledged that offenders' ASD can enliven the application of the six principles articulated in that case ('*Verdins* principles').¹² All the courts in the examined cases applied some of these principles, though they did not always articulate that they were doing so. Yet this study also highlights that there remain gaps in judicial officers' knowledge about particular ASD symptoms and appreciation of the possible relevance of offenders' ASD to certain *Verdins* principles and some other sentencing considerations. The article seeks to explain these omissions and makes several recommendations to improve opportunities for courts to adopt a uniform, informed and humane approach to sentencing offenders with ASD. These reforms could help ensure that courts reach sentencing decisions that are fair to the accused, protect the community, and uphold public confidence in the justice system.

The next Part of this article explores current knowledge about ASD and its association with criminality. Part III analyses how the courts approached offenders' ASD in the examined cases and considers possible reasons for gaps in their discussion of the relevance of offenders' symptoms to some sentencing considerations. Part IV of the article outlines reforms that are proposed to improve courts' approaches to sentencing offenders with ASD.

II ASD AND CRIMINAL OFFENDING

The Court in *Verdins* recognised the forensic limitations of diagnoses of mental disorders, advising they 'should be treated as the beginning ... of the inquiry', and

9 Freckelton, 'Autism' (n 6). Allely, Kennedy and Warren's study examined Australian judicial decisions between 2017 and 2018 regarding offenders with ASD, but these defendants were all charged with the same type of offence, namely, online sexual crimes: Allely, Kennedy and Warren (n 7).

10 Judicial College of Victoria, *Victorian Sentencing Manual* (4th ed, 2021) ch 6.2.2 ('JCV').

11 (2007) 16 VR 269 ('*Verdins*'); Jamie Walvisch, 'Mandated Treatment as Punishment: Exploring the Second Verdins Principle' in Claire Spivakovsky, Kate Seear and Adrian Carter (eds), *Critical Perspectives on Coercive Interventions: Law, Medicine and Society* (Routledge, 1st ed, 2018) 185, 186 ('Mandated').

12 See, eg, *R v Seiden* [2009] VSCA 283, [14] (Mandie JA) ('*Seiden*'); *DPP (Vic) v HPW* [2011] VSCA 88, [28] (Ate JA) ('*HPW*'); *R v Van Zoelen* [2012] VSC 605, [21] (Curtain J) ('*Van Zoelen*').

courts must consider ‘how the particular condition (is likely to have) affected the mental functioning of the particular offender in the particular circumstances’.¹³ This observation is especially apposite where offenders have ASD. Definitions of ASD in the American Psychiatric Association’s Diagnostic and Statistical Manual and the World Health Organization’s International Classification of Mental and Behavioural Disorders are necessarily reductive and not designed to assist courts in identifying its symptoms’ ‘forensic consequences’.¹⁴ Moreover, as its name indicates, ASD encompasses a broad range and extent of impairment. Presentation of ASD – behaviour, skills and psycho-social outcomes (capacity to live independently, maintain employment and participate in the community) – is markedly heterogeneous between those with ASD and for individuals in different environments and life stages.¹⁵ The following overview of ASD therefore draws on clinicians’ and researchers’ publications in addition to diagnostic manuals, and highlights that the possible relationship between ASD symptoms and criminal offending is complex.

Indeed, it is crucial that courts are wary of assuming that the symptoms that health practitioners identify as fundamental to their diagnoses of ASD necessarily or directly correlate with a risk of criminal offending.¹⁶ Critical disability and socio-legal scholarship exposes the potential for the production of ‘medico-legal fictions’ about people with disabilities, such as ASD, in the criminal justice system when their ‘lives ... are defined in terms of medical deficiencies and impairments’.¹⁷ Misleading ‘stock stories’ might be constructed about the incurable inability for people with ASD to control their criminal behaviour, thus necessitating the imposition of severe sanctions.¹⁸ The question of the possible relevance of ASD symptoms to offending and sentencing demands a far more nuanced analysis than such a narrative suggests.

ASD is a neurodevelopmental condition whose disorders, attributable to physical brain dysfunction, start developing in childhood, but may become apparent later.¹⁹ People with ASD share deficits in social interaction, communication and imagination, and demonstrate narrow, rigid, repetitive patterns of behaviour, interests and/or activities, which manifest in varied ways and degrees, but impair their personal, social, academic and/or occupational functioning.²⁰ Some offenders in the examined cases were diagnosed with AS, which current diagnostic manuals subsume within ASD.²¹

13 *Verdins* (2007) 16 VR 269, 272 [13] (Maxwell P, Buchanan and Vincent JJA).

14 *DSM-5* (n 5) 25.

15 *Ibid* 53; Wing (n 3) 12, 27–8, 59, 149; Brewer and Young (n 3) 40, 47.

16 Claire Spivakovsky, ‘Making Risk and Dangerousness Intelligible in Intellectual Disability’ (2014) 23(3) *Griffith Law Review* 389, 389–90, 400–1.

17 *Ibid* 397.

18 *Ibid* 397, 399–400, 402–3.

19 *DSM-5* (n 5) 31, 53; Wing (n 3) 11; World Health Organization, *International Classification of Diseases* (11th revision, 2018) ch 6A02 (‘WHO’) <<https://icd.who.int/browse11/l-m/en>>.

20 *DSM-5* (n 5) 31, 50; Wing (n 3) 25, 32; WHO (n 19) ch 6A02.

21 Albert Lyngzeitson, *DSM-5: Overview of DSM-4 TR Changes* (Barcharts Publishing, 2014); WHO (n 19).

Examples of social interaction and communication impairments include difficulties in: developing, sustaining and understanding relationships; observing and responding to social cues; engaging in reciprocal conversation; comprehending and using non-verbal communication (such as eye contact and facial expression); using appropriate speech; and understanding speech (for instance, they may inappropriately interpret speech literally).²² Problems with imagination manifest in impairment of ‘Theory of Mind’ (‘ToM’): capacity to recognise and understand others’ thoughts, beliefs, emotions and intentions, and comprehend and predict their behaviour.²³ Restricted, repetitive behaviour, interests and/or activities of individuals with ASD can involve: stereotyped, repeated motor movements, use of objects and speech; inflexible adherence to routines and rules; rigid thinking; resistance to and distress at change; fascination with circumscribed special interests that differ from hobbies by their ‘content and/or the intensity with which they are pursued’; and sensitivity or insensitivity to and/or interest in sensory stimuli (including smells, sounds and light).²⁴

There is no evidence that the prevalence of ASD has increased, but diagnoses of it have grown, possibly due to expansion of diagnostic criteria and clinicians’ knowledge.²⁵ Despite this, research indicates that the crime rate among individuals with ASD is no higher and may be lower than that of the ‘neuro-typical’ population, and they commit few violent offences in particular.²⁶ This has been attributed to their rigid thinking, concern to follow rules closely, and conventional moral views.²⁷ As males are more commonly diagnosed with ASD than females, there may be more male than female offenders with this diagnosis.²⁸ Nevertheless, this does not necessarily reflect that more male than female offenders have ASD, as various reasons have been posited for this difference in diagnosis rates beyond the notion that there is a lower incidence of ASD among females compared with males.²⁹ Researchers have not established a direct causal connection between ASD symptoms and criminality, and the low crime rate in this population suggests that these symptoms alone do not lead to offending.³⁰ Yet some speculate that, in the context of comorbid disorders and/or particular social, economic and/or environmental conditions, certain ASD symptoms, in conjunction and if severe, could incline a minority of individuals to offend.³¹ A critical consideration of examples of those theories follows.

22 *DSM-5* (n 5) 31, 50, 54; Wing (n 3) 36–42; Robertson (n 4) chs 2.1.1–2.1.2.

23 Attwood (n 1) 124; Wing (n 3) 45.

24 *DSM-5* (n 5) 50, 54; Wing (n 3) 47–8, 50–2.

25 Wing (n 3) 60–2; *DSM-5* (n 5) 55; Robertson (n 4) ch 2.3; Berryessa, ‘Brief Report’ (n 4) 2770.

26 Attwood (n 1) 347; Wing (n 3) 175–6; Grant et al (n 4) 66; Brewer and Young (n 3) 39; Robertson (n 4) ch 3.2; Marc Woodbury-Smith et al, ‘High Functioning Autistic Spectrum Disorders, Offending and Other Law-Breaking: Findings from a Community Sample’ (2006) 17(1) *Journal of Forensic Psychiatry and Psychology* 108, 108, 113–14 (‘High Functioning’); Hippler et al (n 3) 774–5, 777.

27 Wing (n 3) 175; Attwood (n 1) 347; Hippler et al (n 3) 777.

28 Robertson (n 4) ch 2.3.1.

29 Ibid.

30 Brewer and Young (n 3) 40, 55; Robertson (n 4) ch 1.1.

31 Brewer and Young (n 3) 20, 39, 52–3, 81; Robertson (n 4) ch 3.3.

According to some, offenders with ASD rarely intend to harm others,³² but may not realise laws apply to them, or have difficulty understanding and applying them to new situations.³³ It is plausible that these misunderstandings could lead to people with ASD breaching laws. Especially if they are anxious and lack impulse control, coping and conflict resolution skills and capacity to forecast the impact of their actions, people with ASD may respond aggressively to stressful or unfamiliar situations, unexpected variations to routines or environment, incursions on personal space, or sensory perceptions.³⁴ Conceivably, they could therefore commit criminal offences inadvertently. Nevertheless, others hypothesise that such behaviour could ensue from them presuming inaccurately – due to their difficulties in interpreting others' speech and conduct, deciphering their intentions and predicting their actions – that they need to defend themselves.³⁵ Desire to avenge bullying or social rejection might provoke intentional offending, too.³⁶ Committing crimes may provide a sense of authority that counters feelings of social alienation and powerlessness.³⁷ Craving social acceptance and friendship, they may be susceptible to other offenders' influence.³⁸

Individuals with ASD may appear indifferent or unsympathetic to others' emotions and needs.³⁹ No empirical evidence supports a direct link between a deficit in 'emotional empathy' – the ability to share or have an affective response to another's emotional state – and criminality in this population.⁴⁰ Indeed, researchers distinguish in this respect between ASD, and psychopathy and antisocial personality disorder. Individuals with ASD can empathise with other people, and may especially do so when made aware of others' experiences,⁴¹ and they tend to comply with a moral framework, and not be sadistic or view others instrumentally.⁴² Yet impairments in ToM and cognitive empathy – the ability to understand others' feelings and thoughts, adopt their perspective, and predict the impact of behaviour – are common to individuals with ASD and could account for their offending, including because these attributes are vital for developing the capacity for moral reasoning.⁴³

32 Patricia Howlin, *Autism and Asperger Syndrome: Preparing for Adulthood* (Routledge, 2nd ed, 2004) 303.

33 *Ibid* 307; Wing (n 3) 175; Robertson (n 4) ch 3.3.2.1.

34 Berryessa, 'Judiciary' (n 6) 97–8; Wing (n 3) 56, 105; Freckelton and List (n 1) 21; Howlin (n 32) 302; Freckelton, 'Asperger's' (n 6) 680, 693; Ian Freckelton, 'Expert Evidence by Mental Health Professionals: The Communication Challenge Posed by Evidence about Autism Spectrum Disorder, Brain Injuries and Huntington's Disease' (2012) 35(5–6) *International Journal of Law and Psychiatry* 372, 374 ('Expert Evidence'); Robertson (n 4) ch 3.3.2.2, 3.3.2.5; Hippler et al (n 3) 775.

35 Grant et al (n 4) 66; Robertson (n 4) ch 3.3.2.6.

36 Woodbury-Smith et al, 'High Functioning' (n 26) 116; Robertson (n 4) ch 3.3.2.6; Wing (n 3) 176; Attwood (n 1) 347; Brewer and Young (n 3) 75–7.

37 Kalpana Dein and Marc Woodbury-Smith, 'Asperger Syndrome and Criminal Behaviour' (2010) 16(1) *Advances in Psychiatric Treatment* 37, 38; Attwood (n 1) 347–8.

38 Wing (n 3) 176; Howlin (n 32) 306.

39 Wing (n 3) 36–8.

40 Brewer and Young (n 3) 88; see Grant et al (n 4) 67.

41 Robertson (n 4) ch 3.3.1.1.

42 Brewer and Young (n 3) 88; Freckelton and List (n 1) 21.

43 Grant et al (n 4) 66–70, 73; Robertson (n 4) ch 7.

In some instances, special interests of individuals with ASD, combined with obsessiveness and ToM deficits, could possibly lead to offending.⁴⁴ Intense focus on their interest may increase the manifestation of their ToM and other difficulties, such as problems with responding appropriately to unanticipated circumstances, recognising others' intentions, emotions and communication, and/or appreciating the likely impact of their actions.⁴⁵ They may offend to pursue their interest (such as stealing items for a collection).⁴⁶ Certain special interests may be antisocial,⁴⁷ and/or influence offending,⁴⁸ such as interests in: violence, killing, death or weapons;⁴⁹ technology (which may lead to hacking computer systems for an intellectual challenge);⁵⁰ conducting psychological experiments to explore others' reactions that they do not understand;⁵¹ fire (fascination with its light, for instance, may result in them committing arson);⁵² and pornography and paraphilia (especially if they do not recognise their impropriety).⁵³

It is feasible that other ASD symptoms could contribute to a propensity to commit particular types of crimes, though relevant studies have not unanimously confirmed this.⁵⁴ For example, people with ASD may commit stalking offences if they are socially naïve, misread social cues, and focus obsessively on others, but are unable to form friendships.⁵⁵ Studies have found that individuals with ASD commit sexual offences less often than the general population.⁵⁶ Nevertheless, they may do so if they fail to recognise others' lack of consent and distress, have limited sexual knowledge, and/or are socially isolated and immature.⁵⁷ They could commit child exploitation material offences if they do not appreciate their impact on victims or their illegality, or obsessively hoard this material (hoarding generally can be common in this population).⁵⁸ Although individuals with ASD rarely commit homicide, they may kill to defend themselves against perceived threats.⁵⁹

44 Dein and Woodbury-Smith (n 37) 39; Wing (n 3) 175; Brewer and Young (n 3) 55, 66–7, 97, 101; Berryessa, 'Judiciary' (n 6) 97–8.

45 Brewer and Young (n 3) 105, 134.

46 Dein and Woodbury-Smith (n 37) 39; Attwood (n 1) 348.

47 Dein and Woodbury-Smith (n 37) 39.

48 Hippler et al (n 3) 775.

49 Wing (n 3) 47–8, 176; Robertson (n 4) ch 3.3.2.3; Woodbury-Smith et al, 'Circumscribed Interests and "Offenders" with Autism Spectrum Disorders: A Case-Control Study' (2010) 21(3) *Journal of Forensic Psychiatry and Psychology* 366, 375 ('Circumscribed').

50 Attwood (n 1) 350.

51 Ibid 348.

52 Ibid 350; Woodbury-Smith et al, 'Circumscribed' (n 49) 367.

53 Attwood (n 1) 349.

54 Hippler et al (n 3) 778; Robertson (n 4) ch 3.4.

55 Freckelton, 'Autism' (n 6) 428; Attwood (n 1) 349; Robertson (n 4) 3.3.2.4.

56 Dein and Woodbury-Smith (n 37) 38.

57 Freckelton and List (n 1) 21; Attwood (n 1) 349.

58 Allely, Kennedy and Warren (n 7) 1–3; Paul Skirrow et al, 'I Collect Therefore I Am: Autooetic Consciousness and Hoarding in Asperger Syndrome' (2015) 22(3) *Clinical Psychology and Psychotherapy* 278, 279–82; Yentl Boerema et al, 'Obsessive Compulsive Disorder with and without Hoarding Symptoms: Characterizing Differences' (2019) 246 *Journal of Affective Disorders* 652, 656; Robertson (n 4) ch 3.3.1.1.

59 Attwood (n 1) 350.

Comorbid developmental, behavioural and/or psychiatric conditions could account for or exacerbate the risk of offending in people with ASD.⁶⁰ Possibly 70% of this population has comorbid mental disorders,⁶¹ and many offenders generally have mental health problems that researchers link to criminality.⁶² Comorbid conditions of some individuals with ASD that could increase their propensity to offend include: mood and anxiety disorders; attention-deficit/hyperactivity disorder; conduct disorder; oppositional defiant disorder; personality disorder; and intellectual disability.⁶³ These conditions may increase their susceptibility to experiencing social, economic and environmental risk factors for offending, such as poverty, unemployment, substance abuse, victimisation and social isolation.⁶⁴

III ANALYSIS OF SENTENCING CASES INVOLVING OFFENDERS WITH ASD

Before analysing the examined cases, this Part of the article considers: sentencing law principles and practice; how sentencing courts can factor offenders' mental impairment into their decision-making; and studies that have investigated judicial officers' responses to offenders' ASD.

A Overview of Australian Sentencing Law Principles and Practice

Australian sentencing law derives from legislation and case law, which specify sentencing objectives: specific deterrence; general deterrence; community protection; rehabilitation; retribution; and denunciation.⁶⁵ Where relevant, courts apply mitigating factors, which reduce the harshness of the penalty, and aggravating factors, which have the opposite effect.⁶⁶ Courts must reach sentences by undertaking an 'instinctive synthesis of all the various aspects involved in the punitive process'.⁶⁷ This entails identifying factors relevant to the sentence, attaching a weight to them (without articulating it, except if conferring discounts for guilty pleas and/or cooperation with authorities), and balancing them to set the penalty.⁶⁸

60 Brewer and Young (n 3) 57, 73–4.

61 *DSM-5* (n 5) 58.

62 Jamie Walvisch, '“Mental Disorder” and Sentencing: Resolving the Definitional Problem' (2018) 26(1) *Journal of Law and Medicine* 159, 159 ('Mental Disorder'); Dion Gee and James Ogloff, 'Sentencing Offenders with Impaired Mental Functioning: *R v Verdins, Buckley and Vo* [2007] at the Clinical Coalface' (2014) 21(1) *Psychiatry, Psychology and Law* 46, 46.

63 Brewer and Young (n 3) 60, 62, 67, 73–4; Dein and Woodbury-Smith (n 37) 38–40.

64 Brewer and Young (n 3) 60, 74; Robertson (n 4) ch 3.2.3.1.

65 Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 235.

66 Mirko Bagaric, Richard Edney and Theo Alexander, *Sentencing in Australia* (Thomson Reuters, 6th ed, 2018) 13.

67 *Ibid* 31; see *R v Williscroft* [1975] VR 292, 300 (Adams, Starke and Crockett JJ); *Barbaro v The Queen* (2014) 253 CLR 58.

68 Freiberg (n 65) 228; see, eg, *Markarian v The Queen* (2005) 228 CLR 357; *Wong v The Queen* (2001) 207 CLR 584.

Proportionality is a key sentencing principle: the severity of the penalty must match the crime's objective gravity.⁶⁹ Courts must also apply the principle of parsimony by imposing the most lenient sentence that will achieve its objectives.⁷⁰ Courts can choose from a range of sanctions. The lightest are unsupervised orders (such as good behaviour orders and fines), the harshest is imprisonment, and between them are intermediate punishments (such as community correction orders ('CCO')), and substitutional prison orders (such as suspended sentences and home detention).⁷¹ Legislation in some jurisdictions requires courts to consider 'current sentencing practices' – statistics about sentences imposed in comparable cases – to achieve consistency in approach, though not numerical equivalence.⁷² A 'tariff', based on previous sentences imposed in cases involving comparable offences and offenders, can set a reference point for the sentence.⁷³ In certain jurisdictions, courts can establish 'guideline judgments', which, for instance, advise on factors to consider in sentencing for particular offences.⁷⁴ It would, however, be very difficult for courts to create tariffs or guideline judgments for cases involving offenders with ASD who have committed the same or similar crimes, due to the heterogeneity of the presentation of this disorder and possible relevance of its symptoms to offending.

B Sentencing and Offenders' Mental Impairment

Some Commonwealth, state and territory legislation requires courts to take into account offenders' mental 'condition' or 'impairment' where relevant in sentencing them.⁷⁵ Further, the Court in *Verdins* stated, 'the proper exercise of the sentencing discretion frequently calls for a consideration of the offender's mental state' during the offending and/or at sentencing.⁷⁶ Reformulating principles expressed in *R v Tsiaras*,⁷⁷ this Court articulated the following ways in which temporary or permanent '[i]mpaired mental functioning' could be 'relevant to sentencing':

1. The condition may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.
2. The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.

69 Bagaric, Edney and Alexander (n 66) 9; see *Veen v The Queen* (1979) 143 CLR 458, 467 (Stephen J); *Veen v The Queen [No 2]* (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ). Some statutes nonetheless permit imposing sanctions that are disproportionate to the seriousness of particular crimes to protect the community: see, eg, *Sentencing Act 1991* (Vic) s 6D.

70 Freiberg (n 65) 245.

71 Geraldine Mackenzie, Nigel Stobbs and Jodie O'Leary, *Principles of Sentencing* (Federation Press, 2010) 141, 161, 182–3; Bagaric, Edney and Alexander (n 66) 13.

72 Freiberg (n 65) 167, 169, 449–51, 455; Bagaric, Edney and Alexander (n 66) 90.

73 Bagaric, Edney and Alexander (n 66) 90. See generally Mackenzie, Stobbs and O'Leary (n 71).

74 Bagaric, Edney and Alexander (n 66) 64.

75 See, eg, *Crimes Act 1914* (Cth) s 16A(2)(m); *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(m); *Sentencing Act 2017* (SA) s 11(1)(f).

76 *Verdins* (2007) 16 VR 269, 270 [1] (Maxwell P, Buchanan and Vincent JJA).

77 [1996] 1 VR 398.

3. Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.
4. Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.
5. The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.
6. Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment.⁷⁸

If applied, these principles could mitigate the sentence imposed. The offender bears the onus of establishing 'facts to enliven the *Verdins* principles on the balance of probabilities as a mitigating factor', by producing 'cogent' (usually expert) evidence of the existence of their impairment and its effects at the time of offending and/or sentencing.⁷⁹ Courts are not required to consider whether each principle applies, and generally need only refer to principles raised by the accused or defence counsel and where they produce sufficient relevant evidence.⁸⁰

C Research into Judicial Officers' Responses to Offenders' ASD

The Court in *Verdins* confirmed that the principles it articulated would apply where the offender suffered from a 'mental disorder or abnormality',⁸¹ which could encompass 'a wide variety of conditions',⁸² not only '(serious) mental illness'.⁸³ Courts have subsequently applied the principles in sentencing offenders with ASD.⁸⁴ Yet, as noted in Part I, a few studies have exposed deficiencies in understanding of ASD symptoms and their potential forensic relevance among judicial officers. Further, those investigations revealed that judicial officers were willing to rely on expert evidence, but this did not always ensure that they approached sentencing offenders with ASD consistently or in an enlightened way.

From their analysis in 2009 of three cases involving offenders with AS (one of which was Australian), Ian Freckelton and David List concluded that the courts did not understand AS symptomatology well.⁸⁵ Examining further cases concerning

78 *Verdins* (2007) 16 VR 269, 276 [32] (Maxwell P, Buchanan and Vincent JJA).

79 *Charles v The Queen* (2011) 34 VR 41, 69 [162] (Robson AJA) ('*Charles*'); *DPP (Vic) v O'Neill* (2015) 47 VR 395, 415 [77] (Warren CJ, Redlich and Kaye JJA) ('*O'Neill*').

80 *Davey v The Queen* [2010] VSCA 346, [101] (Hollingworth AJA); *R v Zander* [2009] VSCA 10, [33] (Dodds-Streeton JA), [36] (Nettle JA); JCV (n 10) ch 6.2.2.11.

81 *Verdins* (2007) 16 VR 269, 271 [5] (Maxwell P, Buchanan and Vincent JJA).

82 *Ibid* [7].

83 *Ibid* [5].

84 See, eg, *Seiden* [2009] VSCA 283; *HPW* [2011] VSCA 88; *Van Zoelen* [2012] VSC 605.

85 Freckelton and List (n 1) 35.

offenders with AS from Australia and internationally, in 2011, Freckelton observed that the judges had ‘very limited familiarity with [AS] and have required expert assistance from psychiatrists and clinical psychologists ... to enable them to factor symptoms informedly ... into their own decision-making’.⁸⁶ In 2013, Freckelton opined that there remained ‘a relatively low level of understanding of ASD ... within the justice system’, but judges realised they needed ‘forensically focused mental health insights to evaluate whether ASD symptomatology is relevant’.⁸⁷ In some cases, judges were ‘successfully educated ... about the effects of ASD’, which ‘resulted in more informed and humane outcomes that have properly taken into account therapeutic and health considerations’.⁸⁸ Nevertheless, appellate courts took different approaches to ASD and sexual offending in particular, depending on expert evidence adduced.⁸⁹

Caitlin Robertson reported in 2017 that surveys of 21 Australian magistrates indicated that, although many were aware of ASD symptoms, their understanding of their potential forensic relevance varied.⁹⁰ Of those who recognised that offenders’ ASD could be pertinent to sentencing, only two noted the possible application of the *Verdins* principles,⁹¹ though most respondents confirmed they would consider mitigating penalties for such offenders.⁹² None of the magistrates had formal training in ASD,⁹³ and most welcomed reports from psychologists with appropriate expertise.⁹⁴

Clare Allely, Sally Kennedy and Ian Warren examined 10 Australian decisions between 2017 and 2018 concerning online sexual offenders with ASD.⁹⁵ They found that judges appreciated they needed to understand the connection between ASD symptoms and this crime, and received insightful psychological evidence.⁹⁶ Nevertheless, they rarely mitigated sentences in light of it or delved into effects of ASD on offending, especially where offenders were intelligent or their symptoms appeared mild.⁹⁷

Colleen Berryessa’s reports of a 2014 study of 21 Californian judges yielded similar results. Several judges recognised that sanctions other than incarceration might be preferable for offenders with ASD and that their condition was a potential mitigating factor, while some regarded it as an aggravating factor.⁹⁸ Yet, although judges were willing to rely on expert advice, they did not know how to factor information about ASD into their decision-making.⁹⁹

86 Freckelton, ‘Asperger’s’ (n 6) 680.

87 Freckelton, ‘Autism’ (n 6) 431–2.

88 Ibid 431.

89 Ibid 429.

90 Robertson (n 4) ch 6.3.5.

91 Ibid ch 6.3.5.3.

92 Ibid ch 6.3.5.

93 Ibid ch 6.3.6.1.

94 Ibid ch 6.3.6.2.

95 Allely, Kennedy and Warren (n 7) 2.

96 Ibid 8.

97 Ibid.

98 Berryessa, ‘Brief Report’ (n 4) 2771–3.

99 Berryessa, ‘Judiciary’ (n 6) 103–4.

D Courts' Approaches to Sentencing Eight Offenders with ASD, 2014–20

Building on these studies, this Part of the article analyses Australian sentencing cases between 2014 and 2020 involving eight offenders with ASD, six of whom appealed their sentences. It first outlines the offences committed, sentences imposed and, where applicable, decisions made on appeal in each case. This Part then considers how the courts applied the *Verdins* principles. Finally, this Part examines how, in light of offenders' ASD, the courts approached some sentencing objectives and mitigating and aggravating factors that are not addressed by the *Verdins* principles.

1 Details of the Examined Cases

(a) Stephen Borg

Stephen Borg drove across double white lines on a highway, colliding with a vehicle in which two passengers died and two other passengers were seriously injured.¹⁰⁰ Smallwood J in the County Court of Victoria sentenced Borg to a five-year CCO with conditions (including treatment and rehabilitation).¹⁰¹ The Victorian Court of Appeal dismissed the Director of Public Prosecution's ('DPP') appeal against this sentence.¹⁰²

(b) Daniel Chapman

Daniel Chapman was convicted of manslaughter by unlawful and dangerous act.¹⁰³ When his father attempted to stop him playing computer games so he would join the family for dinner, 20-year-old Chapman stabbed him once with a sword that was part of his collection of medieval weaponry.¹⁰⁴ Harrison J in the Supreme Court of NSW sentenced Chapman to a six-year prison term with a three-year non-parole period.¹⁰⁵

(c) Brendan Davies

Brendan Davies intentionally set fire to two churches, a police station, patisserie and childcare centre.¹⁰⁶ For these arson offences, Mullaly J in the County Court of Victoria sentenced Davies to 14 years and 6 months' imprisonment with a 12-year and 3-month non-parole period.¹⁰⁷ Davies applied for leave to appeal against the conviction and sentence, and the Victorian Court of Appeal re-sentenced him to 12 years and 3 months' imprisonment with a 10-year and 3-month non-parole period.¹⁰⁸

100 *DPP (Vic) v Borg* (2016) 258 A Crim R 172, 175 [6]–[9] (Maxwell P, Weinberg and Priest JJA) ('*Borg*').

101 *Ibid* 173–4 [1].

102 *Ibid* 174–5 [2]–[3].

103 *R v Chapman* [2018] NSWSC 1741, [1] (Harrison J) ('*Chapman*').

104 *Ibid* [4], [7]–[9] (Harrison J).

105 *Ibid* [42].

106 *DPP (Vic) v Davies* [2017] VCC 1101, [7], [11], [14], [17], [26] (Mullaly J) ('*Davies*').

107 *Ibid* [118].

108 *Davies v The Queen* [2019] VSCA 66, [2], [787] (Kaye, McLeish and T Forrest JJA).

(d) Michael Durovka

Michael Durovka pleaded guilty to offences related to possessing and accessing child pornography.¹⁰⁹ Davison J in the District Court of SA sentenced Durovka to an 11-month prison term of which he was required to serve 3 months, with the other 8 months suspended, provided he entered a 2-year good behaviour bond.¹¹⁰ The SA Court of Criminal Appeal dismissed Durovka's appeal from that sentence.¹¹¹

(e) Tom Gray (a pseudonym)

Tom Gray (a pseudonym) abducted an 18-year-old woman, assaulted, sexually assaulted and raped her.¹¹² Hannan J in the County Court of Victoria sentenced Gray to 19 years' imprisonment with a 15-year non-parole period.¹¹³ The Victorian Court of Appeal dismissed Gray's application for extension of time to appeal against that sentence and found that his proposed ground of appeal lacked merit.¹¹⁴

(f) Thomas Hemming

Thomas Hemming fatally stabbed two of his neighbours.¹¹⁵ King J in the Supreme Court of Victoria sentenced him to 32 years' imprisonment with a minimum 27-year non-parole period.¹¹⁶

(g) William Hladik

William Hladik was convicted of sexually abusing a child, producing child pornography (Hladik photographed his victim), and possessing child pornography (44,575 images and 244 movies were found on Hladik's computer).¹¹⁷ Harbison J in the County Court of Victoria sentenced Hladik to a prison term of 6 years and 9 months, and a 4.5 year non-parole period.¹¹⁸ In response to Hladik's appeal against this sentence, the Victorian Court of Appeal reduced it to 5 years' imprisonment with a 3-year non-parole period.¹¹⁹

(h) Jaymes Todd

For the crimes of sexually assaulting, raping and murdering Dixon, Kaye JA in the Supreme Court of Victoria sentenced Todd to life imprisonment with a 35-year

109 *R v Durovka* (District Court of South Australia, Davison J, 15 July 2015) 1 ('*Durovka*').

110 *Ibid* 7.

111 *R v Durovka* [2015] SASCF 140, [1] (Gray ACJ), [2] (Vanstone J), [31] (David J).

112 *Tom Gray (a pseudonym) v The Queen* [2018] VSCA 163, [3] (Priest, Beach and Niall JJA) ('*Gray*').

DPP (Vic) v [Gray] (County Court of Victoria, Hannan J, 18 May 2016) is subject to a suppression order.

113 *Gray* [2018] VSCA 163, [4] (Priest, Beach and Niall JJA).

114 *Ibid* [26], [51], [55] (Priest, Beach and Niall JJA).

115 *R v Hemming* [2014] VSC 521, [5], [15] (King J) ('*Hemming*').

116 *Ibid* [50].

117 *DPP (Vic) v Hladik* [2014] VCC, [1], [19], [23] (Harbison J) ('*Hladik*').

118 *Ibid* [68].

119 *Hladik v The Queen* [2015] VSCA 149, [50] (Ashley, Redlich and Weinberg JJA).

non-parole period.¹²⁰ The Victorian Court of Appeal refused Todd's application for leave to appeal against this sentence.¹²¹

2 *The Courts' Application of the Verdins Principles*

As noted above, all of the courts in the examined cases applied at least some of the *Verdins* principles. Nevertheless, judges in the Victorian County Court, NSW Supreme Court, and SA District Court and Court of Criminal Appeal, did not explicitly state that they were applying those principles in Borg, Chapman and Durovka's cases, respectively. Further, none of the courts considered all of the *Verdins* principles.

(a) *Verdins Principle 1 – Moral Culpability*

The first *Verdins* principle envisages that offenders' mental impairment could diminish their moral responsibility for their crimes, so it is less necessary to denounce them and appropriate to reduce their sentences. The Court in *Verdins* provided the following non-exhaustive list of effects of mental impairment that could reduce moral culpability:

- (a) impairing the offender's ability to exercise appropriate judgment;
- (b) impairing the offender's ability to make calm and rational choices, or to think clearly;
- (c) making the offender disinhibited;
- (d) impairing the offender's ability to appreciate the wrongfulness of the conduct;
- (e) obscuring the intent to commit the offence; or
- (f) contributing (causally) to the commission of the offence.¹²²

Courts have confirmed that mental impairment will only diminish moral culpability if it is proved to have contributed or been causally linked to the offending.¹²³ An offender's culpability will be higher the greater their understanding of 'the act and its potential harm'.¹²⁴

In all but one of the examined cases (Durovka), the courts expressly considered whether the offenders' ASD had one or more of these effects and diminished their moral culpability. They discussed the possible connections between the offending and ASD and comorbid mental health conditions of the offenders, and thus the potential impact of offenders' impairments on their moral culpability. Yet some of those courts appear not to have taken into account how certain ASD symptoms might have contributed to the offending and therefore reduced the offenders' moral culpability. For instance, judicial officers did not discuss the possibility that

120 *Todd* [2019] VSC 585, [1], [125].

121 *Todd v The Queen* [2020] VSCA 46, [7] (Ferguson CJ, Priest and Beach JJA).

122 *Verdins* (2007) 16 VR 269, 275 [26] (Maxwell P, Buchanan and Vincent JJA).

123 See, eg, *Bowen v The Queen* [2011] VSCA 67, [33] (Warren CJ); *Ibrahim v The Queen* [2016] NSWCCA 6, [36] (Bellew J).

124 *DPP (Vic) v Weidlich* [2008] VSCA 203, [17] (Vincent, Weinberg JJA and Mandie AJA).

Hemming, Davies, Durovka and Hladik had special interests that could have had some link to their offending.

In addition, Hladik was the only offender in the examined cases who was found not to have understood the moral wrongfulness of his offending.¹²⁵ Yet, as noted in Part II, people with ASD often have deficits in ToM and cognitive empathy and, when this is the case, frequently their capacity for complex moral reasoning is also impaired.¹²⁶ Borg and Chapman's abilities in relation to moral reasoning were irrelevant to their offending. Further, Kaye JA accepted one expert's evidence that Todd's empathy was not diminished and both experts' assessments that Todd understood that his offending was wrong.¹²⁷ Nevertheless, one expert, whose testimony Hannan J accepted, speculated that Gray's empathy may have been impaired,¹²⁸ and King J found that, due to his AS, Hemming was 'incapable of feeling genuine empathy'.¹²⁹ In neither of those cases, however, was the potential correlation between this deficit and the offender's capacity for moral reasoning, and thus his moral culpability, discussed. Likewise, although it was apparent that Davies understood that his actions were illegal,¹³⁰ judicial officers did not comment on whether Davies' ToM and cognitive empathy may have been impaired and if he might have been unable to appreciate that his crimes were morally wrong.

A detailed exploration of how the courts approached the offenders' moral culpability in the examined cases follows.

(i) *Borg*

Smallwood J found that Borg's 'moral culpability' for his dangerous driving causing death and serious injury was 'of a low order' due to his 'incapacities and disabilities'.¹³¹ Borg was diagnosed with ASD and low IQ.¹³² A clinical neuropsychologist, respiratory and sleep disorders physician, consultant neurologist and psychologist jointly reported that Borg's cognitive and behavioural impairments, attributable to ASD, likely contributed to the offending, as they reduced his capacity to monitor and react to dangerous circumstances and were exacerbated by his fatigue.¹³³ The Victorian Court of Appeal agreed that Borg's moral culpability was low.¹³⁴ It nonetheless remarked that the sentence was manifestly inadequate because it gave excessive weight to mitigating factors and the objective gravity of the offending was high (it dismissed the DPP's appeal only due to the conduct of its prosecution).¹³⁵

125 *Hladik* [2014] VCC, [46] (Harbison J).

126 *Grant et al* (n 4) 66–70, 73; *Robertson* (n 4) ch 7.

127 *Todd* [2019] VSC 585, [74]–[75], [79].

128 *Gray* [2018] VSCA 163, [29] (Priest, Beach and Niall JJA).

129 *Hemming* [2014] VSC 521, [41].

130 *Davies v The Queen* [2019] VSCA 66, [782] (Kaye JA, McLeish and T Forrest JJA).

131 *DPP (Vic) v Borg* [2015] VCC 1385, [48].

132 *Borg* (2016) 258 A Crim R 172, 178 [29] (Maxwell P, Weinberg and Priest JJA).

133 *Ibid* 184 [67], 184–5 [69] (Maxwell P, Weinberg and Priest JJA).

134 *Ibid* 193–4 [112]–[113].

135 *Ibid* 174–5 [2]–[3], 193–4 [111]–[113], 194 [119]–[121].

(ii) *Chapman*

Harrison J found that Chapman's mental impairment materially contributed to his stabbing of his father, and his moral culpability for this offence and its objective seriousness were low.¹³⁶ Chapman 'was unable to control himself' in 'a momentary lapse' that resulted from his 'accumulated frustrations' related to his ASD, 'depressive illness', and withdrawal from antidepressant medication.¹³⁷ Harrison J reached this conclusion by accepting evidence of Dr Olav Nielssen, a psychiatrist, rather than Professor Greenberg, who disagreed that there was a significant causal connection between Chapman's mental condition and his offending.¹³⁸ Harrison J did not indicate why he preferred Nielssen's evidence, but the fact that Greenberg, unlike Nielssen, did not examine Chapman may have contributed to this decision.¹³⁹

(iii) *Davies*

Mullaly J found that Davies' moral culpability for committing arson was 'very high' and not diminished by his AS, anxiety or post-traumatic stress disorder.¹⁴⁰ Mullaly J considered there was no causal connection between Davies' impairments and his offending because he executed a planned campaign to avenge society (believing it harmed him by supporting the institution of the family in which he claimed he suffered abuse).¹⁴¹ Davies expressed this motive in videos he posted online in which he justified commission of arson by 'a tortured victim of society'.¹⁴² Nevertheless, the Victorian Court of Appeal re-sentenced Davies in part because it found that his AS mitigated his culpability 'to a moderate degree'.¹⁴³

That Court held that AS 'affected [Davies'] reasoning processes' and was causally connected to the motivation that 'played a material role' in his offending.¹⁴⁴ The diminution of Davies' culpability was not substantial, though, because he understood his actions were illegal.¹⁴⁵ The Court inferred from evidence of two forensic psychologists – Pamela Matthews and Timothy Watson-Munro – a relationship between Davies' AS and his 'thinking processes'.¹⁴⁶ The Court found that Mullaly J misinterpreted Watson-Munro's evidence due to the prosecution's inaccurate interpretation of the first *Verdins* principle.¹⁴⁷ Watson-Munro opined that Davies' AS affected his 'impulse control' and 'led to an impairment of his judgment, which in turn impacts upon his culpability' (though Davies was aware he was offending).¹⁴⁸ Neither Mullaly J nor the Court of Appeal referred to the

136 *Chapman* [2018] NSWSC 1741, [25], [36]–[37].

137 *Ibid* [36] (Harrison J).

138 *Ibid* [22]–[23].

139 *Ibid*.

140 *Davies* [2017] VCC 1101, [90].

141 *Ibid* [53]–[54], [76], [90].

142 *Davies v The Queen* [2019] VSCA 66, [25] (Kaye JA, McLeish and T Forrest JJA).

143 *Ibid* [782], [787].

144 *Ibid* [688], [698], [763], [769].

145 *Ibid* [699], [782].

146 *Ibid* [697].

147 *Ibid* [691]–[695].

148 *Ibid* [633], [691], [695]–[696].

potential for a special interest in fire and obsessiveness in an individual with ASD to contribute to them committing arson, or to the possibility that Davies' ToM, empathy and capacity for moral reasoning were impaired. Also potentially relevant to Davies' moral culpability, and not discussed by these judicial officers, is the speculation that some individuals with ASD may be motivated to offend by their rigid application of social rules and perception that offending is a morally legitimate response to others' perceived moral transgressions.¹⁴⁹

(iv) *Durovka*

Davison J did not explicitly indicate whether Durovka's AS, low intellectual functioning and depression reduced his moral culpability for his child pornography offences, though she suspended Durovka's prison term due to them.¹⁵⁰ The SA Court of Criminal Appeal did not comment on Durovka's moral culpability.

(v) *Gray*

Hannan J found that Gray's moral culpability for his crimes was reduced 'to a moderate degree' due to his AS.¹⁵¹ The Victorian Court of Appeal concluded that Gray's offending fell within the worst category for these crimes; the Court refrained from summarising the sexual acts to which Gray subjected his victim because it considered them so depraved.¹⁵² That Court commented that Hannan J's sentence was 'merciful' and could 'only be explained by [Hannan J] giving substantial weight to [Gray's] mental impairment'.¹⁵³

Hannan J accepted that, despite his intellect (Gray obtained a doctorate in physics), Gray's AS compromised his mental state and significantly contributed to the fantasy he enacted.¹⁵⁴ After an online relationship ended, Gray 'lost the capacity for relying upon analytical skills' that could have helped him 'think clearly and exercise appropriate judgement'.¹⁵⁵ Yet Gray's 'deficits ... were not causally related to [his] offending at all times'; he protected his identity and was aware of the pain he caused and his crimes' 'disgusting nature'.¹⁵⁶ The Court of Appeal concurred with Hannan J that Gray's offending was 'calculated and planned'.¹⁵⁷ Hannan J relied on two expert reports that referred to different possible effects of Gray's AS symptoms. Associate Professor Andrew Carroll, consultant forensic psychiatrist, speculated that Gray had paraphilias, but owing to his AS, his interpersonal functioning and possibly empathy were impaired, so he may have been 'unable to appreciate the full extent of the impact of his behaviours'.¹⁵⁸ Associate

149 Grant et al (n 4) 69; Robertson (n 4) ch 7.3.

150 *Durovka* (District Court of South Australia, Davison J, 15 July 2015) 7.

151 *Gray* [2018] VSCA 163, [27], [44] (Priest, Beach and Niall JJA).

152 *Ibid* [2], [42].

153 *Ibid* [41].

154 *Ibid* [1],[44].

155 *Ibid* [31], [44].

156 *Ibid* [44], [46].

157 *Ibid* [47].

158 *Ibid* [29].

Professor Warrick Brewer, consultant clinical neuropsychologist, considered that Gray's AS significantly contributed to his offending because it compromised his 'socioemotional executive functioning', and 'ability to formulate rational and reasoned behaviour' and respond to the victim's distress.¹⁵⁹

(vi) *Hemming*

Hemming was the only offender in the examined cases whose culpability was, ultimately, expressly found to be undiminished.¹⁶⁰ King J found that Hemming's AS was 'linked' 'to a degree' to his killing of his neighbours, but he '[knew] what [he] did was wrong' (though, as noted in Part III(D)(2)(a), King J also concluded that Hemming lacked empathy).¹⁶¹ Further, King J stated that Hemming 'chose not to' help himself; before offending, he failed to attend an appointment his mother made with his psychologist after he revealed his violent thoughts.¹⁶² King J considered that Hemming's alcohol consumption prior to the offence may have been 'more disinhibiting' than his AS (which does not 'normally' induce violence), resulting in him enacting his 'fantasy' about 'what it was like to kill someone'.¹⁶³ King J noted that Hemming's psychologist observed his 'great interest in areas that fascinated [him]' when he was younger.¹⁶⁴ King J also referred to two forensic psychiatrists' evidence, but did not indicate if either considered whether Hemming might have pursued a special interest in violence and death. Dr Danny Sullivan opined that 'Hemming's judgment was obscured', but his AS was not disinhibiting and 'his capacity to think clearly or to make calm and rational choices was not impaired'.¹⁶⁵ King J did not discuss Dr Ruth Vine's assessment of Hemming, which was provided to her for consideration, but not tendered in court.¹⁶⁶

(vii) *Hladik*

Harbison J found that Hladik's moral culpability for his offences was 'somewhat diminished' by his ASD, but Hladik failed to discharge his responsibility not to take advantage of the girl whom he sexually abused and photographed.¹⁶⁷ Harbison J accepted evidence of Dr Aaron Cunningham, forensic psychologist, that Hladik's ASD was 'relevant to [his] offending but not the sole contributor'.¹⁶⁸ Harbison J acknowledged Hladik's difficulties in social communication, complying with social mores, and understanding what is morally wrong, others' perspectives and relationships, and his vulnerability to others' influence.¹⁶⁹ Hladik developed distorted thinking that adults should initiate children into sexual experiences and

159 Ibid [33].

160 *Hemming* [2014] VSC 521, [43] (King J).

161 Ibid [44], [39], [41].

162 Ibid [45], [27].

163 Ibid [12], [43]–[44].

164 Ibid [31].

165 Ibid [37]–[38].

166 Ibid [33].

167 *Hladik* [2014] VCC, [18]–[19], [46], [53].

168 Ibid [46].

169 Ibid [16], [37], [46].

that he was interacting with his victim on an equal footing.¹⁷⁰ He befriended the victim's parents after joining a group that engaged in sexual activity related to their belief that they were animal spirits.¹⁷¹

The Victorian Court of Appeal reduced Hladik's sentence partly because it considered that Harbison J 'failed to give sufficient weight to ... the extent to which [Hladik's] mental disorder reduced his moral culpability'.¹⁷² It found that Hladik's 'serious disorder ... contributed significantly to his offending'.¹⁷³ Although Harbison J observed that Hladik's impairments included 'restrictive, repetitive patterns of interest',¹⁷⁴ neither Court commented on whether his extensive collection of child pornography may have reflected obsessiveness and a special interest attributable to ASD.

(viii) *Todd*

Kaye JA concluded that Todd's 'mild' ASD 'mitigated [his] moral culpability' for sexually assaulting, raping and killing Dixon 'to a small degree',¹⁷⁵ and the Victorian Court of Appeal found that Kaye JA 'had due regard to the effect' of Todd's ASD 'on his moral culpability'.¹⁷⁶ Kaye JA stated that ASD 'did not directly contribute to [his] offending', but '[played] a role in [Todd's] addiction to violent online pornography'.¹⁷⁷ That addiction, in turn, 'fed the fantasy' that 'culminated' in his crimes, and made an 'indirect contribution ... to the development of the sexual sadism disorder [(‘SSD’)] that precipitated the offending'.¹⁷⁸

Kaye JA preferred the evidence of Professor James Ogloff, a clinical and forensic psychologist, to that of Dr David Thomas, a consultant psychiatrist. These experts agreed that ASD 'does not, ordinarily, predispose a person to violent offending', and Todd knew his actions were wrong.¹⁷⁹ Yet Thomas considered that Todd's ASD 'reduced [his] ability to exercise an appropriate judgment, to make appropriate choices, and to moderate [his] behaviour', and led to his 'deficit in being able to perceive and comprehend the suffering that [his] actions might cause' others.¹⁸⁰ Conversely, Ogloff opined that Todd would not have misinterpreted Dixon's cues and he understood the effect of choking (having previously, consensually, choked his girlfriend during sex).¹⁸¹ Further, Ogloff considered that the log of Todd's online activities before his offending did not reflect repetitive behaviour that can be associated with ASD.¹⁸²

170 Ibid [38].

171 Ibid [35]–[36].

172 *Hladik v The Queen* [2015] VSCA 149, [48], [50] (Ashley, Redlich and Weinberg JJA).

173 Ibid [47].

174 *Hladik* [2014] VCC, [16].

175 *Todd* [2019] VSC 585, [80].

176 *Todd v The Queen* [2020] VSCA 46, [52] (Ferguson CJ, Priest and Beach JJA).

177 *Todd* [2019] VSC 585, [76], [80].

178 Ibid [80], [113] (Kaye JA).

179 Ibid [77], [79].

180 Ibid [74].

181 Ibid [75].

182 Ibid [80].

(b) *Verdins Principle 2 – Choice of Sanction*

Pursuant to the second *Verdins* principle, a court may consider the suitability of particular sanctions in light of an offender's mental impairment. Where offenders have ASD, courts could consider which sentencing options might enable them to obtain treatment for their impairments to improve their prospects of rehabilitation and reduce their risk of reoffending. Sanctions they may contemplate imposing include: if incarceration is deemed necessary, a reduced prison term with an extended parole period (given prison's rehabilitative capacity is unclear)¹⁸³; detention in a mental health facility through a hospital security order or residential treatment order; home detention; a suspended prison term with good behaviour orders; or a CCO with conditions requiring the offender to participate in rehabilitation and treatment programs.

As discussed below, reflecting the application of this *Verdins* principle, in relation to four of the offenders in the examined cases – Borg, Chapman, Durovka and Hladik – courts contemplated imposing and/or did impose alternative sanctions to lengthy incarceration due to the offenders' need for treatment for mental impairments.

(i) *Borg*

Smallwood J imposed a CCO on Borg because it 'would be punitive', 'a general deterrent', and facilitate his rehabilitation by enabling him to maintain and derive support from relationships with family and friends.¹⁸⁴

(ii) *Chapman*

Harrison J reduced the non-parole period of Chapman's sentence so that he could access medical support and counselling for his 'mental conditions'.¹⁸⁵

(iii) *Durovka*

Davison J referred to the report of psychologist, Luke Broomhall, that Durovka's 'residing in the community with a rehabilitation program' and continuing his employment were 'the most protective factors' against his reoffending.¹⁸⁶ Davison J thus suspended part of Durovka's prison sentence, as noted in Part III(D)(1)(d), and required him, during the two years in which he was subject to a good behaviour bond, to be supervised by community corrections and undergo assessment of his suitability for participation in and, if found suitable, to complete therapeutic programs at a particular service.¹⁸⁷

183 Mackenzie, Stobbs and O'Leary (n 71) 141, 182–3.

184 *DPP (Vic) v Borg* [2015] VCC 1385, [52]–[55].

185 *Chapman* [2018] NSWSC 1741, [40].

186 *Durovka* (District Court of South Australia, Davison J, 15 July 2015) 5.

187 *Ibid* 7.

(iv) *Hladik*

The Court of Appeal would have preferred to impose a prison term and CCO to enable Hladik to undergo supervision and sex offenders' treatment, but legislation only permitted this sanction where the prison term was two years or less (which the Court considered too lenient given the seriousness of Hladik's crimes).¹⁸⁸

(v) *Davies, Gray, Hemming and Todd*

In the other examined cases, the courts did not refer to alternative sanctions to imprisonment. It is unclear whether experts recommended penalties that could address the offenders' impairments. Yet, although incarceration could be extremely punitive for offenders with ASD,¹⁸⁹ alternative dispositions, such as detention in secure hospitals or psychiatric units, may not better address their needs or ensure they do not experience abuse.¹⁹⁰ Moreover, there may be limited capacity to supervise and support offenders with ASD who are released from prison.¹⁹¹ In addition to the gravity of the crimes that the offenders committed and their perceived risk of recidivism, these factors may explain why some of the courts did not consider sanctions other than imprisonment, despite acknowledging the burden it would impose on the offenders. Further, in sentencing *Davies, Hemming and Todd*, courts seemingly regarded their mental impairments as an aggravating factor, for they indicated that difficulties in treating them made their lengthy incarceration imperative to protect the community.¹⁹²

(c) *Verdins Principle 3 – General Deterrence*

The third *Verdins* principle permits a court to pursue the sentencing objective of general deterrence less than it otherwise might or not pursue it at all in light of offenders' symptoms of impaired mental functioning and their impact on their mental capacity during their offending and/or at sentencing. The court must consider whether the offender's impairment makes application of this aim 'repugnant to the underlying sense of humanity which guides proper sentencing', or if, during offending, it 'materially diminished' the offender's capacity to 'reason appropriately' about its 'wrongfulness'.¹⁹³ This objective will only be moderated slightly 'if the offender acts with knowledge of what he is doing and ... the gravity of his actions'.¹⁹⁴ Rationales for this principle include that: due to the offender's impairment, they are not a suitable vehicle for making an example to others; the community would disapprove of their retribution, and appreciate that their

188 *Hladik v The Queen* [2015] VSCA 149, [51]–[52] (Ashley, Redlich and Weinberg JJA).

189 *Howlin* (n 32) 311–12; *Allely, Kennedy and Warren* (n 7) 3.

190 Caitlin Robertson and Jane McGillivray, 'Autism Behind Bars: A Review of the Research Literature and Discussion of Key Issues' (2015) 26(6) *Journal of Forensic Psychiatry and Psychology* 719, 731–2.

191 *Allely, Kennedy and Warren* (n 7) 10.

192 *Davies* [2017] VCC 1101, [95] (Mullaly J); *Hemming* [2014] VSC 521, [46] (King J); *Todd* [2019] VSC 585, [94] (Kaye JA); Walvisch, 'Mental Disorder' (n 62) 160.

193 *O'Neill* (2015) 47 VR 395, 410 [59] (Warren CJ, Redlich and Kaye JJA).

194 *R v Wright* (1997) 93 A Crim R 48, 51 (Hunt CJ at CL), quoted in *Verdins* (2007) 16 VR 269, 273–4 [20] (Maxwell P, Buchanan and Vincent JJA).

impairments are innate and thus justify the sentencing court granting them special consideration; and the sentence would not achieve general deterrence owing to public sympathy for the offender.¹⁹⁵

In all the examined cases, courts discussed whether this principle was applicable, and the objective of general deterrence was ultimately moderated in sentencing Chapman, Gray and Hladik due to their impairments. Those cases are discussed below as well as possible explanations for why the courts did not moderate this objective in sentencing the offenders in the other examined cases.

(i) *Chapman*

Harrison J justified moderating this aim of general deterrence due to Chapman's mental impairment and the finding that his offending was attributable to 'impulsive' 'loss of self-control', not 'rational' 'consideration of the consequences' of it or intention to kill, so his sentence could not influence the community.¹⁹⁶

(ii) *Gray*

Hannan J 'moderated the usual effects of' general deterrence, according to the Court of Appeal, due to Gray's 'mental impairment'.¹⁹⁷

(iii) *Hladik*

Harbison J referred to the importance of general deterrence given the nature of Hladik's offences,¹⁹⁸ but the Court of Appeal considered he was not 'a suitable vehicle for general deterrence' because he had 'the mental age of a child'.¹⁹⁹

(iv) *Borg and Durovka*

In Borg and Durovka's cases, it appears that judicial officers considered that the sentences could take into account the offenders' impairments without moderating the objective of general deterrence. In Borg's case, Smallwood J cited a previous decision that considered that, although seemingly lenient, a CCO 'would act as a general deterrent' if the court explained why it was sufficient punishment in the particular case.²⁰⁰ Referring to the impact of Durovka's crimes and relevant legislation, Davison J emphasised that this aim of general deterrence must be given 'paramount consideration' and it 'assumes more importance in the sentence than [Durovka's] personal circumstances'.²⁰¹ Yet the Court of Criminal Appeal observed that, 'bearing in mind' Durovka's AS, Davison J 'crafted a sentence that catered for general deterrence and at the same time was merciful'.²⁰²

195 *Verdins* (2007) 16 VR 269, 273–4 [18]–[22] (Maxwell P, Buchanan and Vincent JJA).

196 *Chapman* [2018] NSWSC 1741, [27].

197 *Gray* [2018] VSCA 163, [27], [41] (Priest, Beach and Niall JJA).

198 *Hladik* [2014] VCC, [51], [58].

199 *Hladik v The Queen* [2015] VSCA 149, [49] (Ashley, Redlich and Weinberg JJA).

200 *DPP (Vic) v Borg* [2015] VCC 1385, [52].

201 *Durovka* (District Court of South Australia, Davison J, 15 July 2015) 6–7.

202 *R v Durovka* [2015] SASFC 140, [31] (David AJ).

(v) *Davies, Hemming and Todd*

In the other three examined cases, courts did not moderate this objective of general deterrence due to their findings about the gravity of the crimes and/or the offenders' comprehension of their wrongfulness. Mullaly J concluded that the community would agree that Davies was 'a suitable vehicle for the message of deterrence ... to others who may consider using arson' against society.²⁰³ The Court of Appeal concurred and also considered that Davies' ASD did not justify moderating this objective owing to his 'high intellectual functioning' and understanding that 'what he was doing was wrong'.²⁰⁴ King J similarly did not moderate the objective of general deterrence because, despite Hemming's AS, he understood his actions were 'wrong' and '[attempted] to avoid detection'.²⁰⁵ Kaye JA stated that only Todd's life imprisonment could 'serve as a general deterrent' by conveying that such 'depraved conduct' will lead to 'the most severe of sentences, in which mercy plays no role'.²⁰⁶

(d) *Verdins Principle 4 – Specific Deterrence*

According to the fourth *Verdins* principle, a court need not increase the harshness of a sentence (at all or to the same degree as it otherwise would) if it considers this will not discourage the offender from reoffending because their impairment limits their capacity to compare rationally 'the likely gains from the crime against the prospect, and likely severity, of punishment'.²⁰⁷ It may often be unnecessary for courts to pursue the objective of specific deterrence in sentencing offenders with ASD. No tool has been developed to assess how ASD traits may influence offenders' risk of recidivism.²⁰⁸ Yet clinicians have observed particularly of young people with ASD that penalties are unlikely to deter them from repeating 'inappropriate behaviour' or reoffending regardless of their intelligence because they are motivated by reward rather than punishment, which they perceive not as shameful, but as part of a repetitive routine, and they are not innately interested in pleasing others.²⁰⁹ Further, individuals with ASD may be unable to appreciate the purpose of sanctions if their offending was not motivated by malice.²¹⁰ Courts in all the examined cases, except Hladik's, considered the objective of specific deterrence, but none moderated it owing to these observations.

(i) *Borg and Chapman*

Smallwood and Harrison JJ eliminated the objective of specific deterrence, but due, respectively, to Borg and Chapman's low risk of reoffending, not their ASD.²¹¹

203 *Davies* [2017] VCC 1101, [91].

204 *Davies v The Queen* [2019] VSCA 66, [685]–[689], [783] (Kaye, McLeish and T Forrestt JJA).

205 *Hemming* [2014] VSC 521, [42].

206 *Todd* [2019] VSC 585, [109], [116]–[117].

207 *Payne v The Queen* (2002) 131 A Crim R 432, 444 [43] (Anderson, Steytler and Parker JJ).

208 Allely, Kennedy and Warren (n 7) 9.

209 Wing (n 3) 57, 105, 107, 130, 158; Attwood (n 1) 348.

210 Allely, Kennedy and Warren (n 7) 3.

211 *DPP (Vic) v Borg* [2015] VCC 1385, [23], [64]; *Chapman* [2018] NSWSC 1741, [28].

(ii) *Gray*

Hannan J moderated this objective, though still sought to deter Gray from reoffending through the sentence.²¹²

(iii) *Davies, Durovka, Hemming and Todd*

Courts in the other examined cases did not moderate this objective at all, considering that its pursuit was necessary and the sentences would deter the offenders from reoffending notwithstanding their ASD. In this respect: Mullaly J and the Court of Appeal noted Davies' capacity to comprehend the concept of specific deterrence, intelligence, understanding of his actions and their illegality, prior offending, and experience in the criminal justice system;²¹³ Davison J reinforced that Durovka 'must be deterred from' reoffending;²¹⁴ King J referred to Hemming's apparent knowledge of the wrongfulness of his actions and attempts to evade detection;²¹⁵ and Kaye JA considered the sentence would 'instil' in Todd 'insight into ... the horrifying nature' of his crimes.²¹⁶

(e) *Verdins Principle 5 – Potential for the Sentence to Weigh More Heavily*

A court can mitigate a sentence pursuant to the fifth *Verdins* principle if an offender proves that the proposed sanction – generally a prison term – would be more onerous for them than the average offender because their impairment would make it disproportionately severe for or impose a greater burden on them.²¹⁷ Although there are few studies on prison experiences of individuals with ASD,²¹⁸ clinicians have identified ASD traits that could make them especially onerous. This knowledge appears to have influenced courts in the examined cases. They mitigated sentences of all the offenders, except Gray, because they recognised that prison would be more difficult for them due to their ASD.

Communication difficulties of individuals with ASD may make them susceptible to conflict with and victimisation by other inmates.²¹⁹ They may overlook or misinterpret social rules and cues, misconstrue others' intentions as threatening and seek to defend themselves unnecessarily, and/or offend others inadvertently.²²⁰ A review of four studies of prisoners with ASD found they had an increased risk of being exploited, bullied, anxious and socially isolated due to their obsessions, social naivety and impaired empathy²²¹ (though prison may

212 *Gray* [2018] VSCA 163, [27].

213 *Davies* [2017] VCC 1101, [36]–[46], [92], [108]; *Davies v The Queen* [2019] VSCA 66, [685]–[689], [782] (Kaye, McLeish and T Forrest JJA).

214 *Durovka* (District Court of South Australia, Davison J, 15 July 2015) 6.

215 *Hemming* [2014] VSC 521, [42].

216 *Todd* [2019] VSC 585, 32 [111].

217 *Verdins* (2007) 16 VR 269, 275 [27] (Maxwell P, Buchanan and Vincent JJA); Walvisch, 'Mental Disorder' (n 62) 167–8.

218 Robertson and McGillivray (n 190) 731, 733.

219 *Ibid* 727–8; Attwood (n 1) 352.

220 Grant et al (n 4) 68; Robertson and McGillivray (n 190) 727–8.

221 Allely, Kennedy and Warren (n 7) 3.

be less burdensome in some respects for inmates with ASD who benefit from its predictable routines).²²² Prison staff may not help inmates with ASD, and even isolate them for their own or others' protection, if they lack knowledge about ASD and/or do not notice their difficulties in coping with social interactions and prison conditions (perhaps because the prisoners' problems manifest in subtle ways or they use compensatory strategies).²²³ If they are segregated, prisoners with ASD may be unable to complete rehabilitation programs (though they may, in any event, not be adapted for their needs).²²⁴

Judicial officers acknowledged that prison would be burdensome for Durovka and Hladik, but did not specify why.²²⁵ By contrast, as discussed below, courts identified ASD traits of five offenders in the other examined cases – Borg, Chapman, Davies, Hemming and Todd – that would exacerbate their prison experiences.

(i) *Borg*

Smallwood J emphasised that psychologist, Mr Pyman, highlighted that Borg would have 'real difficulty' in prison because his '[inability] to read cues' made him 'particularly vulnerable'.²²⁶

(ii) *Chapman*

Harrison J recognised that Chapman's 'deficits in social communication and interaction' had already made his prison experience more 'punitive' and 'onerous' (he was transferred to 'protective custody for his own safety').²²⁷

(iii) *Davies*

This was the only *Verdins* principle that Mullaly J applied in sentencing Davies.²²⁸ The experts agreed that Davies' difficulties with interpersonal space and interpreting cues would aggravate his prison experience.²²⁹ The Court of Appeal took into account Davies' evidence that he had received threats in prison and was consequently placed in a cramped high security unit that he found stressful.²³⁰

222 Howlin (n 32) 312; Robertson and McGillivray (n 190) 720, 731.

223 Robertson and McGillivray (n 190) 728, 732–3.

224 Ibid 729.

225 *Durovka* (District Court of South Australia, Davison J, 15 July 2015) 5–6; *Hladik* [2014] VCC, [31] (Harbison J); *Hladik v The Queen* [2015] VSCA 149, [48] (Ashley, Redlich and Weinberg JJA).

226 *DPP (Vic) v Borg* [2015] VCC 1385, [34]. See also *Borg* (2016) 258 A Crim R 172, 183 [63], 186 [72] (Maxwell P, Weinberg and Priest JJA).

227 *Chapman* [2018] NSWSC 1741, [38].

228 *Davies* [2017] VCC 1101, [89].

229 Ibid [65]–[66], [86]; *Davies v The Queen* [2019] VSCA 66, [630], [634] (Kaye, McLeish and T Forrest JJA).

230 *Davies v The Queen* [2019] VSCA 66, [767]–[768] (Kaye, McLeish and T Forrest JJA).

(iv) *Hemming*

King J moderated Hemming's sentence owing to the 'difficulty' he might have in serving it, as he was unable to 'socialise in an everyday manner'.²³¹

(v) *Todd*

For Kaye JA, a 'mitigating circumstance' was that, owing to Todd's ASD, he would 'suffer some hardship' in prison.²³² Todd might need to be isolated if the 'tone and style' of his communication led to conflict with other inmates, which would restrict his opportunities to participate in employment, training and educational activities.²³³ The Court of Appeal considered that Kaye JA 'had due regard to the effect' of Todd's ASD 'on his time in prison which is likely to be more difficult for him'.²³⁴

(f) *Verdins Principle 6 – Prison's Adverse Effect on the Offender's Mental Health*

A court can mitigate a prison sentence if the probable impact of incarceration on the offender's mental health would be more detrimental than its effect on other prisoners because it would exacerbate their 'mental condition' or 'cause' it to 'deteriorate'.²³⁵ In applying this principle, a court can consider the history of the offender's mental impairment and likelihood of them receiving effective treatment in prison.²³⁶ Incarceration could have an adverse impact on the mental health and impairments of offenders with ASD if the unfamiliar social situation augments their communication problems and/or provokes their aggression, inmates bully them, and/or prison staff have difficulty managing their behaviour.²³⁷

Allely, Kennedy and Warren reported that courts' pursuit of objectives of specific and general deterrence mostly outweighed their concern to mitigate sentences due to the probable detrimental impact of prison on the mental health of offenders with ASD.²³⁸ Consistent with that finding, this principle was not applied in any of the examined cases, even though courts acknowledged expert evidence that Davies and Durovka's mental health could deteriorate in prison.²³⁹ Although the Court of Appeal suspected that Harbison J 'failed to give sufficient weight to ... the likelihood that [Hladik's] condition will be detrimentally affected by a lengthy term of imprisonment', Redlich JA had refused leave to appeal on the ground that Harbison J neglected to take this principle into account.²⁴⁰

231 *Hemming* [2014] VSC 521, [43].

232 *Todd* [2019] VSC 585, [113].

233 *Ibid* [105] (Kaye JA).

234 *Todd v The Queen* [2020] VSCA 46, [52] (Ferguson CJ, Priest and Beach JJA).

235 *Verdins* (2007) 16 VR 269, 276 [29] (Maxwell, Buchanan and Vincent JJA); *O'Neill* (2015) 47 VR 395, 415 [76] (Warren CJ, Redlich and Kaye JJ); Freiberg (n 65) 298.

236 Freiberg (n 65) 298.

237 Grant et al (n 4) 71.

238 Allely, Kennedy and Warren (n 7) 9.

239 *Davies v The Queen* [2019] VSCA 66, [634] (Kaye, McLeish and T Forrest JJA); *Durovka* (District Court of South Australia, Davison J, 15 July 2015) 5–6.

240 *Hladik v The Queen* [2015] VSCA 149, [4], [48] (Ashley, Redlich and Weinberg JJA).

3 Community Protection and Rehabilitation

Community protection and rehabilitation are central, intertwined sentencing objectives. An offender's increased 'danger to the community' owing to their impairment can counterbalance the mitigatory impact of the *Verdins* principles.²⁴¹ Critical to courts' determination of the weight to attach to the need to protect the community is their assessment of offenders' potential for rehabilitation and risk of recidivism.²⁴² Matters that may indicate the likelihood of offenders' rehabilitation include: their insight into their impairment, their need for treatment as well as the wrongfulness of their offending; the impact of previous treatment; and the susceptibility of their conditions to treatment.²⁴³ Sentencing courts may also seek to reduce offenders' risk of recidivism by pursuing the objective of rehabilitation.²⁴⁴ Courts might facilitate offenders' rehabilitation, for instance, by reducing their non-parole period so they can obtain treatment that is unavailable in prison.²⁴⁵ An offender's good chance of rehabilitation is also a mitigating sentencing factor.²⁴⁶

ASD is a lifelong, incurable disorder, and knowledge about its aetiologies and effective interventions is still emerging.²⁴⁷ Nevertheless, therapies that seek to minimise the impact of impairments experienced by people with ASD could potentially improve some offenders' prospects of rehabilitation and lower their risk of reoffending²⁴⁸ (though they may be less effective if malice motivated their offending).²⁴⁹ Offenders with ASD are more likely to benefit from treatment that is provided in a rehabilitative setting by professionals specialising in ASD.²⁵⁰ Undergoing cognitive behaviour therapy ('CBT') – which aims to improve patients' awareness and understanding of their own and others' emotions, and ability to manage their feelings – might increase offenders' insight into their behaviour and capacity for moral reasoning and cognitive empathy, help them manage anxiety and depression, and diminish their focus on sexual or violent matters.²⁵¹ Treatment programs for sexual offenders have been modified for those with ASD²⁵² (though some studies have raised concerns about the efficacy of CBT in particular for treating these offenders).²⁵³ Other programs provide guidance about social skills, communication, anger management and relationships, and interactive software

241 *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1, 43 [177] (McClellan CJ at CL). Nevertheless, this consideration 'cannot lead to the imposition of a more severe penalty than would have been imposed if the offender had not been suffering from' a mental impairment: *Veen v The Queen [No 2]* (1988) 164 CLR 465, 477 (Mason CJ, Brennan, Dawson and Toohey JJ).

242 See, eg, *DPP (Vic) v Sokaluk* (2013) 228 A Crim R 189, 199 [42] (Maxwell P, Neave and Kaye JJA).

243 Jamie Walvisch, 'Sentencing Offenders with Impaired Mental Functioning: Developing Australia's "Most Sophisticated and Subtle" Analysis' (2010) 17(2) *Psychiatry, Psychology and Law* 187, 196.

244 Freiberg (n 65) 257.

245 See, eg, *DPP (Vic) v Hosking* [2009] VSC 549, [57] (Hollingworth J).

246 Freiberg (n 65) 257–8.

247 Freckelton and List (n 1) 35; Brewer and Young (n 3) 174; Wing (n 3) 12.

248 Wing (n 3) 12, 87, 193.

249 Attwood (n 1) 348.

250 Grant et al (n 4) 73.

251 Attwood (n 1) 163; Dein and Woodbury-Smith (n 37) 41.

252 Attwood (n 1) 349.

253 Allely, Kennedy and Warren (n 7) 3.

trains people to recognise others' emotions and mental states.²⁵⁴ Medication, including antidepressants, stimulants, mood stabilisers and antipsychotics, can treat conditions that may co-occur with ASD.²⁵⁵

Courts considered the impact of ASD on the risk of recidivism and prospects of rehabilitation of all the offenders in the examined cases except Gray, and thus the need to prioritise the sentencing objective of community protection. Nevertheless, only Smallwood J, in Borg's case, pursued the sentencing goal of rehabilitation (though, as noted in Part III(D)(2)(b)(iv), in Hladik's case, the Court of Appeal wanted to achieve this objective by imposing a CCO that would have ensured that Hladik received treatment, but it was unable to do so because it sentenced him to a term of imprisonment that was longer than two years).²⁵⁶ The courts acknowledged options for treating symptoms of Davies, Durovka, Hemming, Hladik and Todd's ASD and comorbid conditions. Yet they concluded (often relying on expert evidence) that the benefit of treatment for those offenders, with the exception of Durovka, was unclear and/or minimal, so they could not significantly reduce the weight they attached to the objective of community protection. Details of the courts' consideration of matters pertaining to community protection and the offenders' rehabilitation are now examined.

(a) *Borg*

Smallwood J sought to achieve the sentencing goal of rehabilitation by attaching supervision and treatment conditions to Borg's CCO so he could receive treatment for and assistance in managing his ASD.²⁵⁷ In imposing a lenient sentence, Smallwood J was optimistic about the likelihood of Borg's rehabilitation and believed he had a low risk of recidivism.²⁵⁸

(b) *Chapman*

Harrison J similarly imposed a lenient sentence on Chapman on the basis that he had 'very good prospects of complete rehabilitation' and was not 'at risk of reoffending'.²⁵⁹ Harrison J did, nonetheless, note that Chapman required treatment for depression and ASD.²⁶⁰

(c) *Davies*

Mullaly J concluded that Davies' prospects for rehabilitation were 'very slim' or 'non-existent', he had a 'very high' likelihood of reoffending, and there was 'a real need' for community protection given his prior arson offences.²⁶¹ Mullaly J was unconvinced that Davies would cooperate with specialists from whom

254 Attwood (n 1) 352; Dein and Woodbury-Smith (n 37) 41; Wing (n 3) 93, 195.

255 Howlin (n 32) 48; Dein and Woodbury-Smith (n 37) 40; Wing (n 3) 110.

256 *Hladik v The Queen* [2015] VSCA 149, [52] (Ashley, Redlich and Weinberg JJA).

257 *DPP (Vic) v Borg* [2015] VCC 1385, [53]–[55], [61].

258 Ibid [61], [64].

259 *Chapman* [2018] NSWSC 1741, [39].

260 Ibid [32], [40].

261 *Davies* [2017] VCC 1101, [46], [95].

Watson-Munro recommended he obtain treatment, and believed he lacked insight into his offending.²⁶² The Court of Appeal found no evidence that Davies was willing to engage in CBT, which Watson-Munro considered might reduce his risk of recidivism, and referred to Matthews's opinion that Davies' condition was unlikely to improve through pharmacological or counselling treatments.²⁶³

(d) *Durovka*

Davison J noted Broomhall's opinion that Durovka had a 'moderate' chance of reoffending without treatment, but could reduce this risk by completing a program on sexual behaviour and functioning, and building 'functional social and relationship skills'.²⁶⁴ Durovka's consultation with a psychologist was one reason why Davison J partially suspended his sentence.²⁶⁵

(e) *Hemming*

King J found that, due to his AS, Hemming lacked 'emotional connectedness' with others and, as noted in Part III(D)(2)(a), the capacity to experience 'genuine empathy'.²⁶⁶ King J therefore assessed Hemming as having 'exceedingly poor prospects of rehabilitation' and being at risk of reoffending, which increased the need for community protection.²⁶⁷ King J emphasised Sullivan's evidence that, although CBT might assist Hemming, he required extensive psychological counselling, and 'there is no medication' to engender emotional and social understanding, empathy and care for others.²⁶⁸

(f) *Hladik*

Harbison J recognised Hladik's development, through counselling, of some understanding of the criminality of and harm caused by his conduct, and the 'grossness of [his] reasoning'.²⁶⁹ Yet Harbison J accepted Cunningham's evidence that Hladik remained a moderate risk of reoffending owing to his impaired empathy and difficulty understanding sexually inappropriate behaviour towards children, and would require ongoing counselling – the efficacy of which was uncertain – and treatment for sexual deviance.²⁷⁰ The Court of Appeal recommended imposing 'strict conditions' on Hladik's parole, but considered that 'sex offenders treatment', which was unavailable in prison, could help rehabilitate him.²⁷¹

262 Ibid [95]–[96], [106].

263 *Davies v The Queen* [2019] VSCA 66, [630], [635], [741]–[743] (Kaye, McLeish and T Forrest JJA).

264 *Durovka* (District Court of South Australia, Davison J, 15 July 2015) 5.

265 Ibid 7.

266 *Hemming* [2014] VSC 521, [39], [41].

267 Ibid [39], [46].

268 Ibid [39], [41], [46].

269 *Hladik* [2014] VCC, [44], [47]–[48].

270 Ibid [44], [49]–[50].

271 *Hladik v The Queen* [2015] VSCA 149, [51], [53] (Ashley, Redlich and Weinberg JJA).

(g) *Todd*

Kaye JA focused on Todd's SSD in concluding that his prospects of rehabilitation were poor and his risk of reoffending high, so only a sentence of life imprisonment with a fixed non-parole period could protect the community.²⁷² The experts concurred that Todd's 'paraphilic interest' that underlay his SSD could not be eliminated, but disagreed on the potential to treat SSD effectively.²⁷³ Kaye JA preferred Ogloff's evidence that it was impossible.²⁷⁴

4 *Retribution and Denunciation*

None of the courts in the examined cases stated that they moderated the objectives of retribution and denunciation due to the offenders' ASD. Nevertheless, judicial officers may have implicitly done so in mitigating Borg and Chapman's sentences, as they found that their moral culpability was low due to their impairments.²⁷⁵ As noted above, the Court in *Verdins* observed that 'denunciation is less likely to be a relevant sentencing objective' if the offender's moral culpability is diminished.²⁷⁶ Further, Harrison J described the support of Chapman's mother for him as 'a very important matter when assessing both the need for retribution and denunciation'.²⁷⁷ By contrast, courts expressly pursued the goal of denunciation in sentencing Davies, Gray, Hladik and Todd, despite acknowledging that ASD played some role in their offending.²⁷⁸ For those courts, this objective assumed particular importance undoubtedly due to the gravity of offending; punishment would convey society's condemnation of their crimes.²⁷⁹

5 *Other Mitigating and Aggravating Factors*

Courts in the examined cases considered various mitigating and aggravating factors, and some contemplated whether the offenders' ASD was relevant to their application. Harbison J found that, because Hladik's ASD made him 'oblivious' to the victim's 'vulnerability', it was 'inappropriate to treat' that vulnerability as 'an aggravating feature' of his offending.²⁸⁰ Kaye JA treated Todd's lack of previous convictions as a mitigating circumstance given his past 'behavioural difficulties' associated with ASD (and his upbringing).²⁸¹

272 *Todd* [2019] VSC 585, [89]–[91], [110], [116], [119], [121].

273 *Ibid* [84]–[91] (Kaye JA).

274 *Ibid* [88].

275 *DPP (Vic) v Borg* [2015] VCC 1385, [48] (Smallwood J); *Chapman* [2018] NSWSC 1741, [25] (Harrison J).

276 *Verdins* (2007) 16 VR 269, 269 [32] (Maxwell P, Buchanan and Vincent JJA).

277 *Chapman* [2018] NSWSC 1741, [29].

278 *Davies* [2017] VCC 1101, [108] (Mullaly J); *Davies v The Queen* [2019] VSCA 66, [689] (Kaye, McLeish and T Forrest JJA); *Gray* [2018] VSCA 163, [27] (Priest, Beach and Niall JJA); *Hladik v The Queen* [2015] VSCA 149, [52] (Ashley, Redlich and Weinberg JJA); *Todd* [2019] VSC 585, [108], [116], [118] (Kaye JA).

279 *Ryan v The Queen* (2001) 206 CLR 267, 302 [118] (Kirby J).

280 *Hladik* [2014] VCC, [8].

281 *Todd* [2019] VSC 585, [104], [113].

In addition, the courts considered whether all the offenders, except Gray, exhibited remorse. Evidence of contrition (generally acceptance of responsibility for offending and acknowledgment of the harm it caused) is a mitigating factor because it is interpreted as reflecting offenders' rehabilitation and low risk of recidivism, and thus reduces the need to pursue the sentencing objective of specific deterrence.²⁸² Courts must not treat offenders' failure to demonstrate remorse as an aggravating factor if it is attributable to their impairment.²⁸³ Offenders who display traits associated with ASD of flat affect, poor eye contact, other social interaction and communication impairments, and unusually candid responses to questions, could imply inaccurately that they are unremorseful.²⁸⁴ Yet deficits in ToM and cognitive empathy may diminish their ability to feel remorse. Further, if offenders with ASD are unable to understand that their crimes are morally wrong due to impairment of their capacity for complex moral reasoning, they may be unlikely to feel remorseful for having committed them.

Several of the courts in the examined cases recognised that ASD diminished the offenders' capacity to experience and/or express remorse, suggesting that they either did not treat their apparent lack of remorse as an aggravating factor or treated any remorse that they did feel as a mitigating factor. Mullaly J believed that Davies had 'a total absence of remorse',²⁸⁵ and King J was similarly unconvinced that Hemming had 'the emotional understanding to be truly remorseful'.²⁸⁶ Other courts found that the offenders had some remorse,²⁸⁷ and indicated that they reached this conclusion in relation to Chapman, Hladik and Todd by taking their impairments into account. Harrison J stated:

Having regard to [Chapman's] acknowledged lack of social skills, I do not treat his decision to say nothing on his own behalf as destructive of the fact that he has otherwise demonstrated he has accepted responsibility for his actions and acknowledged the ... damage they have caused.²⁸⁸

Harbison J recognised that Hladik's admissions against interest to police were attributable to his ASD, though concluded that his remorse was 'qualified' because he was unable to accept the wrongfulness of his conduct.²⁸⁹ Kaye JA accepted expert evidence that ASD reduced Todd's ability to feel and express remorse.²⁹⁰

282 *Barbaro v The Queen* (2012) 226 A Crim R 354, 365 [39] (Maxwell P, Harper JA and T Forrester AJA); Bagaric, Edney and Alexander (n 66) 360; Freiberg (n 65) 408–9.

283 *R v Broadbent* [2009] VSCA 320, [18] (Maxwell P and Buchanan JA).

284 Grant et al (n 4) 72; Robertson and McGillivray (n 190) 720.

285 *Davies* [2017] VCC 1101, [106].

286 *Hemming* [2014] VSC 521, [3].

287 *DPP (Vic) v Borg* [2015] VCC 1385, [3]–[4], [6] (Smallwood J); *Durovka* (District Court of South Australia, Davison J, 15 July 2015) 7.

288 *Chapman* [2018] NSWSC 1741, [31].

289 *Hladik* [2014] VCC, [29], [33]; *Hladik v The Queen* [2015] VSCA 149, [33] (Ashley, Redlich and Weinberg JJA).

290 *Todd* [2019] VSC 585, [100], [113].

6 Summary of the Analysis of the Courts' Approaches to Sentencing Offenders with ASD

The above analysis highlights that, since previous studies were undertaken, familiarity with and understanding of ASD symptoms among judicial officers has grown. Courts remain receptive to expert evidence about the impact of ASD on offenders. Their increasing appreciation of the potential forensic relevance of ASD and application of the *Verdins* principles (despite not always referring to them explicitly) has led to sentencing decisions that are, in several respects, informed and humane. Specifically, some courts thoughtfully considered: the impact of ASD on the offenders' moral culpability; the possibility of imposing alternative sanctions to prison in light of the offenders' condition; the appropriateness of moderating the objective of general deterrence owing to offenders' ASD; offenders' ASD symptoms that could make incarceration an especially onerous experience for them; the efficacy of treatments for ASD symptoms and offenders' consequent risk of reoffending and likelihood of rehabilitation; the relevance of offenders' ASD to other mitigating and aggravating factors, and especially remorse; and, for Chapman, Durovka and Todd, the relative contribution to their offending of ASD and comorbid conditions.

Nevertheless, this study also highlights gaps in the courts' knowledge about certain ASD symptoms and examination of their potential relevance to some sentencing considerations. As Allely, Kennedy and Warren found, where ASD symptoms of offenders seemed mild and they were intelligent – such as Davies and Gray – courts appeared to underestimate possible effects of their impairments.²⁹¹ Courts seemingly did not consider the possibility that some of the offenders had special interests that may have contributed to their offending. Some courts also did not contemplate the potential correlation between impairments in certain offenders' ToM and cognitive empathy and their capacity for moral reasoning and, therefore, their moral culpability for their crimes. The courts did not discuss whether, due to their ASD, punishment might not discourage the offenders from reoffending, and moderate the objective of specific deterrence accordingly. They also did not mitigate the offenders' sentences due to the potential for incarceration to affect their mental health adversely owing to their ASD. The courts did not explicitly moderate the sentencing objectives of retribution and denunciation even where they recognised that ASD contributed to the offending, and only one Court pursued the sentencing goal of rehabilitation.

Various factors may account for these omissions. As noted in Part III(B), accused bear the onus of raising relevant *Verdins* principles and producing evidence supporting their application.²⁹² Counsel representing the accused in the examined cases and Davies, who was self-represented, may not have raised all relevant *Verdins* principles and/or submitted sufficient evidence in support of their application. Notably, King J stated that, as Hemming's counsel 'expressly

291 Allely, Kennedy and Warren (n 7) 8.

292 *Charles* (2011) 34 VR 41, 69 [162] (Robson AJA); *O'Neill* (2015) 47 VR 395, 415 [77] (Warren CJ, Redlich and Kaye JJA).

disavowed' the *Verdins* principles other than principle five, and did not fulfil her request 'to explain the connection between' them and Hemming's AS, she did not take them into account in sentencing him.²⁹³ Likewise, the Court of Appeal noted that Borg's case on the plea had not 'been put specifically on the basis of' *Verdins* (though it was submitted that the Court of Appeal 'should, so view it').²⁹⁴

Consistent with previous studies, this investigation demonstrates that courts often rely on expert evidence to determine the impact of ASD on offending and its relevance to sentencing considerations.²⁹⁵ Yet experts may not address pertinent matters and it can be difficult for courts to interpret and apply their evidence if there are variations in the depth of their analyses and/or conflict between their opinions (as occurred in Chapman and Todd's cases). Indeed, navigating inconsistencies in expert evidence can be especially challenging for courts, as reasonable minds may differ and even health professionals with expertise in ASD may reach assessments of the same offender that contradict one another. Further, courts might be unequipped to evaluate the accuracy of health professionals' assessments of offenders.

The high objective gravity of the offending in these cases raised the importance of pursuing sentencing objectives and may have discouraged the courts from addressing matters that might have mitigated the offenders' sentences.²⁹⁶ Indeed, the Court of Appeal reinforced in Todd's case, '[a]s the seriousness of the offending increases, so too does the emphasis on denunciation, general and specific deterrence'.²⁹⁷ In relation to several of the offenders (and especially Davies, Gray, Hemming and Todd), courts seemingly considered that lenient sanctions would be unacceptable to the community given the harm caused by their crimes and their assessments that they understood the wrongfulness of their conduct. Further, the courts needed to prioritise protection of the community and they were not confident that some of the offenders could be rehabilitated. Despite the availability of treatments for particular ASD symptoms, their efficacy for individuals is difficult to predict and can be influenced by the similarly uncertain vicissitudes of life. Some offenders, such as Todd, had comorbid symptoms that are currently untreatable.

IV RECOMMENDATIONS FOR REFORM

That similar offenders convicted of the same or similar offences receive similar sentences is a key common law principle that is deemed critical for upholding the rule of law, creating a fair legal system, and instilling public confidence in it.²⁹⁸ Nevertheless, as the Court of Appeal observed in Todd's matter: 'No two cases are alike. Each must turn on its own facts, including the circumstances of the

293 *Hemming* [2014] VSC 521 [44].

294 *Borg* (2016) 258 A Crim R 172, 183 [63] (Maxwell P, Weinberg and Priest JJA).

295 *Freckelton and List* (n 1) 20.

296 See, eg, *Todd v The Queen* [2020] VSCA 46, [59]–[60] (Ferguson CJ, Priest and Beach JJA).

297 *Ibid* [49] (Ferguson CJ, Priest and Beach JJA).

298 Sarah Krasnostein and Arie Freiberg, 'Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?' (2013) 76(1) *Law and Contemporary Problems* 265, 265–6, 270.

offence and ... the offender'.²⁹⁹ It might be especially rare for offenders with ASD to be similar to one another given the substantial variation in the manifestation and impact of ASD symptoms.³⁰⁰ Some offending by individuals with ASD may not be attributable at all to their condition, while in other cases, ASD traits might contribute considerably to their commission of crimes.³⁰¹ Courts' review of sentencing decisions for similar offences in cases involving offenders with ASD may therefore not assist them to achieve uniform sentencing and, as noted in Part III(A), it would be difficult for courts to set tariffs or guideline judgments that apply where offenders have ASD. It is, however, feasible to strive for courts to take a consistent approach to sentencing offenders with ASD, and crucial that it is an enlightened one. The above analysis highlights that reforms are needed to ensure this occurs.

The recommendations discussed below seek to improve courts' capacity to reach informed and humane sentencing decisions in relation to offenders with ASD. It is vital that such decisions do not heighten the marginalisation and stigmatisation that these offenders may have already experienced as a consequence of their condition.³⁰² Viewing offending solely through the lens of offenders' ASD diagnosis may lead to a construction of them as inherently dangerous, which suggests that they require harsh sanctions to coerce and control them.³⁰³ Sentencing courts should, therefore, not rely on a diagnosis of offenders' ASD alone, but take into account offenders' ASD symptoms where evidence, research and/or clinicians' knowledge about ASD indicates that these symptoms may have substantially contributed to their offending.³⁰⁴ Humane sentencing decisions would also consider comorbid conditions and social, economic and environmental factors, such as lack of support, that might have exacerbated offenders' ASD symptoms and played some role in their offending.³⁰⁵ To the extent possible, humane sentencing decisions would respect and attempt to protect offenders' autonomy, consider their needs and provide them with opportunities to manage, treat and reduce the impact of their impairments.³⁰⁶ They would seek to convey to offenders the harm they have caused and the wrongness of their actions, and encourage them to recognise the importance of their repentance and reform.³⁰⁷

A Pre-sentence Reports

Without sufficient resources and understanding of ASD, offenders and their legal representatives may neglect to raise aspects of their condition that could

299 *Todd v The Queen* [2020] VSCA 46, [54] (Ferguson CJ, Priest and Beach JJA).

300 *DSM-5* (n 5) 53; Wing (n 3) 27–8; Freckelton and List (n 1) 35.

301 Berryessa, 'Judiciary' (n 6) 103.

302 Walvisch, 'Mandated' (n 11) 191, 196.

303 Linda Steele, *Disability, Criminal Justice and Law: Reconsidering Court Diversion* (Routledge, 2020) 43, 138; Liat Ben-Moshe, 'Why Prisons Are Not "The New Asylums"' (2017) 19(3) *Punishment and Society* 272, 277–9.

304 Walvisch, 'Mandated' (n 11) 193.

305 Ben-Moshe (n 303) 277.

306 Walvisch, 'Mandated' (n 11) 191, 195–6. See generally, Steele (n 303).

307 Walvisch, 'Mandated' (n 11) 191–2, 195.

be relevant to their sentencing. It would be unusual for judicial officers to have substantial knowledge of ASD symptoms, which can be diverse, complex, subtle and variable,³⁰⁸ and their possible relevance to sentencing considerations. Consequently, it is vital that courts are educated about these matters when required to sentence offenders with ASD so that they can reach informed and humane decisions.

As others have recognised, those best placed to educate courts in this regard are health professionals who have specialist knowledge about ASD, its potential forensic relevance, the *Verdins* principles, and other sentencing considerations.³⁰⁹ Accused may struggle to identify practitioners who can provide such evidence and meet the costs of engaging them to prepare reports. Dion Gee and James Ogloff raised concerns that, following *Verdins*, more practitioners began preparing court reports despite their lack of forensic training, understanding of the *Verdins* principles, and experience with the prison system and its impact on offenders' mental health.³¹⁰ Especially given the nuanced nature of ASD and the continued emergence of new research findings about its impact, parties may submit evidence that is inaccurate and superficial.

To ensure courts obtain impartial, informative evidence based on current knowledge, which can assist them in fairly sentencing offenders with diagnosed or suspected ASD, they could be required in such cases to adjourn proceedings and order pre-sentence reports.³¹¹ The authors of the reports would be available for cross-examination and critical examination by the court.³¹² It would be useful if a pool of health professionals with relevant knowledge and experience was identified from which courts could request these independent reports. Particularly crucial is that these practitioners are trained in diagnosing ASD (which involves taking a detailed history, observing behaviour and administering psychological tests) and conditions with which ASD can co-occur, and in treating people with ASD.³¹³ As diagnosis of an offender's mental health condition is only the beginning of the sentencing court's inquiry,³¹⁴ such practitioners should also have expertise in discerning the effects of impairments on individuals' cognitive and emotional functioning. Freckelton aptly observes that it is important that health professionals who provide court reports are experienced in conveying this impact accurately, but also empathically and without demeaning individuals with ASD generally.³¹⁵

308 *DSM-5* (n 5) 53; Wing (n 3) 27–8.

309 Brewer and Young (n 3) 163–4; Gee and Ogloff (n 62) 50.

310 Gee and Ogloff (n 62) 60.

311 Courts currently have discretion to request pre-sentence reports and are required to do so before making a CCO: Freiberg (n 65) 173–5. In *R v Johnstone*, Maxwell P commented: '[J]udges should feel no hesitation in ordering an independent report ... if, having regard to the principles in *Verdins*, they apprehend that such a report may shed light on the applicability of one or other of those principles to the case at hand': [2007] VSCA 193, [32].

312 Freiberg (n 65) 174, 293.

313 Wing (n 3) 28–9; Brewer and Young (n 3) 162; Freckelton, 'Asperger's' (n 6) 678.

314 *Verdins* (2007) 16 VR 269, 272 [13] (Maxwell, Buchanan and Vincent JJA).

315 Freckelton, 'Expert Evidence' (n 34) 372; Freckelton, 'Autism' (n 6) 432.

The success of this recommendation will depend in part on offenders' cooperation with expert assessors, which is not guaranteed. Indeed, Davies refused to consult with health professionals at Forensicare from whom Mullaly J requested a report.³¹⁶

B Practice Guidelines

Gee and Ogloff recommended developing practice guidelines to assist 'forensic mental health assessors' in preparing expert evidence.³¹⁷ Notably, Victoria's Supreme and County Courts have now issued a Practice Note concerning expert reports on offenders' mental functioning that are produced for sentencing hearings.³¹⁸ Adaptation of such guidelines specifically for assessing offenders with ASD would be extremely beneficial. Those guidelines could suggest that experts comment on ASD symptoms that may have relevance for sentencing and matters that sentencing courts may take into account, including: the nature and severity of offenders' impairments; their effects on their cognitive and emotional functioning during offending and at sentencing; possible causal connections between symptoms of ASD and comorbid conditions and offending; the likely impact of different sanctions on offenders' mental health; the extent to which the average offender would share the offenders' impairments that contributed to the offending, and thus the offenders' suitability to be vehicles for general deterrence; the degree to which sanctions are likely to deter the offenders from reoffending in light of their conditions; the impact of offenders' impairments on their insight into and remorse for their offending; and the potential for rehabilitating offenders and reducing their risk of recidivism.³¹⁹

C Consideration of the *Verdins* Principles and Other Sentencing Matters in Light of Offenders' ASD

Ideally, when sentencing offenders with ASD, courts should be required to consider each *Verdins* principle (even if offenders or their counsel do not refer to them) and other sentencing matters in light of their condition. Implementation of this recommendation may be feasible if sentencing courts receive comprehensive, thoughtful and nuanced pre-sentence reports from health professionals with relevant expertise, which are prepared by following practice guidelines that specifically address the provision of expert reports regarding offenders with ASD. Courts will therefore have evidence before them that highlights the applicability of the *Verdins* principles and other sentencing matters in the context of offenders' ASD symptoms.

316 *Davies* [2017] VCC 1101, [69].

317 *Gee and Ogloff* (n 62) 47, 64.

318 Supreme Court of Victoria, *Practice Note SC CR 7: Sentencing Hearings: Expert Reports on Mental Functioning of Offenders*, 30 March 2017.

319 *Gee and Ogloff* (n 62) 52–6; *Grant et al* (n 4) 70–1; *Brewer and Young* (n 3) 157, 164–5; *Freiberg* (n 65) 293; *Freckelton*, 'Expert Evidence' (n 34) 377; *Freckelton*, 'Autism' (n 6) 431–2.

D Training of Judicial Officers

It is unrealistic to require judicial officers to develop substantial expertise in any mental health condition, but they could receive some training about current research regarding ASD and its potential forensic relevance.³²⁰ Such training could be incorporated into general professional development programs for judicial officers,³²¹ or short educational programs that focus on ASD specifically or offenders' mental health more broadly.³²² To maintain judicial independence and ensure this training is tailored to judicial officers' needs, it would be important for members of the judiciary to oversee its content and design.³²³ This education could still include advice from health professionals with appropriate expertise and experience, who rely on varied educational methodologies, including case studies.³²⁴ The training could inform judicial officers about clinical aspects of ASD and their possible relevance to sentencing considerations.³²⁵ Especially if courts need to compare pre-sentence reports with expert opinions submitted by the parties, this education could help them to discern whether pertinent information has been provided. It could also assist them to evaluate the relative accuracy and relevance of conflicting expert evidence.

V CONCLUSION

In recent years, there has been a growth in ASD diagnoses, cases in which accused raise this diagnosis, and research into ASD and its connections with criminality (though there remains much to be learnt).³²⁶ It is therefore crucial to monitor the impact of current knowledge about ASD on Australian courts' sentencing decisions regarding offenders with this condition. Past studies identified gaps in judicial officers' comprehension of ASD and its potential forensic relevance, and their dependence on expert evidence did not always lead to consistent and enlightened decisions. This article's analysis of Australian sentencing decisions concerning eight offenders with ASD between 2014 and 2020 demonstrates that courts' knowledge about ASD symptoms and appreciation of the possible importance of applying sentencing considerations in light of them has increased. Yet there is still room to improve courts' sentencing of offenders with ASD. It is inappropriate for courts to strive for consistency in sentences imposed on offenders with ASD due to the substantial variation in ASD symptoms and their impact, but it is desirable that they adopt a uniform, informed and humane approach to sentencing these offenders.

320 Robertson (n 4) ch 6.4.4; Colleen Berryessa, 'Defendants with Autism Spectrum Disorder in Criminal Court: A Judges' Toolkit' (2021) 13 *Drexel Law Review* (forthcoming) 25–6 ('Defendants').

321 Robertson (n 4) ch 6.4.4.

322 Berryessa, 'Defendants' (n 320) 25.

323 International Organization of Judicial Training, 'Declaration of Judicial Training Principles' (8 November 2017) 10–11.

324 Ibid.

325 Berryessa, 'Defendants' (n 320) 25.

326 Allely, Kennedy and Warren (n 7) 2; Robertson (n 4) ch 6.1.

Sentencing offenders with ASD is a complex task. Courts must grapple with whether, and if so how, those offenders' impairments should affect the sanctions they receive for offending that, like the crimes committed by offenders in the examined cases, may be brutal and cause substantial harm. These offenders could pose an unacceptable risk to the community, including because the efficacy of treatments for ASD symptoms can be unclear. It might be particularly difficult for courts to understand ASD impairments whose effects are subtle and the possible appropriateness of mitigating sentences where offenders are intelligent and seemingly understand the illegality of their conduct.

This article has therefore proposed building judicial officers' capacity to reach informed, humane sentencing decisions in a consistent manner in cases where offenders have ASD. To this end, the article has recommended ensuring that courts are educated about pertinent matters by health professionals with specialisation in ASD and forensic health assessment, and requiring courts to consider the application of sentencing considerations in light of offenders' ASD. It is imperative that courts receive sophisticated expert evidence that extends beyond reductionist diagnoses to explain, *inter alia*, the experience of ASD symptoms for offenders, the role that these symptoms may have played in their offending, and offenders' likely responses to various sanctions. This can improve judicial officers' familiarity with current research about ASD, their understanding of its potential forensic relevance, and their ability to apply this knowledge when sentencing offenders with ASD. Particularly important is that sentencing courts are equipped to weigh fairly offenders' impairments that contributed to their offending against the seriousness of their crimes and the harm they may have caused. If sentencing courts do not reach sentencing decisions in relation to offenders with ASD in an enlightened way, their sanctions could fail to fulfil sentencing objectives, adversely affect offenders, diminish public confidence in the justice system, and jeopardise community safety.³²⁷

327 Robertson (n 4) chs 1.1, 6.4.