

SENTENCING CRIMINAL OFFENDERS WITH AUTISM: A COMPARATIVE ANALYSIS OF THREE JURISDICTIONS

ABSTRACT

A growing number of defendants in criminal proceedings are bringing their diagnosis of Autism Spectrum Disorder ('ASD'), a neurodevelopmental condition, to courts' attention. Where an offender with ASD is found guilty of committing a crime, the sentencing court may need to take their condition into account in order to ensure it reaches an outcome that is fair to the defendant and achieves sentencing objectives. This article undertakes a comparative analysis of the potential for an offender's ASD symptoms to influence sentencing decisions in three jurisdictions: the State of Victoria in Australia; the federal jurisdiction of the United States of America; and England and Wales in the United Kingdom. The article focuses on whether courts are able to apply factors relevant to the sentencing process in light of a defendant's ASD impairments and if those symptoms can have an impact on the types of sanctions that courts impose. It recommends approaches for courts to adopt in sentencing offenders with ASD and highlights features of the examined jurisdictions that would best guide judges to follow them.

I INTRODUCTION

Individuals who have Autism Spectrum Disorder ('ASD') are not by virtue of this neurodevelopmental condition predisposed to engaging in criminal behaviour.¹ Indeed, research suggests that many people with ASD are law-abiding.² Nevertheless, an increasing number of defendants in criminal proceedings are bringing

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¹ Clare S Allely, *Autism Spectrum Disorder in the Criminal Justice System: A Guide to Understanding Suspects, Defendants and Offenders with Autism* (Routledge, 2022) 54 ('Autism Spectrum Disorder').

² Tony Attwood, *The Complete Guide to Asperger's Syndrome* (Jessica Kingsley, rev ed, 2015) 347. See also Neil Brewer and Robyn L Young, *Crime and Autism Spectrum Disorder: Myths and Mechanisms* (Jessica Kingsley, 2015) 39; Caitlin Eve Robertson, 'Autism Spectrum Disorder: Forensic Aspects and Sentencing Considerations' (PhD Thesis, Deakin University, 2017) 3.2.2.

their ASD diagnosis to courts' attention.³ Where this is the case and a defendant has been found guilty of committing a crime, the sentencing court may need to take their condition into account in order to ensure an outcome that is fair to the defendant, but also achieves sentencing objectives, including community protection.

As discussed further in Part II, the main diagnostic criteria for ASD are problems in social interaction and communication, and narrow, repeated behavioural patterns, interests or activities.⁴ These impairments manifest in a broad range of ways and differently between individuals with ASD.⁵ The potential for sentencing courts to overlook a defendant's ASD symptoms may be high because they are often not immediately evident to those untrained in psychology and, as Ian Freckelton observed, their 'effects can be subtly significant and counter-intuitive'.⁶ A defendant's diagnosis of ASD alone does not confirm that their symptoms influenced their criminal offending or that they are pertinent to the sanctions they should receive.⁷ Yet where a court receives cogent evidence of the defendant's experience of ASD impairments and the clear connection between them and their criminal conduct, judges should consider whether to take them into account in sentencing.⁸

In particular, it may be appropriate for a sentencing court to reflect on: (1) whether a defendant's ASD impairments should influence its application of factor relevant to the sentencing process in their case; and (2) if those symptoms should affect the kinds of sanctions imposed. This article compares the potential for an offender's ASD diagnosis to have an impact on sentencing in these respects in three criminal justice systems: the State of Victoria in Australia; the federal jurisdiction of the United States of America ('US'); and England and Wales in the United Kingdom. These jurisdictions have been chosen for analysis because they have commonalities owing to their shared common law, adversarial tradition and, though there are similarities, there are also differences between their sentencing systems. This study

³ Colleen M 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.

⁴ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed, 2013) 31, 50; World Health Organization, *International Classification of Diseases*, WHO Doc 6A02 Rev. 11 (2019) <<https://icd.who.int/browse/2024-01/mms/en#437815624>> ('ICD-11').

⁵ American Psychiatric Association (n 4) 53.

⁶ 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, 377 ('Expert Evidence'). See also Ian Freckelton and David List, 'Asperger's Disorder, Criminal Responsibility and Criminal Culpability' (2009) 16(1) *Psychiatry, Psychology and Law* 16, 35.

⁷ Freckelton, 'Expert Evidence' (n 6) 377.

⁸ Ibid; Jamie Walvisch and Andrew Carroll, 'Sentencing Offenders with Personality Disorders: A Critical Analysis of *DPP (Vic) v O'Neill*' (2017) 41(1) *Melbourne University Law Review* 417, 441.

therefore provides an opportunity to ascertain which approaches are most likely to lead to sentencing of defendants with ASD that is just and achieves sentencing objectives.

The next Part of this article outlines symptomatology of ASD and its possible relevance for sentencing a defendant with this neurodevelopmental condition. Part III explains some key features of the sentencing systems in the examined jurisdictions and discusses the potential for courts to apply factors relevant to the sentencing process in light of a defendant's ASD impairments. Part IV considers possibilities for courts in the three jurisdictions to take those symptoms into account in selecting the types of sanctions to impose. Parts III and IV propose approaches for courts to adopt in sentencing defendants with ASD, and identify features of the examined jurisdictions that permit judges to follow these approaches and provide guidance to them in doing so.

II SENTENCING DEFENDANTS WITH AUTISM

ASD symptoms, which are related to brain development, can impair an individual's personal, social, educational and/or occupational functioning.⁹ The American Psychiatric Association's ('APA') *Diagnostic and Statistical Manual of Mental Disorders* and the World Health Organization's *International Classification of Diseases* identify two key domains of impairment in ASD, which are often evident from early childhood.¹⁰

Deficits in social interaction and communication constitute the first diagnostic criterion of ASD.¹¹ This can manifest in problems with: engaging in back-and-forth conversation; noticing and reacting appropriately to social cues; understanding and using non-verbal means of communication (for example, eye contact and facial expression); behaving appropriately for particular settings; and forming, maintaining and understanding relationships.¹² Difficulties with social interaction and communication can also be reflected in an impairment of 'theory of mind' ('ToM') or 'cognitive empathy', which is the capacity to differentiate another person's mental state from one's own, and imagine, recognise and understand their perspective, thoughts and feelings.¹³

⁹ American Psychiatric Association (n 4) 31, 50; World Health Organization, *ICD-11* (n 4).

¹⁰ American Psychiatric Association (n 4) 55–6; World Health Organization, *ICD-11* (n 4).

¹¹ American Psychiatric Association (n 4) 50; World Health Organization, *ICD-11* (n 4).

¹² American Psychiatric Association (n 4) 31, 50, 53–4; World Health Organization, *ICD-11* (n 4).

¹³ World Health Organization, *ICD-11* (n 4); Attwood (n 2) 124; Tessa Grant et al, 'Criminal Responsibility in Autism Spectrum Disorder: A Critical Review Examining Empathy and Moral Reasoning' (2018) 59(1) *Canadian Psychology* 65, 66–7; Clare Sarah Allely, 'Contributory Role of Autism Spectrum Disorder Symptomatology to the Viewing of Indecent Images of Children (IIOC) and the Experience of the Criminal Justice System' (2020) 11(3) *Journal of Intellectual Disabilities and Offending Behaviour* 171, 172.

An individual with ToM impairment may not appreciate the impact of their behaviour and could misinterpret others' attitudes and intentions, and have difficulty predicting their actions.¹⁴ Cognitive empathy is, however, distinguished from emotional empathy, which is the ability to share or have an affective response to another person's emotional state.¹⁵ People with ASD may empathise with others in this way, especially when made aware of their feelings.¹⁶ The second major diagnostic criterion of ASD is '[r]estricted, repetitive patterns of behavior, interests, or activities'.¹⁷ These can involve: rigidly following rules, rituals or routines and discomfort with change; preoccupation with 'special interests'; and intense interest in or unresponsiveness or aversion to sensory stimuli.¹⁸

'Asperger's syndrome/disorder' was previously categorised as a subtype of ASD that applied to individuals whose language and cognitive development was not delayed, but recent revisions to the abovementioned diagnostic manuals subsume it within ASD.¹⁹ This change is consistent with the recognition that ASD encompasses a broad range of impairments, and high and low functioning classifications can be misleading. People with ASD may mask their difficulties with compensatory mechanisms, their symptoms can change as they develop, and intelligent people can have an 'uneven profile' of functional abilities.²⁰

Courts should be wary of assuming that a defendant's ASD diagnosis is necessarily relevant to their criminal offending and to sentencing them. Diagnostic descriptions of ASD are limited. They overlook the strengths and skills of people who are neurodivergent, and do not encapsulate the variability and nuanced manner in which ASD symptoms can manifest,²¹ though they recognise that ASD — as the term indicates — incorporates a 'spectrum' of impairments.²² Academic Stephen Shore aptly observed, '[i]f you've met one person with autism, you've met one person with

¹⁴ Attwood (n 2) 124; Brewer and Young (n 2) 95.

¹⁵ Grant et al (n 13) 67.

¹⁶ Ibid; 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, 775; Robertson (n 2) 3.3.1.1.

¹⁷ American Psychiatric Association (n 4) 50; World Health Organization, *ICD-11* (n 4).

¹⁸ American Psychiatric Association (n 4) 50, 54; World Health Organization, *ICD-11* (n 4).

¹⁹ World Health Organization, *International Classification of Diseases*, WHO Doc F84.5 Rev. 10 (2016) <<https://icd.who.int/browse10/2016/en#/F84.5>>; American Psychiatric Association (n 4) 32, 51, 53.

²⁰ American Psychiatric Association (n 4) 31–2, 55. The *Diagnostic and Statistical Manual of Mental Disorders* does nonetheless specify '[s]everity levels for autism spectrum disorder': at 52.

²¹ Rosie Cope and Anna Remington, 'The Strengths and Abilities of Autistic People in the Workplace' (2022) 4(1) *Autism in Adulthood* 22, 23–4, 26–9.

²² American Psychiatric Association (n 4) 53.

autism'.²³ Not only are there differences in the presentation of ASD between people, but an individual's impairments can vary depending on their life circumstances.²⁴ Inaccurate suggestions that ASD connotes the propensity to engage in criminal behaviour, or that there is a simple causal relationship between ASD symptoms and offending, can lead to false constructions of people with ASD as dangerous and requiring harsh sanctions to protect the public.²⁵ In fact, researchers have found that individuals with ASD do not have an elevated tendency to offend and that they infrequently commit crimes (especially violent offences), perhaps due to their inclination to observe learnt rules rigidly.²⁶

Notwithstanding these observations, courts should be vigilant for the possibility that some ASD symptoms could be relevant to criminal offending. Forensic psychologist Clare Allely explains, 'in the small subgroup [of individuals with ASD] who do offend, certain features of ASD may be a contributory factor or provide the context of vulnerability to engaging in the offending behaviour'.²⁷ This might especially be the case if those impairments are severe and/or the individual has comorbid developmental or psychiatric conditions, and they experience social, economic or environmental factors that increase their risk of offending.²⁸ The APA estimates that 'about 70% of individuals with [ASD] may have one comorbid mental disorder'.²⁹ However, it would only be appropriate for a court to take into account a defendant's ASD symptoms where it receives clear evidence of their specific effects on that individual and their connection to their offending.³⁰

Where a court determines that a defendant's ASD impairments did contribute to their offending, it may find that they are not legally responsible for and thus not guilty of committing the crime for which they have been charged. A court might conclude that a defendant with ASD did not have the mens rea — the mental intention to commit a crime — which is a precondition to conviction for the offence. This could be due to their impaired ability to observe or predict the effects of their conduct on others, their obsessive focus on special interests or details, or their tendency to respond

²³ Lime, 'Leading Perspectives on Disability: A Q&A; With Dr Stephen Shore' (Web Page, 22 March 2018) <https://www.limeconnect.com/opportunities_news/detail/leading-perspectives-on-disability-a-qa-with-dr-stephen-shore>.

²⁴ American Psychiatric Association (n 4) 53; Lorna Wing, *The Autistic Spectrum: A Guide for Parents and Professionals* (Robinson, 1996) 27–8, 59, 149; Brewer and Young (n 2) 40, 47.

²⁵ See Claire Spivakovsky, 'Making Risk and Dangerousness Intelligible in Intellectual Disability' (2014) 23(3) *Griffith Law Review* 389, 397, 399–403.

²⁶ Clare Sarah Allely and Ann Creaby-Attwood, 'Sexual Offending and Autism Spectrum Disorders' (2016) 7(1) *Journal of Intellectual Disabilities and Offending Behaviour* 35, 35–6; Wing (n 24) 175–6; Hippler et al (n 16) 777; Grant et al (n 13) 69.

²⁷ Allely, *Autism Spectrum Disorder* (n 1) 54.

²⁸ *Ibid* 54, 67; Brewer and Young (n 2) 20–1, 39, 52–3, 57, 60, 73–4, 81.

²⁹ American Psychiatric Association (n 4) 58.

³⁰ Walvisch and Carroll (n 8) 441; Freckelton, 'Expert Evidence' (n 6) 377.

impulsively to stressful circumstances.³¹ As discussed in Part III, a defendant with ASD might refer to their impairments in seeking to establish various defences to their criminal responsibility.³²

The focus of this article is nonetheless on the sentencing phase of the judicial response to a defendant with ASD, so its recommendations apply to cases where a court has found the defendant guilty of committing a crime. An offender's ASD impairments could potentially be pertinent to the application of factors relevant to the sentencing process, including the court's consideration of whether it should aggravate or mitigate a sentence. An offender's ASD symptoms could be relevant, too, to the court's predictions of the impact of particular sanctions on the offender and their efficacy in achieving sentencing objectives, and thus to its choice of penalties to impose.

III APPLICATION OF SENTENCING CONSIDERATIONS IN CASES INVOLVING DEFENDANTS WITH AUTISM

There are differences between the sentencing systems discussed in this article, but in each there is no impediment to the court applying factors relevant to the sentencing process in light of an offender's ASD symptoms. In all the examined jurisdictions, courts can potentially treat an offender's ASD symptoms as a matter that mitigates or aggravates their sentence, and those impairments can have an impact on courts' pursuit of sentencing objectives. Nevertheless, the extent and nature of guidance that legislation, case law and sentencing advisory bodies provide to courts regarding how they sentence offenders with a mental impairment varies between the jurisdictions.

One commonality between the jurisdictions is that an offender's mental impairment may be a mitigating sentencing factor if it reduces their culpability for their offending.³³ If they are found to have intentionally committed an offence and are thus legally responsible for it, an offender will be culpable for it at least to some extent. Further, the mere fact that a defendant has a diagnosis of a mental impairment may have no bearing on their moral culpability for their offending.³⁴ Nevertheless, where a court receives evidence indicating that a defendant's mental

³¹ Freckelton and List (n 6) 31–2, 35.

³² Ibid.

³³ See, eg: *Sentencing Act 1991* (Vic) ss 5(2)(d), (g) ('*Sentencing Act* (Vic)'); *R v Verdins* (2007) 16 VR 269, 276 [32] (Maxwell P, Buchanan and Vincent JJA) ('*Verdins*'); United States Sentencing Commission, *Guidelines Manual* §§ 3E1.1, 5K2.13 (November 2023) ('*Guidelines*'); 'Sentencing Offenders with Mental Disorders, Developmental Disorders, or Neurological Impairments', *Sentencing Council* (Web Page, 1 October 2020) 2 [9] <<https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments/>> ('Sentencing Offenders').

³⁴ Freckelton and List (n 6) 34.

impairment was connected with and contributed to their offending, it might find that the defendant is not wholly morally blameworthy for their crime.³⁵ This could be a reasonable finding if, for example, the defendant's symptoms diminished their capacity to understand the wrongfulness of or control their behaviour, compromised their judgement, or otherwise led to their offending.³⁶

It would be appropriate for a sentencing court to consider whether the symptoms of a defendant with ASD might decrease their culpability for their offending. Some researchers hypothesise that there can be a connection between ToM impairment and a deficit in the capacity for complex moral reasoning.³⁷ This problem may diminish the ability of an offender with ASD to understand the moral impropriety of their conduct and/or its implications, even if they realise it is illegal.³⁸ For instance, a defendant with ASD may believe their offending was a morally legitimate response to another person's perceived breach of moral rules,³⁹ or bullying of them (which people with ASD can be susceptible to experiencing due to their symptoms).⁴⁰ Also owing to their impaired ToM, an individual with ASD might incorrectly infer that another person is intending to mistreat them, and offend by harming them.⁴¹ If they have endured social rejection or are socially naïve, people with ASD may be influenced to participate in the commission of crimes by offenders whom they wish to befriend,⁴² or imitate offenders they revere. A person with ASD may also commit a crime where they respond impulsively and aggressively to a disruption to their usual routines or their sensory overload.⁴³

Researchers have identified the risk of ASD impairments resulting in some individuals with ASD committing certain types of crimes.⁴⁴ For example, a person who has an obsessive interest in fire and perceives it as a means of resolving problems

³⁵ Freckelton, 'Expert Evidence' (n 6) 377.

³⁶ *Verdins* (n 33) 275 [26]; Christine Cea, 'Autism and the Criminal Defendant' (2014) 88(2) *St John's Law Review* 495, 522–3.

³⁷ Grant et al (n 13) 66–70, 73.

³⁸ *Ibid* 69; Colleen Berryessa, 'Defendants with Autism Spectrum Disorder in Criminal Court: A Judge's Toolkit' (2021) 13(4) *Drexel Law Review* 841, 861 ('Defendants with Autism Spectrum Disorder').

³⁹ Grant et al (n 13) 69.

⁴⁰ Clare Allely et al, 'Violence is Rare in Autism: When it Does Occur, is it Sometimes Extreme?' (2017) 151(1) *The Journal of Psychology* 49, 60; Brewer and Young (n 2) 75–7.

⁴¹ Grant et al (n 13) 68; Robertson (n 2) 3.3.2.6.

⁴² Felicity Gerry, Clare Allely and Andrew Rowland, 'Autism Spectrum Disorder and the Criminal Law', *Libertas Chambers*, (Web Page, 1 June 2021) <<https://www.libertaschambers.com/wp-content/uploads/Autism-Spectrum-Disorder-and-the-Criminal-Law-Felicity-Gerry-June-2021.pdf>>; Wing (n 24) 176.

⁴³ Freckelton and List (n 6) 21; Robertson (n 2) 3.3.2.2, 3.3.2.5.

⁴⁴ Robertson (n 2) 3.4.

could commit firesetting offences.⁴⁵ Evidence suggests that people with ASD commit sexual offences less frequently than the general population,⁴⁶ but impaired ToM and difficulties forming relationships and observing social norms and cues may contribute to a small number engaging in crimes such as stalking and sexual assault.⁴⁷ Individuals with ASD who rely on the internet for social connection and have problems interpreting other people's facial expressions and estimating their ages, may access child pornography without realising they are offending.⁴⁸ They might also hoard such material ritualistically (without this reflecting their propensity for committing other sexual offences).⁴⁹

Notably, some of the abovementioned ways in which a defendant's ASD symptoms could diminish their moral culpability for their offending might also substantiate a defence to their commission of a crime (in which case they would be found not guilty and avoid sentencing). Owing to their impairments, a defendant with ASD might be able to establish the following defences in jurisdictions where they are available: mental impairment (for instance, if they did not appreciate that they were committing a crime or that their offending was wrong, or they were unable to control their behaviour); self-defence or provocation (if they misconstrued another's intentions and inaccurately believed they needed to protect themselves); and duress (if they were vulnerable to others' pressure to offend).⁵⁰

Where an offender with ASD has been found guilty of committing a crime, it might be appropriate for a court to mitigate their sentence if, due to their impairments, it would be unnecessary, difficult, or counterproductive to pursue sentencing objectives — either at all, or to the extent that it otherwise would be. If a court finds that a defendant with ASD has reduced moral culpability for their offending, it could decide to pursue less vigorously the sentencing goal of punishment that is common to the examined jurisdictions,⁵¹ and also the aim in Victoria of denunciation.⁵² As discussed in Part IV, owing to a defendant's ASD impairments, a prison term might be unlikely to improve, and could reduce, their prospects of rehabilitation, which is

⁴⁵ Clare Allely, 'Arson and Firesetting in Individuals with Autism Spectrum Disorder: A Systematic PRISMA Review' (2019) 10(4) *Journal of Intellectual Disabilities and Offending Behaviour* 89, 96.

⁴⁶ Kalpana Dein and Marc Woodbury-Smith, 'Asperger Syndrome and Criminal Behaviour' (2010) 16(1) *Advances in Psychiatric Treatment* 37, 38.

⁴⁷ Allely, *Autism Spectrum Disorder* (n 1) 133–4, 243–7.

⁴⁸ Clare Allely and Larry Dubin, 'The Contributory Role of Autism Symptomatology in Child Pornography Offending: Why There is an Urgent Need for Empirical Research in This Area' (2018) 9(4) *Journal of Intellectual Disabilities and Offending Behaviour* 129, 134.

⁴⁹ *Ibid.*

⁵⁰ Ian Freckelton, 'Asperger's Disorder and the Criminal Law' (2011) 18(4) *Journal of Law and Medicine* 677, 678; Freckelton and List (n 6) 32.

⁵¹ *Sentencing Act* (Vic) (n 33) ss 1(d)(iv), 5(1)(a); *Sentencing Act 2020* (UK) s 57(2)(a) ('Sentencing Code'); 18 USC § 3553(a)(2)(A).

⁵² *Sentencing Act* (Vic) (n 33) ss 1(d)(iii), 5(1)(d).

a central sentencing objective in Victoria and England and Wales,⁵³ though less of a focus of US sentencing.⁵⁴ If that is the case, a court may mitigate the sentence by reducing or refraining from imposing a term of imprisonment.

In addition, owing to the impairments of an offender with ASD, a tough sanction may not help achieve the sentencing objective in all the jurisdictions of deterrence.⁵⁵ It might therefore be inappropriate to reach a sentence that is designed for deterrent purposes. A sentence focused on general deterrence is intended to discourage other would-be offenders from committing crimes.⁵⁶ Yet if a defendant's impairments contributed to their offending, and especially if they did not understand its moral wrongfulness, their sentence may not provide a useful example of the consequences of committing crimes.⁵⁷ Further, harsh punishment of an offender with ASD might not deter others from offending if the public has sympathy for them and considers this sanction unjust.⁵⁸ Such a sentence might also be unlikely to deter other people with ASD in particular from offending where, for example, they commit a crime inadvertently or for reasons they deem morally defensible.⁵⁹

A court may also be unable to achieve the objective of specific deterrence by imposing a harsh sentence on an offender with ASD. Punishment might not discourage them from reoffending if they were not wholly culpable for their crime; where they were not driven to offend by malice or believed their offending was morally justified, they may not appreciate the purpose of the sentence and thus it would not have a deterrent function in their case.⁶⁰ Where offending by a defendant with ASD was attributable to an unusual circumstance in which they found themselves, they may be unlikely to reoffend and it would thus be unnecessary to increase the severity of the sentence for the purpose of specific deterrence.⁶¹ Further, young people with

⁵³ Ibid ss 1(d)(ii), 5(1)(c); Sentencing Code (n 51) s 57(2)(c).

⁵⁴ Lisa Seghetti, *Federal Sentencing Guidelines: Background, Legal Analysis and Policy Options*, (Report, Congressional Research Service, 16 March 2009) 4.

⁵⁵ *Sentencing Act* (Vic) (n 33) ss 1(d)(i), 5(1)(b); Sentencing Code (n 51) s 57(2)(b); 18 USC § 3553(a)(2)(B).

⁵⁶ Mirko Bagaric, Theo Alexander and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 9th ed, 2022) 217.

⁵⁷ *Verdins* (n 33) 273–4 [18]–[22].

⁵⁸ Jamie Walvisch, 'Sentencing Offenders with Impaired Mental Functioning: Developing Australia's "Most Sophisticated and Subtle" Analysis' (2010) 17(2) *Psychiatry, Psychology and Law* 187, 193 ('Sentencing').

⁵⁹ See Jamie Walvisch, Andrew Carroll and Tim Marsh, 'Sentencing and Mental Disorder: The Evolution of the Verdins Principles, Strategic Interdisciplinary Advocacy and Evidence-based Reform' (2022) 29(5) *Psychiatry, Psychology and Law* 731, 734.

⁶⁰ 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(1) *International Journal of Law and Psychiatry* 1, 3; Walvisch, 'Sentencing' (n 58) 193–4.

⁶¹ Walvisch, 'Sentencing' (n 58) 194.

ASD in particular can be motivated more by reward than punishment.⁶² Courts should be wary of presuming that they need to prioritise specific deterrence because an offender with ASD appears unremorseful.⁶³ Even if they are remorseful, they may convey the impression that they are unremorseful due to their unusual facial expressions, avoidance of eye contact, limited demonstration of emotion, and reduced response to others' emotional states.⁶⁴ Nevertheless, a defendant with ASD may not experience remorse if they consider their offending was justified and/or if, due to deficient cognitive empathy, they cannot appreciate the harm they have caused, in which case punishment may be unlikely to discourage their reoffending.

Despite finding that a defendant's ASD symptoms reduced their moral culpability for their offending, a court might be reluctant to mitigate their sentence if it determines that those impairments also increase the need to protect the community, which is a key sentencing objective in all the examined jurisdictions.⁶⁵ Courts could effectively treat a defendant's mental impairment as an aggravating sentencing factor that outweighs any mitigation of sentence that it may warrant.⁶⁶ A court might be inclined to impose a harsh sentence, prioritising community protection, if it concludes that, owing to their symptoms, a defendant has a high risk of reoffending.⁶⁷ A court may reach this conclusion if it finds that a defendant with ASD: does not understand or lacks insight into the moral impropriety and/or illegality of their conduct and its impact; is unable to control their impulsive behaviour; has a tendency to become preoccupied with matters they believe are wrong; and/or engages in obsessive behaviour that could lead to criminal activity.⁶⁸

The potential for courts to apply sentencing considerations in light of the impairments of an offender with ASD, and guidance they receive in this respect in each of the examined jurisdictions, is now analysed.

A *Victoria, Australia*

Australia has nine jurisdictions: six states; two territories; and the federal jurisdiction. This article examines the sentencing system of the State of Victoria because it produced a landmark decision regarding sentencing offenders who have a mental impairment, which most other Australian jurisdictions follow: the judgment of

⁶² Wing (n 24) 107, 130, 158.

⁶³ See Allely, Kennedy and Warren (n 60) 3.

⁶⁴ Allely, *Autism Spectrum Disorder* (n 1) 89–90; Penny Cooper and Clare Allely, 'You Can't Judge a Book by Its Cover: Evolving Professional Responsibilities, Liabilities and "Judgecraft" When a Party Has Asperger's Syndrome' (2017) 68(1) *Northern Ireland Legal Quarterly* 35, 49–50.

⁶⁵ *Sentencing Act* (Vic) (n 33) s 5(1)(e); Sentencing Code (n 51) s 57(2)(d); 18 USC § 3553(a)(2)(C).

⁶⁶ Walvisch, Carroll and Marsh (n 59) 735.

⁶⁷ See, eg, *Channon v The Queen* (1978) 20 ALR 1, 4 (Brennan J).

⁶⁸ Freckelton and List (n 6) 34.

the Victorian Court of Appeal in *R v Verdins* ('*Verdins*').⁶⁹ Victorian sentencing courts have substantial discretion, particularly where legislation does not stipulate penalties for offences.⁷⁰ Legislation and case law guide and to some extent constrain courts' exercise of that discretion. Judges have clear latitude to mitigate an offender's sentence in light of their mental impairment, though also to impose a harsher sentence due to their condition.

Victorian judges must reach sentences by undertaking an 'instinctive synthesis of all the various aspects involved in the punitive process'.⁷¹ This methodology entails: '[i]dentifying] all the factors that are relevant to the sentence'; assigning 'greater and lesser weight' to 'factors depending on their relevance' to the offender and the crime; and making 'a value judgment as to what is the appropriate sentence'.⁷² The *Sentencing Act 1991* (Vic) ('*Sentencing Act* (Vic)') outlines factors that courts need to consider, including the 'purposes for which sentences may be imposed' — punishment, deterrence, rehabilitation, denunciation and community protection⁷³ — and other matters to which courts must 'have regard' as set out below.⁷⁴ An offender's mental impairment might have relevance for any of the sentencing purposes.⁷⁵

A Victorian court could reduce the severity of a sentence due to its consideration of an 'offender's culpability and degree of responsibility for the offence' and 'the presence of any ... mitigating factor concerning the offender'.⁷⁶ The court must, nonetheless, balance these matters against: 'current sentencing practices' (statistics about sentences imposed in comparable cases); 'the nature and gravity of the offence'; 'any injury, loss or damage resulting directly from the offence'; 'any aggravating ... factor concerning the offender'; and any 'maximum penalty' and 'standard sentence' prescribed by legislation for the offence.⁷⁷ Victorian legislation stipulates minimum sentences for certain crimes, but as discussed in Part IV(A), a court can sometimes depart from them owing to a defendant's 'impaired mental functioning'.⁷⁸ In addition, the Court of Appeal can give 'guideline judgments' indicating factors that apply to particular offences, offenders, or penalties, which sentencing courts should take into account.⁷⁹ Victoria's Sentencing Advisory Council provides its 'views' on

⁶⁹ Bagaric, Alexander and Edney (n 56) 402; *Verdins* (n 33).

⁷⁰ See, eg, *Markarian v The Queen* (2005) 228 CLR 357, 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ) ('*Markarian*').

⁷¹ *R v Williscroft* [1975] VR 292, 300 (Adam and Crockett JJ).

⁷² *Markarian* (n 70) 377–8 [51], 387 [73] (McHugh J).

⁷³ *Sentencing Act* (Vic) (n 33) s 5(1).

⁷⁴ *Ibid* s 5(2).

⁷⁵ Walvisch, 'Sentencing' (n 58) 198.

⁷⁶ *Sentencing Act* (Vic) (n 33) ss 5(2)(d), (g).

⁷⁷ *Ibid* ss 5(2)(a)–(c), (db), (g).

⁷⁸ *Ibid* s 10A(2)(c).

⁷⁹ *Ibid* ss 6AA–C.

guideline judgments and also ‘statistical information on sentencing’, and advises the Attorney-General,⁸⁰ but does not issue formal sentencing guidelines.⁸¹

The Court in *Verdins* emphasised that ‘the proper exercise of the sentencing discretion frequently calls for a consideration of the offender’s mental state at the time of the offending or at the time of sentence or both’.⁸² It articulated six ways in which ‘impaired mental functioning’ could be ‘relevant to sentencing’ (*Verdins* principles),⁸³ the application of which would generally result in mitigation of a sentence (including, if relevant, the minimum sentence).⁸⁴ Three *Verdins* principles are discussed here and the other three are examined in Part IV(A) as they concern the courts’ choice of sanctions, but they could also have this effect on a sentence. Courts are, however, usually only required to consider *Verdins* principles that a defendant raises through counsel representing them, and can only apply the principles after their ‘scrutiny and assessment, based on cogent evidence, of the relationship between the mental disorder and the offending and other relevant matters’.⁸⁵

The first *Verdins* principle recognises that a defendant’s mental impairment ‘may reduce the moral culpability of the offending conduct’, and the Victorian Court of Appeal stated that, ‘[w]here 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’.⁸⁶ As noted above, if an offender has been found guilty of offending and legally responsible for their crime, they will receive a sentence.⁸⁷ Nevertheless, they may not require a severe sentence if the court finds that they are not completely morally responsible for their offending due to their mental impairment.⁸⁸ Victorian case law confirms that a court can only reach this conclusion if it finds a ‘causative link’ between the defendant’s impaired mental functioning and

⁸⁰ Ibid ss 108C(a)–(b), (f).

⁸¹ Julian Roberts and Lyndon Harris, ‘Sentencing Guidelines Outside the United States’ in Cassia Spohn and Pauline Brennan (eds), *Handbook on Sentencing Policies and Practices in the 21st Century* (2019, Taylor & Francis) 68, 70.

⁸² *Verdins* (n 33) 270 [1].

⁸³ Ibid 276 [32]. This Court reformulated principles expressed in *R v Tsiaras* [1996] 1 VR 398.

⁸⁴ *R v Vuadreu* [2009] VSCA 262, [36]. For an analysis of the application of these principles in some recent Australian cases involving offenders with ASD diagnoses, see Gabrielle Wolf, ‘Growing Enlightenment: Sentencing Offenders with Autism Spectrum Disorder in Australia’ (2021) 44(4) *University of New South Wales Law Journal* 1701.

⁸⁵ *R v Zander* [2009] VSCA 10, [29] (Dodds-Streeton JA, Nettle JA agreeing at [36]); *Verdins* (n 33) 272 [13]. See, eg: *Davey v The Queen* [2010] VSCA 346, [101] (Neave, Redlich JJA and Hollingworth AJA); Judicial College of Victoria, *Victorian Sentencing Manual* (4th ed, 2022) 6.2.2.11; Walvisch and Carroll (n 8) 441.

⁸⁶ *Verdins* (n 33) 276 [32].

⁸⁷ Walvisch, ‘Sentencing’ (n 58) 189.

⁸⁸ Ibid.

their offending.⁸⁹ The Court in *Verdins* gave the following non-exhaustive list of ways that a defendant's mental impairment could diminish their culpability, which might apply to an offender with ASD:

- (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.⁹⁰

The Court in *Verdins* did not, however, expressly refer to the possibility that a defendant's mental impairment might reduce their culpability if it accounted for their susceptibility to being influenced by others to offend.⁹¹

Courts have applied this *Verdins* principle in cases involving defendants with ASD. For instance, in *Director of Public Prosecutions v Bowen*, Gaynor J found the moral culpability of an offender reduced where expert evidence confirmed that, owing to his 'neurodevelopmental deficits', he was 'influenced to utilise antisocial means to have his various needs met'.⁹² Justice Gaynor found that the defendant's ASD 'had some part to play' in his breaching of parole and possessing and trafficking a drug of dependence because these crimes were otherwise 'inexplicable' (he was 'doing well', yet 'engaged in an activity which completely destroyed ... everything [he] did').⁹³

The third and fourth *Verdins* principles contemplate that a court could 'moderate' or 'eliminate' general deterrence and specific deterrence, respectively, as 'sentencing considerations' due to the 'nature and severity' of the defendant's 'symptoms', and

⁸⁹ See, eg, *Bowen v The Queen* [2011] VSCA 67, [33] (Warren CJ).

⁹⁰ *Verdins* (n 33) 275 [26].

⁹¹ It appears that a defendant would still be found at least legally responsible for the offence in this circumstance. The *Crimes Act 1958* (Vic) states: 'a person who is involved in the commission of the offence is taken to have committed the offence and is liable to the maximum penalty', and '[a] person may be involved in the commission of an offence, by act or omission ... whether or not the person realises that the facts constitute an offence': at ss 324(1), 323(3)(b).

⁹² [2021] VCC 516, [60], [81] (Gaynor J).

⁹³ *Ibid* [1], [17], [60], [78]–[79]. In another case, the Victorian Court of Appeal held that the sentencing judge was not precluded from concluding that this *Verdins* principle was engaged, despite finding that the defendant, who was convicted of arson, 'must have known of the risk' created by lighting a fire. Relying on an expert report, Coghlan J found that the offender's moral culpability was reduced due to his ASD impairments, as he did not 'set out to achieve' the 'awful result' of his conduct: *DPP (Vic) v Sokaluk* [2013] VSCA 48, [16], [37] (Maxwell P, Neave JA and Kaye AJA); *R v Sokaluk* [2012] VSC 167, [38], [53]–[55], [58], [66]–[67] (Coghlan J).

their ‘effect’ on their ‘mental capacity’ at the time of offending and/or sentencing.⁹⁴ Victorian cases have clarified that a court can consider specific deterrence to be a less relevant sentencing objective if, owing to their impairment, a defendant does not recognise their responsibility for their offending.⁹⁵

Victorian courts have explained that less weight can be applied to general deterrence as a sentencing purpose if, due to the offender’s mental impairment, they are ‘not an appropriate medium for making an example to others’.⁹⁶ As noted above, this might be the case if the community has sympathy for the defendant and would not understand why they received a harsh sanction.⁹⁷ Victorian case law also confirms that a sentencing court can only moderate the objective of general deterrence in the case of an offender with a mental impairment on the basis of its ‘proper, and informed, consideration of how that impairment might have either materially diminished the capacity of the offender to reason appropriately at the time of the offence concerning the wrongfulness of his or her offending, or of how the offender’s condition might make the full application of the principles of general deterrence repugnant to the underlying sense of humanity which guides proper sentencing’.⁹⁸ In *Hladik v The Queen*, for example, the Victorian Court of Appeal reduced a prison sentence where it found that, due to his ASD symptoms, the offender ‘ha[d] the mental age of a child’ and ‘cannot be regarded as a suitable vehicle for general deterrence’.⁹⁹ The Court nonetheless emphasised that, given the seriousness of the offender’s crimes — sexual abuse of a child and production and possession of child pornography — the sentence still needed to ‘denounce conduct of this type and ensure an appropriate measure of punishment’.¹⁰⁰ Other cases have indicated that a court may only moderate pursuit of the goal of general deterrence marginally ‘if the offender acts with knowledge of what he is doing and ... the gravity of his actions’.¹⁰¹

Victorian law allows a sentencing court to take an offender’s remorse into account, but if a defendant with ASD did not express or experience remorse, this would not necessarily prevent mitigation of their sentence. The *Sentencing Act* (Vic) states, ‘[i]n sentencing an offender a court may have regard to the conduct of the offender on or in connection with the trial or hearing as an indication of remorse or lack of remorse’.¹⁰² Yet, while a defendant’s demonstration of remorse will be a mitigating

⁹⁴ *Verdins* (n 33) 276 [32].

⁹⁵ Judicial College of Victoria (n 85) 6.2.2.5; *R v Imadonmwonyi* [2008] VSCA 135, [22] (Ashley JA, Buchanan and Nettle JJA agreeing at [32]–[33]).

⁹⁶ *R v Mooney* (Victorian Court of Criminal Appeal, Young CJ, 21 June 1978) 5; Judicial College of Victoria (n 85) 6.2.2.4.

⁹⁷ Judicial College of Victoria (n 85) 6.2.2.4.

⁹⁸ *DPP (Vic) v O’Neill* (2015) 47 VR 395, 410 [59] (Warren CJ, Redlich, and Kaye JJA).

⁹⁹ [2015] VSCA 149, [8], [48]–[49] (Ashley, Redlich and Weinberg JJA).

¹⁰⁰ *Ibid* [1], [52].

¹⁰¹ *R v Wright* (1997) 93 A Crim R 48, 51 (Hunt CJ), quoted in *Verdins* (n 33) 273–4 [20].

¹⁰² *Sentencing Act* (Vic) (n 33) s 5(2C).

factor, as it is regarded as ‘[reducing] the need for specific deterrence’,¹⁰³ a court cannot treat failure to display remorse as an ‘aggravating factor’.¹⁰⁴ Indeed, in *R v Van Zoelen* (*‘Van Zoelen’*), Curtain J accepted that, due to the defendant’s ASD symptoms, he was ‘unable to express true remorse’ for his crime of manslaughter.¹⁰⁵ An offender’s neglect to consider the effect of their crime on their victims will also not be an aggravating factor in Victoria if this was attributable to their mental impairment.¹⁰⁶

Notwithstanding the potential for a court to mitigate a defendant’s sentence if it finds that *Verdins* principles are enlivened, it might conclude that, due to the offender’s mental impairment, a harsh sentence is required to achieve the sentencing objective of community protection. Victorian courts have held that, while an offender’s mental impairment may diminish their culpability for their offending, it could simultaneously increase their danger to the public and thus also the significance of this aim.¹⁰⁷ Further, if the court deems the defendant to be a ‘serious offender’ who has committed an especially grave crime, it must treat community protection as the main purpose of sentencing, irrespective of their mental impairment.¹⁰⁸ Yet the goal of community protection could also be given less weight in the case of a defendant with a mental impairment if their condition is found to have been a principal cause of their offending and is treatable, and they are considered unlikely to reoffend if they receive treatment.¹⁰⁹

Victorian courts have also held that a defendant’s mental impairment may have an impact on the pursuit of the sentencing objective of rehabilitation.¹¹⁰ A court may assess the offender’s ‘prospects of rehabilitation’ in light of their impairment.¹¹¹ If a defendant’s mental impairment contributed to their offending, whether the court considers the defendant has good prospects of rehabilitation may depend on if the condition is considered treatable.¹¹² In *Van Zoelen*, Curtain J refused to grant the defendant’s request for a longer than usual parole period so he could obtain behavioural therapy that might be unavailable in prison, for the reason that ‘the Court must be cautiously guarded about [his] prospects for rehabilitation’.¹¹³ Justice Curtain considered that, while the defendant ‘may benefit from appropriate

¹⁰³ *Barbaro v The Queen* (2012) 226 A Crim R 354, 365 [39] (Maxwell P, Harper JA and Forrest AJA).

¹⁰⁴ *R v Duncan* [1998] 3 VR 208, 215 [2] (Callaway JA).

¹⁰⁵ [2012] VSC 605, [23] (Curtain J) (*‘Van Zoelen’*).

¹⁰⁶ *R v Broadbent* [2009] VSCA 320, [18] (Maxwell P and Buchanan JA).

¹⁰⁷ Judicial College of Victoria (n 85) 6.2.2.7.

¹⁰⁸ *Ibid*; Walvisch, ‘Sentencing’ (n 58) 197.

¹⁰⁹ Walvisch, ‘Sentencing’ (n 58) 197.

¹¹⁰ Judicial College of Victoria (n 85) 6.2.2.8.

¹¹¹ *DPP (Vic) v Weidlich* [2008] VSCA 203, [17] (Vincent and Weinberg JJA and Mandie AJA).

¹¹² Walvisch, ‘Sentencing’ (n 58) 196.

¹¹³ *Van Zoelen* (n 105) [25]–[26] (Curtain J).

psychological therapy’, his ASD would ‘not abate’, and he would ‘always have difficulties with impulsive behaviour and regulation of it and this must impact upon [his] prospects for rehabilitation and the likelihood of [him] presenting as a further risk to the community’.¹¹⁴

B *The Federal Jurisdiction of the United States of America*

In the US, the federal jurisdiction and each of the states have their own sentencing systems. In recent years, to increase consistency in sentencing, many of these jurisdictions have shifted from discretionary, indeterminate sentencing systems to prescriptive guideline systems.¹¹⁵ In those jurisdictions, sentencing commissions established by statute — the US Sentencing Commission was formed in the federal jurisdiction — have created sentencing grids that prescribe fixed, minimum or presumptive penalties.¹¹⁶ This article focuses on the federal jurisdiction because the United States Sentencing Commission’s *Guidelines Manual 2023* (*‘Guidelines’*), which governs the sentencing of offenders who are convicted of federal crimes, has influenced many of the states’ sentencing systems.¹¹⁷ The *Guidelines* are intended to reduce sentencing courts’ discretion and direct how they exercise it.¹¹⁸ Nevertheless, the *Guidelines* and policy statements issued by the US Sentencing Commission give courts some latitude to mitigate a sentence due to an offender’s mental impairment, and also allow for the potential for such a condition to aggravate a sentence.

The *Sentencing Reform Act of 1984* (US) (*‘Sentencing Reform Act (US)’*) empowers the US Sentencing Commission to develop the *Guidelines* to achieve the sentencing objectives of: ‘just punishment’; ‘deterrence’; protection of the public; and provision to the defendant of ‘needed educational or vocational training, medical care, or other correctional treatment in the most effective manner’.¹¹⁹ This statute requires a sentencing court to take into account: ‘the need for the sentence imposed’ to achieve these purposes; ‘the nature and circumstances of the offense and the history and characteristics of the defendant’ (which could include their mental impairment); ‘any pertinent policy statement ... issued by the Sentencing Commission’; and ‘the sentencing range established for ... the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines’.¹²⁰

¹¹⁴ Ibid [25].

¹¹⁵ Mirko Bagaric and Gabrielle Wolf, ‘Sentencing by Computer: Enhancing Sentencing Transparency and Predictability, and (Possibly) Bridging the Gap between Sentencing Knowledge and Practice’ (2018) 25(3) *George Mason Law Review* 653, 662–3; Roberts and Harris (n 81) 68.

¹¹⁶ Roberts and Harris (n 81) 81; Bagaric and Wolf (n 115) 657.

¹¹⁷ Mirko Bagaric, Gabrielle Wolf and Daniel McCord, ‘Nothing Seemingly Works in Sentencing: Not Mandatory Penalties; Not Discretionary Penalties — But Science Has the Answer’ (2020) 53(3) *Indiana Law Review* 499, 502.

¹¹⁸ *Guidelines* (n 33) § 1B1.1.

¹¹⁹ Ibid ch 1 pt A, 1–2; 18 USC § 3553(a)(2).

¹²⁰ 18 USC §§ 3553(a)(1), (2), (4)(A), (5)(A).

The sentencing ranges specified in the *Guidelines* are calculated according to various combinations of ‘offense conduct’ (types of crimes committed, ranked according to their seriousness) and ‘offender characteristics’ (offenders’ criminal history).¹²¹ The US Supreme Court has confirmed that, while courts sentencing for federal offences must take these ranges into account and use them as their ‘starting point and initial benchmark’, they are only ‘advisory’ in nature.¹²² In any event, the *Guidelines* envisage that a court will diverge from the ranges in response to any applicable mitigating and aggravating factors.¹²³ They permit ‘adjustments’ and ‘departures’,¹²⁴ which, if applied, could potentially result in a defendant with ASD receiving a less or more severe sentence than a court might have imposed on an offender who did not have their impairments.

Adjustments are matters that can inform a court’s decision to increase or decrease the ‘offense level’.¹²⁵ A court could possibly apply an adjustment if a defendant with ASD was influenced by others to offend.¹²⁶ The *Guidelines* permit the offender’s role in the commission of a crime to affect the court’s determination of the applicable guideline range,¹²⁷ though they do not refer specifically to the circumstance where a defendant has a mental impairment. If more than one person was involved in the offending, an adjustment can be applied in relation to an offender who was ‘substantially less culpable than the average participant in the criminal activity’; their role may have been ‘minimal’ (indicated by their ‘lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others’) or ‘minor’.¹²⁸

A court can impose a sentence that is outside the range prescribed by the *Guidelines* in the form of a downward or upward ‘departure’, if a case has ‘atypical features’,¹²⁹ which could potentially encompass an offender’s ASD impairments. The *Guidelines* ‘[identify] some of the [mitigating and aggravating] circumstances that the Commission may not have adequately taken into consideration in determining the applicable guideline range’.¹³⁰ The *Guidelines* confirm that a departure based on those circumstances ‘may be warranted’.¹³¹ To establish whether the Sentencing Commission adequately took a circumstance into consideration, the court can

¹²¹ Roberts and Harris (n 81) 68; *Guidelines* (n 33) ch 5, pt A.

¹²² *Gall v United States*, 552 US 83 586, 587 [1]–[3], [5]–[7] (Stevens J) (2007); *United States v Booker*, 543 US 220, 738 (2005); Seghetti (n 54) 1; *Guidelines* (n 33) ch 1, pt A.5.

¹²³ Bagaric, Wolf and McCord (n 117) 502.

¹²⁴ *Guidelines* (n 33) chs 3, 5, pt K.

¹²⁵ Seghetti (n 54) 14; *Guidelines* (n 33) ch 3.

¹²⁶ *Guidelines* (n 33) § 3B1.2.

¹²⁷ See *Guidelines* (n 33) §§ 3B1.2, 5H1.7.

¹²⁸ *Ibid* § 3B1.2, application notes [3]–[4].

¹²⁹ *Ibid* ch 1 pt A; 18 USC § 3553(b).

¹³⁰ *Guidelines* (n 33) § 5K2.0(a)(2)(A). See also 18 USC § 3553(b)(1).

¹³¹ *Ibid*.

consider the *Guidelines* and the Commission’s policy statements and official commentary.¹³²

‘Diminished [c]apacity’ is one such circumstance identified by the *Guidelines*.¹³³ The Sentencing Commission’s policy statement on this matter could possibly apply to an offender with ASD.¹³⁴ It states:

A downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense.¹³⁵

The definition of ‘significantly reduced mental capacity’ in this policy statement could reflect an offender’s decreased culpability. It states that the defendant ‘has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful’.¹³⁶ This is illustrated by the Court’s determination in *United States v Knott* (*Knott*) that a downward variance in the sentence was warranted because the defendant’s ‘ASD diminished his moral culpability’.¹³⁷ The Court received evidence confirming that the defendant’s commission of the offence of possessing child pornography ‘was strongly influenced by his ASD’; he did not realise that real children were involved in the production of pornography.¹³⁸

‘Diminished [c]apacity’ nonetheless prioritises the sentencing objective of community protection. It prohibits a departure ‘below the applicable guideline range’ on the basis of the offender’s diminished capacity if ‘the facts and circumstances of the defendant’s offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence’, or ‘the defendant’s criminal history indicates a need to incarcerate the defendant to protect the public’.¹³⁹ Such matters influenced the Court in *United States v Welshans* to refuse to grant a downward variance of the sentence below the bottom of the range for a defendant with ASD.¹⁴⁰ The Court referred to the defendant’s ‘history and characteristics’, ‘the nature and circumstances of this offense’ — possessing and distributing child

¹³² 18 USC § 3553(b)(1).

¹³³ *Guidelines* (n 33) § 5K2.13.

¹³⁴ Cea (n 36) 522–3.

¹³⁵ *Guidelines* (n 33) § 5K2.13, application notes [1].

¹³⁶ *Ibid.*

¹³⁷ 638 F Supp 3d 1310, 1320 [21] (Thompson J) (2022) (*Knott*).

¹³⁸ *Ibid.*

¹³⁹ *Guidelines* (n 33) § 5K2.13.

¹⁴⁰ 803 Fed Appx 626, 627 (Porter J) (2020) (*Welshans*’).

pornography — which the Court deemed ‘very serious’, and its ‘[concern] about protecting the public’.¹⁴¹

The *Sentencing Reform Act* (US) lists the defendant’s ‘mental and emotional condition’ among ‘matters ... with respect to a defendant’ — which the *Guidelines* describe as ‘specific offender characteristics’¹⁴² — that the Sentencing Commission should take into account ‘in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences’.¹⁴³ The *Guidelines* explain that specific offender characteristics ‘may warrant a sentence outside the applicable guideline range if the characteristic, individually or in combination with other such characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines’.¹⁴⁴ The Sentencing Commission has issued a policy statement titled, ‘Mental and Emotional Conditions’, which could apply to offenders with ASD, and confirms that a defendant’s mental impairment ‘may be relevant in determining whether a departure is warranted’.¹⁴⁵ It also indicates that ‘a downward departure may be appropriate to accomplish a specific treatment purpose’.¹⁴⁶ Nevertheless, a court can only sentence outside the range on this basis if it ‘finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant’s criminality is related to the treatment problem to be addressed’.¹⁴⁷ This might only apply to offenders with ASD who have a comorbid psychiatric condition.

The Sentencing Commission has not provided further advice on when an offender’s mental condition could warrant a departure. Nevertheless, a departure can be based on a circumstance that the Sentencing Commission has not identified if the case is ‘exceptional’ and the matter is ‘relevant to determining the appropriate sentence’.¹⁴⁸ Thus, a court could potentially justify a downward departure on the basis that, due to the offender’s ASD impairments, pursuit of the objective of deterrence by imposing a sentence within the range would be inappropriate. Indeed, in *Knott*, the Court determined that it was unnecessary to incarcerate the offender with ASD for the purposes of specific or general deterrence.¹⁴⁹ The Court received evidence that indicated the defendant was unlikely to reoffend and his risk of recidivism could be

¹⁴¹ Ibid. Notably, in another case where the defendant committed offences of distributing and possessing child pornography and sexually exploiting children, which the Court described as ‘horrendous’, the Court concluded that the defendant’s ASD was not a mitigating factor because it found that he ‘knew’ his conduct ‘was wrong’: *United States v Lucarell* (6th Cir, No 22-3732, 1 June 2023) slip op 4–5 (Mathis J for the Court).

¹⁴² *Guidelines* (n 33) ch 5 pt H.

¹⁴³ 28 USC § 994(d)(4); *Guidelines* (n 33) ch 5 pt H.

¹⁴⁴ *Guidelines* (n 33) ch 5 pt H, introductory commentary.

¹⁴⁵ Ibid § 5H1.3.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid § 5C1.1, application notes [6].

¹⁴⁸ Ibid § 5K2.0(a)(2)(B).

¹⁴⁹ *Knott* (n 137) 1322, [25]–[26].

lowered by him receiving counselling that was unavailable in prison.¹⁵⁰ Further, the Court considered that, given the defendant's ASD 'deficits' and their impact on his behaviour, 'other defendants' who did not have those deficits (including defendants with ASD) 'cannot expect to receive a similar sentence'.¹⁵¹

'Coercion and [d]uress' is another ground of departure,¹⁵² which could possibly be applied to mitigate the sentence of a defendant with ASD who was influenced by others to offend. The Sentencing Commission has issued a policy statement confirming, '[i]f the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may depart downward'.¹⁵³ However, this policy statement does not alert courts that this circumstance may arise due to an offender's mental impairment, and confines the application of this ground. It notes, '[o]rdinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency'.¹⁵⁴

A defendant's demonstration of 'acceptance of responsibility for his offense' is a basis for an adjustment.¹⁵⁵ Yet the *Guidelines* do not indicate whether a defendant's failure to accept responsibility for their offending, or their remorse or absence of remorse, could influence their sentence. It therefore appears that a court could not justify either declining to mitigate or increasing the harshness of the sentence of an offender with ASD where their impairments affected their capacity to express or feel remorse for their offending.

Courts in the US federal jurisdiction have not received specific direction regarding whether they can mitigate a sentence owing to an offender's mental impairment where they have committed offences for which no sentencing guidelines have been developed. The *Sentencing Reform Act* (US) simply requires the court, 'in the absence of an applicable sentencing guideline', to have 'due regard for' the sentencing 'purposes' and, if the crime is not 'a petty offense', for 'the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission'.¹⁵⁶

C England and Wales

England and Wales has been selected as the third jurisdiction for comparative analysis due to the relatively detailed direction provided to its courts regarding

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² *Guidelines* (n 33) § 5K2.12.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid § 3E1.1.

¹⁵⁶ 18 USC § 3553(b)(1).

the potential to mitigate or aggravate the sentence of an offender with a mental impairment, and specifically ASD.

The *Sentencing Act 2020* (UK) — referred to as the ‘Sentencing Code’ — prescribes minimum and maximum sentences for certain offences, but gives sentencing courts substantial discretion.¹⁵⁷ The Sentencing Council of England and Wales (‘Sentencing Council’) was established by statute for the purpose of issuing guidelines to assist courts in exercising their discretion.¹⁵⁸ Although the Sentencing Code requires courts to ‘follow’ the Sentencing Council’s guidelines that are relevant to defendants’ cases, it allows courts to diverge from them if ‘satisfied that it would be contrary to the interests of justice’ to adhere to them,¹⁵⁹ and the guidelines also permit courts some latitude.¹⁶⁰

The Sentencing Council has issued the ‘overarching guideline’, ‘Sentencing Offenders with Mental Disorders, Developmental Disorders, or Neurological Impairments’ (‘Sentencing Offenders’).¹⁶¹ It expressly applies to sentencing of offenders with ASD,¹⁶² and highlights features of ASD that could be relevant. It emphasises the ‘variation’ in the impact of ASD symptoms, recommends that courts ‘recognise the mix of abilities and difficulties in each individual’, and observes that interruption to the ‘inflexible’ routines of an individual with ASD could provoke ‘aggression’.¹⁶³

‘Sentencing Offenders’ provides advice about determining the culpability of an offender who has a mental impairment. It recommends that the court ‘make an initial assessment’ pursuant to ‘any relevant offence-specific guideline’ and ‘then consider whether [the offender’s] culpability was reduced by reason of the impairment or disorder’.¹⁶⁴ Yet it reinforces that ‘[c]ulpability will only be reduced if there is sufficient connection between the offender’s impairment or disorder and the offending behaviour’.¹⁶⁵ ‘Sentencing Offenders’ provides a non-exhaustive list of

¹⁵⁷ ‘About Sentencing Guidelines’, *Sentencing Council*, (Web Page) <<https://www.sentencingcouncil.org.uk/sentencing-and-the-council/about-sentencing-guidelines/>>.

¹⁵⁸ *Ibid*; Roberts and Harris (n 81) 72–3.

¹⁵⁹ Sentencing Code (n 51) s 59(1).

¹⁶⁰ Roberts and Harris (n 81) 79.

¹⁶¹ ‘Sentencing Offenders’ (n 33).

¹⁶² *Ibid* Annex A.

¹⁶³ *Ibid*.

¹⁶⁴ *Ibid* [10].

¹⁶⁵ *Ibid* [11]. In a case where the defendant had a diagnosis of ASD and was convicted of offences relating to sexual activity with children, the Court of Appeal agreed with the sentencing judge that ‘the psychiatric evidence ... did not support any conclusion that his neuro-diverse condition was relevant to or reduced his culpability for the offences’ and ‘all the material ... indicated that the applicant was able to function very well in the community’: *R v Marsden* [2023] EWCA Crim 1211, [2]–[3], [22] (Recorder Menary for the Court).

possible relevant inquiries, including whether the defendant's impairment diminished their capacity at the time of offending to 'exercise appropriate judgement', 'make rational choices' and/or 'understand the nature and consequences of their actions'.¹⁶⁶ In addition, it suggests the court consider 'relevant expert evidence', but notes it 'is not bound to follow' it.¹⁶⁷ 'Sentencing Offenders' does not, however, direct the court to consider whether a defendant with a mental impairment was influenced by others to offend and if such a circumstance might reduce their culpability. *R v W* demonstrates a Court's application of this guideline; it found that the culpability of the defendant with ASD for engaging in sexual activity with a child was 'reduce[d]' (though not 'extinguish[ed]').¹⁶⁸ The sentencing judge observed that the offender's emotional development age was 'significantly lower' than his chronological age and this may have contributed to his '[failure] to realise the wholly inappropriate nature of' his 'relationship' with the victim.¹⁶⁹ The Court of Appeal also considered that the defendant's 'failure to comprehend his wrongdoing is likely to be a product of his autistic traits'.¹⁷⁰

The Sentencing Council has also produced guidelines for sentencing for the major categories of offences ('offence-specific guidelines'), which outline 'steps' for the court to follow that could permit it to mitigate or aggravate a sentence on the basis of an offender's ASD impairments.¹⁷¹ Step one involves the court '[d]etermining the offence category' by reference to the defendant's 'culpability' and the 'harm' their offence caused.¹⁷² Some of the guidelines list factors that can justify a finding of 'lesser culpability' and might apply to a defendant with ASD, namely, the offender's: 'mental disorder or learning disability' (provided it is 'linked to the commission of the offence'),¹⁷³ 'limited awareness or understanding of offence',¹⁷⁴ involvement in the offending 'through coercion, intimidation or exploitation',¹⁷⁵ and performance

¹⁶⁶ 'Sentencing Offenders' (n 33) [15].

¹⁶⁷ Ibid [13].

¹⁶⁸ [2023] EWCA Crim 1257, [2], [15] (Judge Leonard for the Court).

¹⁶⁹ Ibid [15].

¹⁷⁰ Ibid [16].

¹⁷¹ Roberts and Harris (n 81) 75; 'Magistrates' Courts Sentencing Guidelines', *Sentencing Council* (Web Page) <<https://www.sentencingcouncil.org.uk/offences/>>; 'Sentencing Guidelines for Use in Crown Court', *Sentencing Council* (Web Page) <<https://www.sentencingcouncil.org.uk/crown-court/>>.

¹⁷² See, eg, 'Attempted Murder', *Sentencing Council* (Web Page, 1 July 2021) <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/attempted-murder-2/>> ('Attempted Murder').

¹⁷³ See, eg, 'Domestic Burglary', *Sentencing Council* (Web Page, 1 July 2022) <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/domestic-burglary/>> ('Domestic Burglary'); 'Sentencing Offenders' (n 33) [16].

¹⁷⁴ See, eg, 'Abstracting Electricity', *Sentencing Council* (Web Page, 1 February 2016) <<https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/abstracting-electricity/>> ('Abstracting Electricity').

¹⁷⁵ See, eg, 'Bribery', *Sentencing Council* (Web Page, 1 October 2014) <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/bribery/>>.

of a ‘limited function under direction’ in the commission of the crime.¹⁷⁶ The Sentencing Code similarly allows a court to impose the minimum prescribed sentence for some offences if the defendant ‘suffered from any mental disorder’ that ‘lowered’ their ‘degree of culpability’.¹⁷⁷

If the Sentencing Council has issued offence-specific guidelines, the court must impose a sentence within the specified offence range.¹⁷⁸ Nevertheless, according to the offence-specific guidelines, step two entails the court using a prescribed ‘starting point to reach a sentence within the appropriate [specified] category range’ and then considering whether to make an ‘upward or downward adjustment’ due to ‘aggravating or mitigating factors’.¹⁷⁹ The non-exhaustive lists in several guidelines of factors that could ‘[reduce] seriousness or [reflect] personal mitigation’ include: the defendant’s ‘mental disorder or learning disability’ (some guidelines indicate that this matter can be taken into account at step two if it is not linked to the offending),¹⁸⁰ and ‘the offender was in a lesser or subordinate role if acting with others’ or ‘performed limited role under direction’.¹⁸¹ While these matters might be relevant to an offender with ASD, the court must avoid ‘double counting factors including those already taken into account in assessing culpability’, and therefore could only consider them at one of the steps.¹⁸² Lists of aggravating factors in these guidelines do not include an offender’s mental impairment, but it might be relevant to some of the specified considerations that reflect a heightened need to protect the community.¹⁸³

The Sentencing Council’s guideline for sentencing in relation to crimes for which it has not issued offence-specific guidelines requires the court, ‘where possible’, to follow a similar ‘stepped approach’.¹⁸⁴ At step one, the court reaches a ‘provisional sentence’ by assessing the seriousness of the offence through determining the offender’s culpability and the harm their offence caused, but also considering which of the sentencing purposes ‘it is seeking to achieve’ and weighing their ‘importance’ against the ‘offence and offender characteristics’.¹⁸⁵ The Sentencing Code identifies the following sentencing purposes: ‘punishment of offenders’; ‘reduction of crime (including its reduction by deterrence)’; ‘reform and rehabilitation of offenders’;

¹⁷⁶ See, eg, ‘Benefit Fraud’, *Sentencing Council* (Web Page, 1 October 2014) <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/benefit-fraud/>>.

¹⁷⁷ See, eg, Sentencing Code (n 51) sch 21 cls 8, 10(c).

¹⁷⁸ *Ibid* s 60(2).

¹⁷⁹ See, eg, ‘Abstracting Electricity’ (n 174).

¹⁸⁰ See, eg, ‘Attempted Murder’ (n 172); ‘Sentencing Offenders’ (n 33) [16].

¹⁸¹ See, eg, ‘Domestic Burglary’ (n 173).

¹⁸² ‘General Guideline: Overarching Principles’, *Sentencing Council* (Web Page, 1 October 2019) <<https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/general-guideline-overarching-principles/>> (‘General Guideline’).

¹⁸³ See, eg, ‘Abstracting Electricity’ (n 174).

¹⁸⁴ ‘General Guideline’ (n 182).

¹⁸⁵ *Ibid*.

‘protection of the public’; and ‘making of reparation by offenders to persons affected by their offences’.¹⁸⁶ Nevertheless, the Sentencing Council has not explicitly directed courts to consider whether they should modify their pursuit of an objective in light of ‘offender characteristics’, such as a mental impairment, and aggravate or mitigate a sentence on that basis. At step two, the court considers aggravating and mitigating factors, including the abovementioned matters if relevant, and whether they ‘should result in any upward or downward adjustment’ from the provisional sentence.¹⁸⁷

This guideline and the offence-specific guidelines confirm that a court can mitigate a sentence if ‘satisfied that the offender is genuinely remorseful for the offending’, but emphasise that ‘[l]ack of remorse should never be treated as an aggravating factor’.¹⁸⁸ Also potentially relevant for sentencing an offender with ASD is the Sentencing Council’s implied caution that the court should not assume a defendant is unremorseful based on their presentation and must be vigilant for unconventional expressions of remorse, though it does not refer to a defendant’s mental impairment in this context. It advises: ‘[r]emorse can present itself in many different ways ... The court should be aware that the offender’s demeanour in court or the way they articulate their feelings of remorse may be affected by, for example: ‘nervousness’, ‘a lack of understanding of the system’, ‘mental disorder’, ‘communication difficulties’, ‘a belief that they have been or will be discriminated against’ and ‘a lack of maturity’.¹⁸⁹ The Sentencing Council suggests the court consult a pre-sentence report if available for guidance in this regard.¹⁹⁰ In *R v Simmonds* (*Simmonds*), the Court reduced a defendant’s sentence for robbery on appeal because it took into account various mitigating factors and a pre-sentence report that noted that her failure to display remorse might be attributable to her ASD impairments.¹⁹¹

D *Best Practices and Lessons from the Examined Jurisdictions*

From the above discussion, it is clear that courts in all the examined jurisdictions, notwithstanding differences between their sentencing systems, can consider some sentencing factors in light of a defendant’s mental impairment, though in divergent ways. Below are proposed best practices to ensure that courts take into account a defendant’s ASD symptoms in applying sentencing considerations where appropriate. Also discussed are features of the examined jurisdictions that allow courts to do so and provide helpful guidance to them in this regard.

The greater a court’s discretion in reaching sentences, the more opportunities it may have to apply factors relevant to the sentencing process in light of a defendant’s

¹⁸⁶ Sentencing Code (n 51) s 57(2).

¹⁸⁷ ‘General Guideline’ (n 182).

¹⁸⁸ Ibid. See, eg, ‘Arson (Criminal Damage by Fire)’, *Sentencing Council* (Web Page, 1 October 2019) <<https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/arson-criminal-damage-by-fire/>>.

¹⁸⁹ ‘General Guideline’ (n 182).

¹⁹⁰ Ibid.

¹⁹¹ [2023] EWCA Crim 1063, [13], [23], [25] (Steyn J for the Court) (*Simmonds*).

ASD impairments. Courts in the examined jurisdictions have latitude to attach varying weight to sentencing factors according to their relevance to the offender and their specific characteristics, including any mental impairment. All courts would nonetheless benefit from guidance in how to take into account a defendant's mental impairment, and particularly ASD symptoms, in applying sentencing considerations. Especially helpful is the Sentencing Council of England and Wales's guideline, 'Sentencing Offenders', as it alerts judges to specific impairments that some defendants with ASD might have and that could be relevant for sentencing purposes. Also useful is the emphasis in that guideline, and in case law in Victoria, on the need for courts to consider whether a defendant's mental impairment should influence their application of factors relevant to the sentencing process if there is evidence of its link to their offending.

If courts receive such evidence where a defendant has ASD, for the reasons discussed above, it is important that they can consider whether the offender's symptoms reduced their moral culpability for their offending and mitigate their sentence where appropriate. This is possible in all the jurisdictions, and advice provided to courts about how an offender's mental impairment might diminish their culpability is valuable. In its policy statement, 'Diminished Capacity', the US Sentencing Commission identifies two ways in which a defendant's culpability might be reduced. The lists of inquiries courts can make to determine if it is appropriate to mitigate the sentence of a defendant with a mental impairment owing to their reduced culpability provided by the Victorian Court of Appeal in *Verdins*, and the Sentencing Council in 'Sentencing Offenders', are comparatively more expansive. As both lists are indicated to be non-exhaustive, they may encourage judges to consider other ways in which a defendant's impairment could affect their culpability for their offending.

As previously discussed, it might be appropriate for a court to find that a defendant's culpability is reduced if, due to their ASD symptoms, they were vulnerable to others' influence to offend. The offence-specific guidelines produced by the Sentencing Council of England and Wales are useful in highlighting for courts that a defendant's involvement in criminal conduct due to 'coercion, intimidation or exploitation' could lead to a finding of their diminished culpability, and that the offender's performance of a limited role in the crime under others' direction could lower the gravity of their offence. The confirmation by the US Sentencing Commission in its policy statement, 'Coercion and Duress', that imposing a sentence outside the prescribed range in the form of a downward departure may be warranted if the defendant committed their crime due to coercion or duress is similarly helpful. The US Sentencing Commission's *Guidelines* also draw courts' attention to the possibility of decreasing the offence level for an offender who, together with others, commits a crime, but did not know or understand its scope, which might be the case for certain defendants with ASD.

Courts should also be encouraged to consider whether it is appropriate for an offender's ASD symptoms to influence their pursuit of sentencing objectives. Some of the ASD impairments discussed above may heighten a defendant's risk of reoffending and posing a danger to others. Victorian case law helpfully alerts sentencing

courts that they may need to prioritise the objective of community protection where a defendant has a mental impairment, and especially if it is untreatable, even though it might also reduce their culpability for their offending. The US Sentencing Commission's policy statement, 'Diminished Capacity', is similarly useful in warning courts not to impose a sentence below the guideline range if, despite the offender's 'significantly reduced mental capacity', there is a need to protect the public.

Courts should nonetheless also be urged to contemplate if it is unnecessary, counter-productive or inappropriate to seek to achieve sentencing objectives in light of an offender's ASD symptoms. For judges who find that the moral culpability of a defendant with ASD is reduced, the Victorian Court of Appeal's advice in *Verdins* could encourage them to consider whether this affects the importance of punishing the offender and if they should treat denunciation as a less relevant sentencing goal. The statement in *Verdins* that courts may moderate or eliminate general and/or specific deterrence as sentencing considerations owing to a defendant's mental impairment could also be especially useful for judges who are sentencing offenders with ASD; for the reasons previously noted, a harsh sentence might not achieve these aims.

As discussed, an offender's ASD impairments could affect their demonstration of remorse for their offending. Courts should therefore not rely on the failure to exhibit remorse by a defendant with ASD as confirming that it is necessary to prioritise the sentencing objectives of specific deterrence or community protection. Victorian case law and the guidelines of the Sentencing Council of England and Wales helpfully reinforce that a court cannot regard a defendant's neglect to demonstrate remorse as an aggravating factor. Particularly pertinent for courts that are sentencing defendants with ASD is the Sentencing Council's implied warning that judges should not rely on an offender's presentation as reflecting their lack of remorse, and in fact may need to look for unconventional manifestations of remorse (including where the defendant has a 'mental disorder'). Also useful is judges' advice in Victoria that courts should not treat as an aggravating factor a defendant's failure to consider the impact of their offending on their victims if this is attributable to their mental impairment.

Courts should also be directed to consider whether, given the nature of ASD impairments, it is worthwhile to pursue the objective of rehabilitation in sentencing a defendant with this condition. Victorian case law is helpful in advising courts to contemplate whether a defendant's mental impairment is treatable and if it affects their potential for rehabilitation.

IV CHOOSING SANCTIONS FOR DEFENDANTS WITH AUTISM

To ensure fairness in sentencing an offender with ASD and achieve sentencing objectives, the court may need to take their impairments into account in selecting the types of sanctions to impose. Relevant matters that a court could consider, which may also result in mitigation of the sentence of an offender with ASD, are how their symptoms might affect their experience of certain sanctions, and the likely impact of different penalties on their symptoms and risk of recidivism.

Punishment of offenders is a sentencing goal in all the examined jurisdictions.¹⁹² Nevertheless, some sanctions, and especially imprisonment, may punish an offender with ASD more harshly than a neurotypical offender. Due to their impairments, incarcerated individuals with ASD can face greater challenges in the prison environment than neurotypical inmates: they may find unexpected changes to daily routines distressing; owing to their social communication difficulties, they could alienate prison staff and provoke conflict with and experience bullying from other prisoners; they may suffer from social anxiety and isolation; and they might find the noises and lighting upsetting and struggle to adapt to them.¹⁹³ Given these issues, to achieve the objective of punishment without penalising an offender with ASD unduly, a court could consider reducing the prison sentence that it would otherwise have imposed or selecting an alternative sanction. Yet if a court finds that an offender's ASD symptoms contributed to their offending, are untreatable, and are likely to lead to their reoffending, it may conclude that a long prison term is the only sanction that could protect the community.

While a prison sentence would ensure the public was protected and punish an offender with ASD, it may not achieve the sentencing objective of rehabilitation if it has the abovementioned impact on them.¹⁹⁴ Incarceration could even lead to a deterioration in the mental health and impairments of an offender with ASD,¹⁹⁵ for example, if it heightens their anxiety, and it may not educate them about the wrongfulness of their conduct.¹⁹⁶ The rehabilitative capacity of prisons generally has not been well established.¹⁹⁷ Rehabilitation has not been a central purpose of sentencing in the US in recent decades owing to the focus on other sentencing objectives of just punishment, community protection and deterrence,¹⁹⁸ but it is a sentencing goal in the other two examined jurisdictions. Moreover, rehabilitation of offenders can be imperative to achieving the sentencing purpose of community protection, which the jurisdictions share. The public could be endangered if incarceration does not rehabilitate an offender with ASD, and especially if it increases their likelihood of reoffending.

¹⁹² *Sentencing Act* (Vic) (n 33) s 5(1)(a); *Sentencing Code* (n 51) s 57(2)(a); 18 USC § 3553(a)(2)(C).

¹⁹³ Allely, *Autism Spectrum Disorder* (n 1) 252, 255–8; Caitlin Robertson and Jane McGillivray, 'Autism Behind Bars: A Review of the Research Literature and Discussion of Key Issues' (2015) 26(6) *The Journal of Forensic Psychiatry and Psychology* 719, 727–9.

¹⁹⁴ Robertson and McGillivray (n 193) 728–9.

¹⁹⁵ Allely, *Autism Spectrum Disorder* (n 1) 274.

¹⁹⁶ Cea (n 36) 525.

¹⁹⁷ See, eg, Tina Bloom and GA Bradshaw, 'Inside of a Prison: How a Culture of Punishment Prevents Rehabilitation' (2022) 28(1) *Peace and Conflict: Journal of Peace Psychology* 140.

¹⁹⁸ Megan Kurlychek and John Kramer, 'The Transformation of Sentencing in the 21st Century' in Cassia Spohn and Pauline Brennan (eds), *Handbook on Sentencing Policies and Practices in the 21st Century* (2019, Taylor & Francis) 19, 22, 26.

To achieve the objectives of rehabilitation and community protection in sentencing an offender with ASD, a court could impose sanctions that give them opportunities to obtain treatment that is directed towards reducing their risk of recidivism. ASD is a lifelong condition,¹⁹⁹ but therapies are continually being developed to address ASD symptoms, including those that could potentially play a role in offending. Such treatment can involve assisting people to recognise others' mental states and manage their emotions, social skills and communication training and, in the case of sex offenders, treatment programs that are adapted for individuals with ASD.²⁰⁰ In most prisons, offenders with ASD would lack opportunities to participate in treatment programs that are tailored to their needs and delivered by appropriately trained personnel.²⁰¹ A sentencing court could, however, reduce the prison term and/or non-parole period of an offender with ASD or, in the US federal jurisdiction and England and Wales, order a suspended sentence (suspended sentences have been abolished in Victoria),²⁰² so they can obtain therapy that is available outside prison. A court could also impose sanctions that have a therapeutic focus, such as requirements to undergo mental health treatment, participate in a rehabilitation program, or be subject to community-based supervision.²⁰³

It might not always be appropriate for a court to take into account an offender's diagnosis of ASD in deciding which penalties to impose.²⁰⁴ The court would need to receive evidence about the defendant's ASD impairments, the likely impact of certain sanctions on them due to those symptoms, and their potential for rehabilitation.²⁰⁵ Such evidence might also help the court determine the defendant's probability of reoffending, as no risk assessment tools have yet been adapted to evaluate the effect of an offender's ASD symptoms in particular on their risk of recidivism.²⁰⁶

The following is an analysis of the potential for an offender's ASD impairments to influence sentencing courts' choice of sanctions in the examined jurisdictions. Pre-trial diversion schemes that could possibly shift some defendants with ASD

¹⁹⁹ World Health Organization, *ICD-11* (n 4).

²⁰⁰ Dein and Woodbury-Smith (n 46) 41; Attwood (n 2) 163, 349, 352; Allely and Creaby-Attwood (n 26) 45–6.

²⁰¹ Robertson and McGillivray (n 193) 729; Grant et al (n 13) 71, 73; Clare Allely, 'Experiences of Prison Inmates with Autism Spectrum Disorders and the Knowledge and Understanding of the Spectrum Amongst Prison Staff: A Review' (2015) 6(2) *Journal of Intellectual Disabilities and Offending Behaviour* 55, 60–2.

²⁰² 'Suspended Sentences and Other Abolished Sentencing Orders', *Sentencing Advisory Council* (Web Page, 3 November 2022) <<https://www.sentencingcouncil.vic.gov.au/about-sentencing/suspended-sentences-and-other-abolished-orders>>; Bagaric, Alexander and Edney (n 56) 782.

²⁰³ Berryessa, 'Defendants with Autism Spectrum Disorder' (n 38) 866–7; Allely, Kennedy and Warren (n 60) 11.

²⁰⁴ Freckelton, 'Expert Evidence' (n 6) 377.

²⁰⁵ Walvisch and Carroll (n 8) 442.

²⁰⁶ Allely, *Autism Spectrum Disorder* (n 1) 43–4.

out of the criminal justice system and into mental healthcare are available in these jurisdictions,²⁰⁷ but a detailed discussion of them is beyond the scope of this article.

A *Victoria, Australia*

In deciding on the sanctions to impose on any offender, Victorian courts must follow the principles of proportionality (the harshness of the penalty must match the seriousness of the crime) and consistency,²⁰⁸ but also the principle of parsimony (the court should impose the most lenient sentence that can still achieve the sentencing objectives).²⁰⁹ Notwithstanding these principles, an offender's ASD impairments could potentially influence the types of sanctions that a court imposes if it applies the *Verdins* principles discussed below. From this decision and other cases, Victorian courts have received some direction to consider the appropriateness of certain sanctions in light of an offender's mental impairment, and in particular their potential to have a harsher impact than intended and worsen the offender's condition. Victorian legislation prescribes sentences for various offences,²¹⁰ but the *Sentencing Act* (Vic) permits the court in some instances to impose alternative penalties, including sanctions that have a rehabilitative focus, due to an offender's mental impairment and specifically ASD.

²⁰⁷ For instance, some magistrates' courts in England and Wales have diversion schemes that involve admission of a defendant with a mental impairment to a psychiatric or forensic hospital unit where necessary, either 'as a sentence after a finding of guilt or the discontinuance of a charge' in cases involving minor offending, or 'pending trial' where they have been charged with more serious crimes: David James, 'Court Diversion in Perspective' (2006) 40(6–7) *Australian and New Zealand Journal of Psychiatry* 529, 533–4. Some Victorian lower courts have options to defer for a maximum of 12 months sentencing an offender who has been found guilty of committing minor offences, inter alia, so they can participate in 'programs aimed at addressing the underlying causes of the offending', and 'on the review' of this order can decide to 'take no further action': *Sentencing Act* (Vic) (n 33) ss 83A(1), (1A)(c), (1D)(a). 'Mental health courts' in the United States, such as the 'Conviction and Sentence Alternatives Program' in the US District Court, which has divisions within federal courts, hear matters involving defendants with mental impairments who have committed minor offences and can compel them to participate in treatment programs and dismiss federal charges if they complete them successfully: 'Conviction and Sentence Alternatives Program (CASA)', *United States Department of Justice* (Web Page, 17 July 2023) <<https://www.justice.gov/usao-cdca/programs/conviction-and-sentence-alternatives-program-casa>>; Benjamin Barsky, Heather Ellis Cucolo and Dominic Sisti, 'Expanding Therapeutic Jurisprudence Across the Federal Judiciary' (2021) 49(1) *Journal of the American Academy of Psychiatry and the Law* 96.

²⁰⁸ Bagaric, Alexander and Edney (n 56) 8. The proportionality principle theoretically also applies in England and Wales and the US: see Roberts and Harris (n 81) 70.

²⁰⁹ Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 245.

²¹⁰ 'Sentencing Schemes', *Sentencing Advisory Council* (Web Page, 3 November 2022) <<https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-schemes>>.

The second *Verdins* principle states that an offender's 'impaired mental functioning' 'may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served'.²¹¹ A court could apply this principle by finding that an offender's ASD impairments increase their risk of reoffending and therefore that it is necessary to impose a long prison sentence to achieve the objective of community protection.²¹² Yet Victorian courts have also applied this principle by finding that an extended prison sentence would be an 'inappropriate disposition' if it is likely to have a 'devastating effect' on the offender's 'mental health' and if their rehabilitation could occur most effectively outside prison.²¹³ As noted above, incarceration could detrimentally affect the mental health of an offender with ASD and efficacious treatment for them is more likely to be available outside prison. In some cases, Victorian courts have sought to enable the rehabilitation of an offender with a mental impairment, especially one that cannot be adequately treated in prison, through reducing the usual non-parole period, so they can be treated in the community, but also still be monitored.²¹⁴

The fifth *Verdins* principle states that impaired mental functioning is relevant to sentencing where '[t]he 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'.²¹⁵ Thus, a Victorian court may impose a more lenient kind of sanction if a harsher penalty, such as a long prison term, would inflict a 'greater burden' on a defendant due to their mental impairment than on another offender.²¹⁶ Judge Smallwood accepted that this principle was enlivened in *Director of Public Prosecutions v Hardwick (a Pseudonym)* because, due to the defendant's ASD, incarceration would 'be far more difficult than it would be for a person without it'.²¹⁷ His Honour was concerned that the defendant would 'give' and 'take offence unintentionally', leading to other prisoners bullying or threatening him, and predicted that his 'time in custody will be spent in fear'.²¹⁸

A Victorian court could also select an alternative sanction to a lengthy prison sentence pursuant to the sixth *Verdins* principle if it finds that incarceration would lead to an exacerbation of the impairments of an offender with ASD or a deterioration in their mental health generally. This principle states, '[w]here 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'.²¹⁹ Justice Beale found this principle to be engaged in *R v Chey*, as a psychiatrist provided evidence that it

²¹¹ *Verdins* (n 33) 276 [32].

²¹² See, eg, Judicial College of Victoria (n 85) 6.2.2.7.

²¹³ *R v Vardouniotis* (2007) 16 VR 269, 235–6 [33] (Maxwell P).

²¹⁴ Judicial College of Victoria (n 85) 6.2.2.8.

²¹⁵ *Verdins* (n 33) 276 [32].

²¹⁶ *Ibid* 275 [27], quoting *R v Smith* (1987) 44 SASR 587, 589 (King CJ).

²¹⁷ *DPP v Hardwick (a Pseudonym)* [2019] VCC 1528 [37] (Judge Smallwood).

²¹⁸ *Ibid* [37]–[38].

²¹⁹ *Verdins* (n 33) 276 [32].

was ‘probable’ that the mental health of the defendant with ASD would ‘deteriorate’ in prison, due to the ‘likelihood of tensions developing’, the defendant’s ‘vulnerabilities being exposed’ and the defendant being ‘targeted’.²²⁰

Victorian courts can diverge from sentences stipulated by legislation for certain crimes if they make the findings in the *Sentencing Act* (Vic) outlined below, which echo the *Verdins* principles. This statute permits the court to depart from the statutory minimum prison sentence and non-parole period for specified offences if it finds that a ‘special reason exists’.²²¹ One such reason is if an ‘offender proves on the balance of probabilities’ either that: ‘at the time of the commission of the offence, he or she had impaired mental functioning that is causally linked to the commission of the offence and substantially and materially reduces the offender’s culpability’; or ‘he or she has impaired mental functioning that would result in the offender being subject to substantially and materially greater than the ordinary burden or risks of imprisonment’.²²² The definition of ‘impaired mental functioning’ in this provision includes ASD.²²³

The *Sentencing Act* (Vic) also allows the court to impose penalties other than the prescribed sentences for certain serious crimes that are classified as ‘category 1’ and ‘category 2’ offences in specified circumstances due to the offender’s mental impairment.²²⁴ If a defendant who has committed a ‘category 2 offence’ provides the abovementioned evidence about their impaired mental functioning, the court can pass an alternative sentence to a ‘custodial order’.²²⁵ In these cases, the court has the option of making a ‘community correction order’ to which it can attach a ‘treatment and rehabilitation condition’, requiring the offender ‘to undergo treatment and rehabilitation specified by the court’ and as outlined in the statute.²²⁶ Especially useful for an offender with ASD might be ‘psychological’ treatment, programs that ‘[address] factors related to’ the ‘offending behaviour’, and/or ‘employment, educational, cultural and personal development programs’.²²⁷

Provisions of the *Sentencing Act* (Vic) ensure that courts receive expert evidence to inform their decision to make a community correction order, which could be helpful in sentencing an offender with ASD. Before making this order, the court

²²⁰ [2021] VSC 843, [30].

²²¹ See, eg: *Sentencing Act* (Vic) (n 33) ss 9B(2), 10A(2); ‘Guide to Sentencing Schemes in Victoria 2021’, *Sentencing Advisory Council* (Web Page, 2021) 7–8 <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2021-01/Guide_to_Sentencing_Schemes_in_Victoria_2021.pdf> (‘*Guide to Sentencing*’).

²²² *Sentencing Act* (Vic) (n 33) ss 10A(2)(c)(i)–(ii).

²²³ *Ibid* s 10A(1)(d).

²²⁴ ‘*Guide to Sentencing*’ (n 221) 4–5.

²²⁵ *Sentencing Act* (Vic) (n 33) ss 3(1) (definition of ‘category 2 offence’), 5(2H)(c), pt 3, div 2.

²²⁶ *Ibid* ss 37(a), 48D(1), (3).

²²⁷ *Ibid* ss 48D(3)(e)–(g).

must have ‘received a pre-sentence report’ and ‘had regard to any recommendations’.²²⁸ Further, before attaching a treatment and rehabilitation condition to this order, the court ‘must have regard to the need to address the underlying causes of the offending’ and ‘matters identified in the pre-sentence report in relation to the treatment and rehabilitation of the offender’.²²⁹ A pre-sentence report can comment on: the offender’s ‘medical and psychiatric history’ and ‘any special needs’; ‘services that address the risk of recidivism from which the offender may benefit’; ‘courses, programs, treatment, therapy or other assistance that could be available to the offender and from which he or she may benefit’; and ‘the relevance and appropriateness of any proposed condition’.²³⁰

Instead of imposing a ‘custodial order’ on an offender with a mental impairment (including ASD) who has committed certain ‘category 1 offences’, a court may be able to make a ‘mandatory treatment and monitoring order’, ‘residential treatment order’ or ‘Court Secure Treatment Order’.²³¹ A mandatory treatment and monitoring order is a community correction order with mandatory conditions attached, such as ‘a treatment and rehabilitation condition’.²³² While that order could be useful for an offender with ASD, a residential treatment order, which involves detention of the offender for up to five years ‘in a specified residential treatment facility to receive specified treatment’,²³³ might only be appropriate for such an offender if they have a comorbid condition. An offender who is subject to a Court Secure Treatment Order can ‘be compulsorily taken to, and detained and treated, at a designated mental health service’.²³⁴ As this is intended to apply to offenders who have a ‘mental illness’ and require ‘mental health treatment to prevent serious deterioration in their health or to prevent serious harm to the offender or another person’,²³⁵ it may also be inappropriate for offenders with ASD and not result in their rehabilitation.²³⁶ The court can only make these orders if the offender proves ‘on the balance of probabilities’ that they ‘had impaired mental functioning that is causally linked to the commission of the offence and substantially and materially reduces’ their ‘culpability’, and ‘the court is satisfied that’ such an order is ‘appropriate’.²³⁷ In addition, the court must have first received and ‘had regard to’ a report addressing these matters

²²⁸ Ibid ss 37(b), 8A(2).

²²⁹ Ibid s 48D(2).

²³⁰ Ibid ss 8B(1)(c), (k)–(n).

²³¹ Ibid ss 3(1) (definition of ‘category 1 offence’), 5(2GA)(b), (2HB), 10A(1)(d).

²³² Ibid s 44A(1).

²³³ Ibid s 82AA(1).

²³⁴ Ibid s 94A.

²³⁵ ‘Mental Impairment and Sentencing’, *Sentencing Advisory Council* (Web Page, 1 September 2023) <<https://www.sentencingcouncil.vic.gov.au/about-sentencing/mental-impairment-and-sentencing>>.

²³⁶ Robertson and McGillivray (n 193) 729, 731–2.

²³⁷ *Sentencing Act* (Vic) (n 33) s 5(2GA)(b).

prepared by a psychiatrist or psychologist ‘who has examined the offender in relation to the offending’ and ‘any other evidence that the court considers relevant’.²³⁸

B *The Federal Jurisdiction of the United States of America*

In the US federal jurisdiction, courts have discretion to deviate from the guideline range in selecting the kinds of penalties to impose on an offender in light of a mental impairment such as ASD. Nevertheless, the US Congress and Sentencing Commission have provided minimal guidance to courts about the types of sanctions that might be appropriate for them to choose in this circumstance.

The *Sentencing Reform Act* (US) requires the court, in deciding on the sentence, to take into account ‘the kinds of sentences available’ and ‘the kinds of sentence and the sentencing range established for ... the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines’.²³⁹ Yet this statute also indicates that the court must consider the offender’s ‘characteristics’ in determining the sentence,²⁴⁰ and can impose a sentence of a different ‘kind’ if it finds a ‘mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described’.²⁴¹ As noted above, to determine if the Sentencing Commission took a mitigating circumstance into consideration, the court must refer to its policy statements.²⁴² Application of the Sentencing Commission’s policy statement, ‘Mental and Emotional Conditions’,²⁴³ could lead to the court imposing sanctions on an offender with ASD that diverge from the types of penalties stipulated in the relevant guideline range.

As previously discussed, ‘Mental and Emotional Conditions’ confirms that an offender’s mental impairment ‘may be relevant in determining whether a departure is warranted’ and ‘a downward departure may be appropriate to accomplish a specific treatment purpose’.²⁴⁴ While, as noted, the circumstances in which a departure can be made for this reason are limited, the *Guidelines* provide examples of alternative sanctions that could be imposed to accomplish a specific treatment purpose. They provide for

a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) ...²⁴⁵

²³⁸ Ibid s 5(2GB).

²³⁹ 18 USC §§ 3553(3), (4)(A).

²⁴⁰ Ibid § 3553(a)(1).

²⁴¹ Ibid § 3553(b)(1).

²⁴² Ibid.

²⁴³ *Guidelines* (n 33) § 5H1.3.

²⁴⁴ Ibid.

²⁴⁵ Ibid § 5C1.1, application notes [6].

In *Knott*, the Court substituted the defendant's original sentence of incarceration with 'home detention as one of the conditions of seven years of supervised release', because it received evidence that his ASD '[rendered] him exceptionally vulnerable to both decompensation and [emotional and physical] abuse in a prison setting', and he was 'likely ... to experience mental deterioration if he is not able to receive the same frequency and quality of mental-health treatment that he has received in the community'.²⁴⁶

An offender's mental impairment could have an impact on the court's choice of sanctions in this jurisdiction in other ways. The *Guidelines* indicate that a court can consider 'specific offender characteristics', including mental and emotional conditions, 'in determining the sentence within the applicable guideline range, the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence'.²⁴⁷ Further, the *Guidelines* state that the court can impose 'discretionary' conditions on 'probation' and 'supervised release' — which effectively constitute a suspended sentence — that are 'reasonably related' to the defendant's 'characteristics'.²⁴⁸

'Mental and Emotional Conditions' explains that these characteristics 'may be relevant in determining the conditions of probation or supervised release; e.g., participation in a mental health program'.²⁴⁹ The *Guidelines* recommend that '[i]f the court has reason to believe that the defendant is in need of psychological or psychiatric treatment', a 'condition' be attached to probation or supervised release 'requiring that the defendant participate in a mental health program approved by the United States Probation Office'.²⁵⁰ In *United States v Peters*, for example, the Court required the defendant with ASD (who was convicted of producing child pornography and on whom it imposed a 26-year prison sentence and a life term of supervised release) to undergo mental health treatment.²⁵¹ The Court nonetheless noted, 'you can't snap your fingers and make [the condition that led to the defendant's offending] go away', and 'therapy for people on the autism spectrum is not easy', it is 'complicated and difficult and long term'.²⁵²

²⁴⁶ *Knott* (n 137) 1312 [1], 1315–6 [10]–[11], 1318 [17], 1321 [24]. By contrast, in *Welshans* (n 140), the Court recognised the potential difficulties of imprisonment for people with ASD, but considered that it would in fact 'benefit' the defendant: at 627 (Porter J).

²⁴⁷ *Guidelines* (n 33) ch 5, pt H, introductory commentary.

²⁴⁸ *Ibid* § 5B1.3(b), § 5D1.3(b); Richard Frase, 'Suspended Sentences and Free-Standing Probation Orders in U.S. Guidelines Systems: A Survey and Assessment' (2019) 82(1) *Law and Contemporary Problems* 51, 51–2, 57–8.

²⁴⁹ *Guidelines* (n 33) § 5H1.3.

²⁵⁰ *Ibid* § 5B1.3(d)(5).

²⁵¹ (7th Cir, No 22 C 50389, 20 July 2023) slip op 1–2 (Kennelly J).

²⁵² *Ibid*.

C *England and Wales*

Sentencing courts in England and Wales have opportunities to take an offender's mental impairment such as ASD into account in choosing the sanctions to impose on them. The Sentencing Code and the Sentencing Council's guidelines generally give courts considerable direction in this respect, including by encouraging them to consider how offenders might experience certain penalties due to their impairments and how those sanctions could affect their symptoms and potential for rehabilitation. They also seek to ensure courts will receive evidence about an offender's impairments that can assist them in selecting a sentence.

In this jurisdiction, sentences for certain serious offences are 'fixed by law': legislation prescribes a 'mandatory sentence requirement'.²⁵³ Nevertheless, for some of those offences, the Sentencing Code permits the court to diverge from the stipulated minimum custodial sentence if 'there are exceptional circumstances which relate ... to the offender and justify not' imposing that sanction.²⁵⁴ The Sentencing Council advises that, in such a case, 'the court must impose either a shorter custodial sentence than the statutory minimum provides or an alternative sentence'.²⁵⁵ The Sentencing Council's guidelines do not, nonetheless, confirm if an offender's mental impairment, such as ASD, could constitute sufficient justification for the court to impose a sanction other than the minimum sentence, but they imply that whether this is the case may depend on the type of crime committed.²⁵⁶

For offences that are 'punishable with a custodial sentence' under relevant legislation,²⁵⁷ but to which no mandatory sentencing requirements apply, the Sentencing Code sets a '[t]hreshold for imposing [a] discretionary custodial sentence'.²⁵⁸ A court can only 'pass a custodial sentence' if 'it is of the opinion that ... the offence ... was so serious that neither a fine alone nor a community sentence can be justified for the offence'.²⁵⁹ To form this opinion, 'the court must take into account' any 'mitigating

²⁵³ Sentencing Code (n 51) s 399.

²⁵⁴ See, eg, *ibid* s 311(2).

²⁵⁵ See, eg, 'Firearms — Possession of Prohibited Weapon', *Sentencing Council* (Web Page, 1 January 2021) [13] <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/firearms-possession-of-prohibited-weapon/>>.

²⁵⁶ See, eg, *ibid* [12]: this guideline states that 'the mere presence' of 'one or more mitigating factors' 'should not in itself be regarded as' an 'exceptional circumstance' that would 'justify not imposing the statutory minimum sentence'. Cf 'Bladed Articles and Offensive Weapons — Possession', *Sentencing Council* (Web Page, 1 June 2018) <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/bladed-articles-and-offensive-weapons-possession/>>: '[t]he court should consider the following factors to determine whether it would be unjust to impose the statutory minimum sentence; any strong personal mitigation ...'.

²⁵⁷ For the meaning of 'custodial sentence', see Sentencing Code (n 51) s 222.

²⁵⁸ *Ibid* s 230.

²⁵⁹ *Ibid* s 230(2).

factors',²⁶⁰ including the offender's reduced culpability if relevant,²⁶¹ which could be attributable to their mental impairment, and a 'pre-sentence report', which could refer to an offender's symptoms and make suggestions for the sentence.²⁶² If the court does pass a custodial sentence, it must impose 'the shortest term ... that in the opinion of the court is commensurate with the seriousness of ... the offence'.²⁶³ Even if the court finds that the crime 'was so serious that a community sentence could not normally be justified for the offence', also in response to mitigating factors, it can pass a 'community sentence'.²⁶⁴ As discussed below, a court might consider this an appropriate sanction in the case of an offender with ASD.

The Sentencing Code reinforces that its provisions regarding discretionary custodial sentences do not require a court 'to pass a custodial sentence ... on an offender suffering from a mental disorder'.²⁶⁵ Further, it states that if 'an offender is or appears to be suffering from a mental disorder', before imposing a 'custodial sentence other than one fixed by law', 'the court must consider ... any information before it which relates to the offender's mental condition', and 'the likely effect of such a sentence on that condition and on any treatment which may be available for it'.²⁶⁶ Unless 'in the circumstances of the case' the court deems it 'unnecessary', 'the court must obtain and consider' a report from a medical practitioner with 'special experience in the diagnosis or treatment of mental disorder' about the offender's condition.²⁶⁷ The Sentencing Council's guideline, 'Sentencing Offenders', suggests matters regarding the offender's impairment that could be relevant to the court's choice of sanctions, and on which it could request this report comment, including: 'how the condition relates to the offences committed'; 'the level of impairment due to the condition at the time of the offence and currently'; 'if a particular disposal is recommended'; and 'the expected length of time that might be required for treatment'.²⁶⁸

'Sentencing Offenders' also provides guidance about matters the court could take into account when an offender with a mental impairment 'is on the cusp of

²⁶⁰ Ibid s 230(6).

²⁶¹ 'Imposition of Community and Custodial Sentences', *Sentencing Council* (Web Page, 1 February 2017) <<https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/imposition-of-community-and-custodial-sentences/>> ('Imposition of Community and Custodial Sentences').

²⁶² Sentencing Code (n 51) ss 230(7), 30–31; Jane McCarthy et al, 'Defendants with Intellectual Disability and Autism Spectrum Conditions: The Perspective of Clinicians Working Across Three Jurisdictions' (2022) 29(5) *Psychiatry, Psychology and Law* 698, 706.

²⁶³ Sentencing Code (n 51) ss 231(1)–(2).

²⁶⁴ Ibid ss 77(1)–(2).

²⁶⁵ Ibid s 78(1)(a).

²⁶⁶ Ibid ss 232(1), (3).

²⁶⁷ Ibid ss 232(2), (6).

²⁶⁸ 'Sentencing Offenders' (n 33) Annex B.

custody or detention'.²⁶⁹ It states, 'the court may consider that the impairment or disorder may make a custodial sentence disproportionate to achieving the aims of sentencing and that the public are better protected and crime reduced by a rehabilitative approach'.²⁷⁰ If, however, the court concludes that 'custody' is 'unavoidable', the Sentencing Council suggests that 'consideration of the impact on the offender of the impairment or disorder may be relevant to the length of sentence and to the issue of whether any sentence may be suspended', as it 'may mean that a custodial sentence weighs more heavily on them and/or because custody can exacerbate the effects of impairments or disorders'.²⁷¹ Further, this guideline requires the court to 'have regard' to 'any additional impact of a custodial sentence on the offender because of an impairment or disorder, and to any personal mitigation to which their impairment or disorder is relevant'.²⁷² The Court of Appeal appears to have applied this guideline in reducing the prison sentence of a defendant with ASD in *Simmonds*. The Court found that incarceration was 'likely to have a particularly severe impact on the appellant due to her "extreme vulnerability"', and her ASD — which the Court noted 'was of sufficient severity for her to have been placed in a special school' — was one of various 'elements to her vulnerability'.²⁷³

As noted above, in relation to crimes for which the Sentencing Council has issued an offence-specific guideline, the court must impose a sentence within the offence range it stipulates.²⁷⁴ Nevertheless, this does not restrict the sentencing court's 'power' 'to deal with an offender suffering from a mental disorder in the manner it considers to be most appropriate in all the circumstances'.²⁷⁵ 'Sentencing Offenders' emphasises that an offender's impairment may 'be relevant to the decision about the type of sentence imposed', though it also observes, '[m]any offences committed by an offender with an impairment or disorder may not require any therapeutic intervention or the offence may be so minor that the appropriate disposal is a fine or discharge'.²⁷⁶

Sentencing courts in England and Wales have options to impose sanctions that could improve an offender's mental health. These sanctions may help achieve the sentencing purpose of 'the reform and rehabilitation of offenders', but are still intended to meet the objectives of the 'punishment of offenders' and 'protection of the public'.²⁷⁷ 'Sentencing Offenders' encourages courts, in deciding whether to make a 'mental health sentence', to 'weigh up' various 'factors', including 'the nature of the offence',

²⁶⁹ Ibid [22].

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Ibid. See, eg, *Mottram v The Queen* [2022] EWCA Crim 954, [30].

²⁷³ *Simmonds* (n 191) [25], [27].

²⁷⁴ Sentencing Code (n 51) ss 60(1)–(2).

²⁷⁵ Ibid ss 59(3), 62(1) (definition of 'mental disorder'); *Mental Health Act 1983* (UK) s 1(2): "'mental disorder" means any disorder or disability of the mind'.

²⁷⁶ 'Sentencing Offenders' (n 33) [16]–[17].

²⁷⁷ Sentencing Code (n 51) ss 57(2)(a), (c)–(d).

‘the offender’s insight into their condition’, ‘the speed at which risk factors may escalate’ and ‘the need to protect the public’.²⁷⁸ The Sentencing Council recognises that ‘[i]mpairments or disorders may be relevant to an assessment of whether the offender is dangerous’,²⁷⁹ which entails, as the Sentencing Code clarifies, a determination of ‘whether there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences’.²⁸⁰ ‘Sentencing Offenders’ advises, ‘[t]he graver the offence, and the greater the risk to the public on release of the offender, the greater the emphasis the court must place upon the protection of the public and the release regime’.²⁸¹ Following this guideline, in *R v Solomon*, the Court took into account the defendant’s ASD, but having received evidence from psychiatrists that his condition was ‘not sufficiently severe to explain his violent offending’, it concluded that he ‘should be treated as dangerous and that extended custodial sentences were necessary’.²⁸²

If the offence committed by an offender with a mental impairment ‘is punishable with imprisonment’, but is not subject to a mandatory sentence requirement, a court can make a ‘community order’ to which a ‘Mental Health Treatment Requirement’ (‘MHTR’) and/or ‘Rehabilitation Activity Requirement’ (‘RAR’) is attached.²⁸³ While this sanction has a rehabilitative aim,²⁸⁴ ‘the order must include at least one ... requirement imposed for the purpose of punishment’, unless ‘the court also imposes a fine, or there are exceptional circumstances’ that would ‘make it unjust ... for the court to impose’ this requirement or a fine.²⁸⁵

A community order to which an MHTR is attached is potentially a suitable sanction for an offender with ASD. This could be the case if the court receives evidence indicating that mental health treatment could improve the offender’s capacity for moral reasoning, and their abilities to observe social norms and cues, interpret other people’s attitudes and intentions, appreciate the impact of their behaviour, and/or control their responses to unexpected and stressful circumstances. The order would require the offender to ‘submit’ during a specified period to ‘mental health treatment’, such as ‘in-patient treatment’, ‘institution-based out-patient treatment’ or ‘practitioner-based treatment’, provided by, or under the direction of, a medical practitioner or psychologist ‘with a view to improvement of the offender’s mental condition’.²⁸⁶ The court can only attach an MHTR to a community order if it is satisfied of various matters, including that: the offender’s mental condition ‘requires’ and ‘may be susceptible to treatment’, but ‘does not warrant the making of a hospital

²⁷⁸ ‘Sentencing Offenders’ (n 33) [23].

²⁷⁹ *Ibid* [16].

²⁸⁰ Sentencing Code (n 51) s 308(1).

²⁸¹ ‘Sentencing Offenders’ (n 33) [23].

²⁸² [2023] EWCA Crim 1375, [21], [23] (Holgate LJ for the Court).

²⁸³ Sentencing Code (n 51) ss 201, 202(1)(b), (3), 399, sch 9, pts 2, 9.

²⁸⁴ ‘Imposition of Community and Custodial Sentences’ (n 261).

²⁸⁵ Sentencing Code (n 51) ss 208(10)–(11).

²⁸⁶ *Ibid* sch 9, pt 9, cls 16(1)–(2).

order'; arrangements have been or can be made for the intended treatment; and 'the offender has expressed willingness to comply with the requirement'.²⁸⁷

'Sentencing Offenders' contemplates that a community order to which an MHTR is attached might reduce an offender's risk of recidivism more effectively than a brief prison sentence.²⁸⁸ Further, it states that this may be a more appropriate sanction than incarceration if 'the offender's culpability is reduced by their mental state and/or the public interest is served by ensuring they receive appropriate treatment', provided the offender is likely to comply with it.²⁸⁹ A community order to which an RAR is attached might also be beneficial for an offender with ASD. To encourage the offender's rehabilitation, it requires them to 'attend appointments' or an 'accredited programme' and/or 'participate in activities' that have a 'reparative' 'purpose', 'such as restorative justice activities'.²⁹⁰

A court can compel an offender to comply with a community order to which an MHTR or RAR is attached as part of a 'suspended sentence order', which a court can make if it passes a prison sentence of between 14 days and 2 years.²⁹¹ The prison sentence only takes effect if the offender commits another offence or 'during the supervision period, contravenes any community requirement imposed by the order', and the court orders this.²⁹² In some of its guidelines, the Sentencing Council lists factors that may indicate that a suspended sentence is appropriate, including 'strong personal mitigation' and a 'realistic prospect of rehabilitation',²⁹³ which might apply to an offender with ASD.

Another 'mental health disposal' that is available in this jurisdiction if the offence is punishable by imprisonment, but the sentence is not 'fixed by law', is an order authorising the offender's 'admission to and detention in' a hospital.²⁹⁴ A court can make this order if 'satisfied, on the ... evidence of two registered medical practitioners, that the offender is suffering from mental disorder' 'of a nature or degree' that makes the order appropriate, and 'medical treatment is available for' them.²⁹⁵ A court might deem this sanction suitable for an offender with ASD if they have comorbid mental health issues.²⁹⁶

²⁸⁷ Ibid sch 9, pt 9, cl 17.

²⁸⁸ 'Sentencing Offenders' (n 33) [19].

²⁸⁹ Ibid.

²⁹⁰ Sentencing Code (n 51) sch 9, pt 2, cls 4(1), 5(1), (6)–(7).

²⁹¹ Ibid ss 277(2), 286(2).

²⁹² Ibid ss 286(1), (3).

²⁹³ See, eg, 'Imposition of Community and Custodial Sentences' (n 261).

²⁹⁴ *Mental Health Act 1983* (UK) s 37(1); 'Sentencing Offenders' (n 33) [23]–[24], Annex C.

²⁹⁵ *Mental Health Act 1983* (UK) s 37(2)(a)(i).

²⁹⁶ See, eg, *Cleland v The Queen* [2020] EWCA Crim 906.

D Best Practices and Lessons from the Examined Jurisdictions

Pursuant to sentencing laws in all the examined jurisdictions, an offender's ASD impairments could potentially influence the court's choice of penalties, at least to some extent. Outlined below are recommendations for guidance to be provided to courts in determining which sanctions to impose on an offender with ASD, and penalties they should have the opportunity to select. Also highlighted are aspects of the examined jurisdictions that provide useful direction to and options for courts in these respects.

It is important that courts are alerted to the possibility that they can take a defendant's ASD symptoms into account in choosing penalties to impose. Guidance provided to courts in all the jurisdictions might encourage them to do so. This includes the Victorian Court of Appeal's second *Verdins* principle, which recommends that courts contemplate whether an offender's mental impairment should have an impact on the 'kind of sentence' they select. The Sentencing Council of England and Wales provides similar direction in 'Sentencing Offenders', indicating that an offender's mental impairment could be pertinent to the court's determination about the types of sanctions to impose. The US Sentencing Commission's *Guidelines* also confirm that a court can take into account an offender's mental condition in choosing sanctions from the available sentencing options.

In addition, courts should be directed to consider the likely experience of certain sanctions by a defendant with ASD as a consequence of their impairments, and the potential impact of different penalties on their symptoms. As previously discussed, due to their ASD impairments, an offender might find incarceration in particular more burdensome than an offender without their impairments, and imprisonment could lead to a deterioration in their symptoms. Courts could be encouraged to consider whether there is a risk that imprisonment could have this effect on an offender with ASD and, if so, contemplate reducing a custodial sentence or imposing an alternative sanction to a prison term. A shorter prison sentence or another penalty might punish an offender with ASD to the same extent and achieve an equivalent level of general deterrence as a long prison term in the case of a neurotypical offender.

Courts in Victoria and England and Wales receive valuable guidance in these respects. Particularly helpful is the confirmation in Victorian case law applying the second *Verdins* principle that a court can elect not to impose a lengthy prison term if it would worsen the offender's mental health. The fifth *Verdins* principle alerts courts to the possibility that, owing to the defendant's mental impairment, a certain sentence might impose a greater burden on them than on another offender. Likewise, the *Sentencing Act* (Vic) reinforces that a court can depart from the statutory minimum custodial sentence owing to an offender's mental impairment, including if it would inflict a greater than usual burden on them. Also useful is the suggestion in the sixth *Verdins* principle that courts choose a less severe sanction if there is a high risk of incarceration detrimentally affecting the mental health of an offender with a mental impairment. In 'Sentencing Offenders', England and Wales's Sentencing Council similarly highlights for courts the potential for a custodial sentence to worsen the effects of an offender's mental impairment. It usefully suggests that

courts contemplate reducing the length of a custodial sentence or suspending it if it would place a greater burden on the offender due to their impairment than on another offender. The confirmation in England and Wales's Sentencing Code that courts are not required to impose a prison sentence where it is not prescribed by legislation and an offender has a mental impairment is also valuable.

Courts should be guided to consider, and have options to impose, sanctions that may give offenders with ASD opportunities to obtain treatment that is directed towards their rehabilitation and reducing their risk of recidivism. 'Sentencing Offenders' helpfully suggests to courts that they might conclude that a 'rehabilitative approach' would provide greater protection to the public than another sanction where the offender has a mental impairment. If an offender with ASD in England and Wales receives a 'community order' to which an MHTR or RAR is attached, they could obtain treatment for symptoms that led to their offending and thereby potentially lower their risk of recidivism. 'Sentencing Offenders' indicates that this order could be more efficacious in reducing this risk than a prison term. The *Sentencing Act* (Vic) similarly permits courts in Victoria to make a 'community correction order' to which it can attach a 'treatment and rehabilitation condition', where an offender with a mental impairment commits certain serious offences. The US Sentencing Commission usefully highlights in its policy statement, 'Mental and Emotional Conditions', that a downward departure in a sentence may be appropriate for an offender with a mental impairment to achieve a 'specific treatment purpose'. Additionally, in its *Guidelines*, it provides options to impose a sentence of community confinement or home detention rather than a prison term. 'Mental and Emotional Conditions' and the *Guidelines* also helpfully alert courts to the possibility of attaching a condition to probation or supervised release requiring an offender to participate in a mental health program.

Sentencing courts should also be directed only to take an offender's ASD into account in deciding which penalties to impose if they receive persuasive evidence about relevant matters. They might include the offender's likely experience of certain sanctions owing to their impairments, the probable effects on their symptoms of different penalties, their potential for rehabilitation in light of their impairments, and possible treatment for their condition.

Especially useful is the requirement of England and Wales's Sentencing Code that, before imposing a custodial sentence that is not prescribed by legislation on an offender who has a mental impairment, courts must: consider information regarding the impairment, the probable impact of a sentence on it, and any available treatment; and (unless they consider it unnecessary) request a medical practitioner's report on the offender's condition. The articulation in 'Sentencing Offenders' of matters regarding the offender's impairment on which a court should ask the practitioner to comment, including which sanctions might be appropriate, is also valuable. Under the Sentencing Code, a court must also consider a pre-sentence report, which could discuss an offender's mental impairment and make recommendations for sanctions, before imposing a custodial sentence for their commission of a crime that is punishable under legislation with this sanction. Similarly helpful is the requirement of the *Sentencing Act* (Vic) for courts to base decisions to make a community

correction order, and attach a treatment and rehabilitation condition to it, on expert reports regarding the offender's mental impairment, and available treatment that could reduce their risk of reoffending.

Notwithstanding the above recommendations, courts should also be directed to consider if an offender's ASD symptoms contributed to their offending, are untreatable, and are likely to lead to their reoffending, and thus whether it needs to impose a lengthy prison term to protect the community. 'Sentencing Offenders' is particularly helpful in encouraging courts, in deciding on the types of sanctions to impose on an offender with a mental impairment, to consider their 'insight into their condition' and 'risk factors'. It also highlights that the impairment may indicate the threat the offender poses to the community through reoffending if they are not incarcerated.

V CONCLUSION

An individual's ASD diagnosis does not signify their heightened risk of committing criminal offences. Nevertheless, certain ASD impairments could contribute to offending by the small subgroup of people with ASD who commit crimes. Where a defendant has been found guilty of a crime and the sentencing court receives evidence of a connection between their ASD symptoms and their offending, it might be necessary for it to take their condition into account to reach an outcome that is fair to the defendant and achieves sentencing objectives.

As this article has explored, in Victoria, the US federal jurisdiction and England and Wales, a defendant's ASD impairments could potentially influence courts' application of sentencing considerations and their decisions regarding the kinds of sanctions to impose. Yet the ways in which an offender's ASD symptoms could have an impact on their sentence vary between the examined jurisdictions, as does the relevant guidance that sentencing courts receive from legislation, case law and advisory bodies. This article has made recommendations for approaches for courts to adopt in sentencing offenders with ASD and direction to be provided to them, and highlighted lessons that can be learned from optimal features of the three sentencing systems analysed in the article.

The article has proposed that courts have discretion to apply factors relevant to the sentencing process in light of a defendant's ASD impairments, but that they receive advice about the potential relevance of those symptoms. In particular, it might be appropriate for courts to consider if the defendant's symptoms reduced their moral culpability for their offending, and thus whether to mitigate their sentence. Also important is that courts are encouraged to contemplate whether an offender's ASD symptoms should influence their pursuit of the sentencing goals of punishment, denunciation, community protection, deterrence and rehabilitation, and potentially through mitigation or aggravation of the sentence.

In addition, this article has recommended that courts receive guidance about when and how they might take a defendant's ASD symptoms into account in selecting the

types of sanctions to impose. This instruction could encourage courts to consider the probable experience of particular penalties by a defendant with ASD due to their impairments, and the potential impact of different sanctions on their symptoms. For the reasons discussed, it might be important for courts to contemplate imposing on an offender with ASD alternative penalties to a lengthy custodial sentence, including sanctions that give them opportunities to obtain treatment. Nevertheless, courts would also need to consider if an offender's ASD symptoms are treatable, and the potential for them to lead to their reoffending.