

AUTISM: CRIMINALLY RESPONSIBLE OR INSANE? SYMPTOMATIC OFFENDING PATTERNS AND DEFENCE DEFICIENCIES

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This article examines the key criminal defences that are either advanced by, or open to, defendants with Autism Spectrum Disorder ('ASD individuals') in Australia. These defences include insanity, mistake of fact, accident, and self-defence. A doctrinal analysis of five recent Australian cases indicates that these defences are deficient for ASD individuals, even where ASD symptomology is the underlying cause of offending. This is due to the tantalising, albeit futile, endeavour that pleading insanity poses, and the discriminatory objective reasonability elements embedded in the other defences. The research behind this article has found that defence lawyers are either unwilling or lack the ASD understanding to advance the available defences, and instead opt for early pleas of guilty, despite expert evidence finding a realistic possibility of success. Instead of dealing with ASD inconsistently at sentencing, on a post-conviction mercy basis, this article offers a Model ASD Defence to protect this vulnerable sub-class of offenders, who are more likely to be victims than perpetrators, and who are not insane.

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I INTRODUCTION

New Yorker Darius McCollum has been obsessed with the public transport system for as long as he can remember.¹ As a child, Darius was taught to drive trains by employees of the New York MTA. As an adult, he began boarding and operating trains and buses, getting his passengers from A to B, all in perfect timing, all passengers satisfied with the service.² The only problem: Darius was not employed by the MTA, yet he saw his acts as providing a philanthropic helping hand.³

Darius was charged with impersonating a federal employee and imprisoned. Upon his release, his obsession persisted, leading him to operate trains and buses repeatedly, perpetuating the cycle. Darius has now been arrested more than thirty times,⁴ and has spent most of his adult life incarcerated and segregated from society.⁵

¹ *People v McCollum*, 2018 NY Slip Op 51424(U).

² Ibid 34: Darius has admitted to operating 5000 trains and over 1000 buses in this fashion.

³ Lawrence Osborne, *American Normal: The Hidden World of Asperger Syndrome* (Copernicus Books, 2002) 4.

⁴ Jose Martinez, "Transit-Obsessed Queens Man Will Not Be Released Back Into Community", *Spectrum News NY1* (online, 5 October 2018) <<https://ny1.com/nyc/all-boroughs/transit/2018/10/05/transit-obsessed-queens-man-will-not-be-released-back-into-community>>.

⁵ Kiah Fields, "'Off the Rails" Director Adam Irving Talks Darius McCollum, New York's Notorious Transit Imposter', *The Source* (online, 27 April 2016) <<https://thesource.com/2016/04/27/off-the-rails-director-adam-irving-talks-darius-mccollum-new-yorks-notorious-transit-imposter/>>.

Darius pled insanity, which was successful; however, after assessing his mental condition, Justice Ruth Shillingford ruled that Darius ‘suffers from a dangerous mental disorder’.⁶ As such, he was committed to a secure psychiatric centre.⁷ Last known records indicate that Darius resides in the Rochester Forensic Psychiatric Hospital, where he is classified as ‘Track 1’, a classification reserved for the most dangerous and violent inmates.⁸

Darius was diagnosed with ‘autism’, which colloquially refers to Autism Spectrum Disorder (‘ASD’), a life-long neurodevelopmental condition that impacts upon development, the main areas of which are social interaction, communication, and repetitive patterns of behaviour.⁹ ASD is also frequently associated with sensory sensitivities and sensory processing difficulties.¹⁰ Here, Darius’ otherwise harmless interest in trains rendered him susceptible to impersonating a federal employee and imprisonment, a particularly disappointing and preventable outcome of an obsessive interest that is symptomatic of ASD. Whilst this article is Australian-focused, this United States case illustrates the issues at play.

World-renowned medical professionals have long established unique vulnerabilities of autistic people, which increase their vulnerability in criminal justice systems (‘CJS’) worldwide, due to behaving differently from other, neurotypical people.¹¹ For example, Hans Asperger, who ran a combination children’s clinic and residential school in 1930s Vienna,¹² remarked that autistic people displayed social awkwardness, precocious abilities, and a fascination with rules, laws, and schedules.¹³ They seemed immune to external expectations, yet paradoxically, they pursued their own goals with intense, focused determination.¹⁴ They were sophisticated and naive, precocious and childish, standoffish but lonely and clumsy but formal.¹⁵ They had grave, serious dispositions, and were disturbed by changes,

⁶ *People v McCollum*, 2018 NY Slip Op 51424(U), 35.

⁷ See Martinez (n 4).

⁸ Eli Yudin, ‘How A Boy’s Undiagnosed Asperger’s Led To 30 Arrests For Piloting Public Transit Vehicles’, *Cracked* (online, 27 June 2022) <https://www.cracked.com/article_34435_how-a-boys-undiagnosed-aspergers-led-to-30-arrests-for-stealing-public-transit-vehicles.html>.

⁹ Department of Justice (WA), *Equal Justice Bench Book* (2021) 219 (‘*Equal Justice Bench Book*’).

¹⁰ *Ibid*.

¹¹ See, eg, Rachel Slavny-Cross et al, ‘Autism and the Criminal Justice System: An Analysis of 93 Cases’ (2022) 15(5) *Autism Research* 904; Po-See Chen et al, ‘Asperger’s Disorder: A Case Report of Repeated Stealing and the Collecting Behaviours of an Adolescent Patient’ (2003) 107(1) *Acta Psychiatrica Scandinavica* 73.

¹² Steve Silberman, *NeuroTribes: The Legacy of Autism and the Future of Neurodiversity* (Penguin Books, 2015) 5.

¹³ *Ibid* 93.

¹⁴ See, eg, *ibid* 101–2, 104–6.

¹⁵ *Ibid* 94.

particularly to their routines or schedules, which defied their expectations.¹⁶ Others failed in school on account of their pedantic nature and because their ignoring of instructions was misconstrued as wilful insurrection.¹⁷ In those times, the most disabled of ASD individuals were confined to asylums and labelled as feeble-minded.¹⁸

The children were extremely regimented, acting as though their routinised manner could ward off chaos itself.¹⁹ They sourced pleasure from repetition by acquiring huge collections of treasured objects, sometimes as mundane as matchboxes.²⁰ Some of the autistic children Asperger diagnosed were referred for behaviours commensurate with conduct disorder.²¹

According to the 2022 Australian Bureau of Statistics Survey of Disability, in Australia, there exists a prevalence of ASD of 1.1%,²² a 41.8% rise from 0.8% in 2018.²³ This 2022 figure roughly translates to 1 in 100 Australians with ASD.²⁴

A corollary of this rise in ASD prevalence is the increasing number of accused persons raising an ASD diagnosis in criminal proceedings, and the growing number of investigations into ASD and its links with criminality.²⁵ Moreover, concerning, ASD individuals are seven times more likely to intersect with the CJS,²⁶ albeit research is clear that ASD prevalence in prison is unrepresentative of ASD individuals in the general population, the vast majority of whom are law-abiding.²⁷

¹⁶ Ibid 93.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid 94.

²⁰ Ibid.

²¹ Kathrin Hippler and Christian Klicpera, 'A Retrospective Analysis of the Clinical Case Records of "Autistic Psychopaths" Diagnosed by Hans Asperger and his Team at the University Children's Hospital, Vienna' (2003) 358(1430) *Philosophical Transactions of the Royal Society B* 291, 301.

²² Australian Bureau of Statistics, *Survey of Disability, Ageing and Carers: Summary of Findings, 2022* (11 October 2024).

²³ Australian Bureau of Statistics, *Disability, Ageing and Carers: Summary of Findings, 2018* (29 November 2019).

²⁴ *Equal Justice Bench Book* (n 9) 219.

²⁵ Caitlin Eve Robertson, 'Autism Spectrum Disorder: Forensic Aspects and Sentencing Considerations' (PhD Thesis, Deakin University, 2017) xviii, ch 6.1; Colleen Berryessa, 'Brief Report: Judicial Attitudes Regarding the Sentencing of Offenders with High Functioning Autism' (2016) 46(8) *Journal of Autism and Developmental Disorders* 2770, 2770 ('Attitudes'); Tessa Grant et al, 'Criminal Responsibility in Autism Spectrum Disorder: A Critical Review Examining Empathy and Moral Reasoning' (2018) 59(1) *Canadian Psychology* 65, 65.

²⁶ See Colleen Berryessa, 'Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism' (2014) 5(2) *Journal of Intellectual Disabilities and Offending Behaviour* 97, 99 ('Judiciary Views').

²⁷ Lorna Wing, *The Autistic Spectrum: A Guide for Parents and Professionals* (Robinson, 1996) 175; Neil Brewer and Robyn Young, *Crime and Autism Spectrum Disorder: Myths and Mechanisms* (Jessica

The reason for this is that ASD individuals tend to have fervently conventional moral views, adhere rigidly to learnt rules,²⁸ and are more likely to be victims than perpetrators.²⁹

Contextually, it has been increasingly held that the culpability of ASD individuals in offending is not equal to non-affected offenders.³⁰ The nature of offending in most ASD individuals can be linked to three overarching ASD characteristics, all of which are described in, and consistent with, the fifth edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ('*DSM-5*') comprising criteria for ASD,³¹ which render them more susceptible to being caught up in the CJS.³² In most instances, they are the underlying cause of their crimes.³³ These three overarching ASD characteristics are: an inability to read or respond to social cues and social naivety;³⁴ hypersensitivities;³⁵ and obsessive interests.³⁶

Yet this article acknowledges that there are many cases where there is no causal link between the individual's ASD symptoms and their criminal offending behaviour. This is especially so for violent offences not common from the characteristics expressed from the ASD condition,³⁷ such as in many murder cases.³⁸ Resultantly, this article does not purport to, nor attempt to, apply to such offenders who have ASD somewhat by happenstance to their offending.

Kingsley Publishers, 2015) 39 ('*Myths*'); Kathrin Hippler et al, 'Brief Report: No Increase in Criminal Convictions in Hans Asperger's Original Cohort' (2010) 40(6) *Journal of Autism and Developmental Disorders* 774, 777 ('*Hippler Brief*').

²⁸ Wing (n 27); *Myths* (n 27); Hippler Brief (n 27).

²⁹ Thomas Mayes, 'Persons with Autism and Criminal Justice: Core Concepts and Leading Cases' (2003) 5(2) *Journal of Positive Behaviour Interventions* 92, 94.

³⁰ Ian Freckelton and David List, 'Asperger's Disorder, Criminal Responsibility and Criminal Culpability' (2009) 16(1) *Psychiatry, Psychology and Law* 16, 17, 20, 33 ('*Culpability*').

³¹ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Publishing, 5th ed, 2013) 299.0 ('*DSM-5*').

³² See Berryessa, 'Judiciary Views' (n 26) 98.

³³ *Ibid.*

³⁴ See, eg, *R v Wilson* [2022] ACTSC 7; *Vucemillo v Western Australia* [2017] WASCA 37.

³⁵ See, eg, *Shortland v Stone* [2019] WASC 217; *R v Chapman* [2018] NSWSC 1741.

³⁶ See, eg, *Cluett v The Queen* [2019] WASCA 111.

³⁷ See M Ghaziuddin, Luke Tsai and N Ghaziuddin, 'Brief Report: Violence in Asperger Syndrome: A Critique' (1991) 21(3) *Journal of Autism and Developmental Disorders* 349, 351.

³⁸ See, eg, *Mack v The State of Western Australia* [2014] WASCA 207, [171], [177], [205], [214]: Expert evidence found no causal link between the appellant's ASD and the murder offence, outside of finding ASD to be a significant impairment. See also *Davies v The Queen* [2019] VSCA 66, wherein the ASD individual was convicted of five counts of arson, however expert evidence cited PTSD, depression, and anxiety as culminating in his resentment towards 'society', and thereby his offending.

This article, through a doctrinal analysis of literature and case law, will focus on the defences raised by ASD individuals in Australia: primarily insanity, but including mistake of fact, accident, and self-defence. This will illuminate how all the defence options are deficient for ASD individuals. The author then offers an alternative protective ASD defence scheme, which reflects the objectives of the CJS and the specific needs of ASD individuals.

To this author's knowledge, to date, two relevant articles exist globally, both of which were published in the United States, in 2009,³⁹ and 2011.⁴⁰ These articles contemplate the inadequacies of the mistake of fact and insanity defences for accused ASD individuals, before proffering the need for an 'autism defence'. Unhelpfully however, in one article, the proposed defence is effectually too limited and restrictive for use by ASD individuals and poses an even higher threshold to meet than the already deficient insanity defence for ASD individuals.⁴¹ In the other, the proposed autism defence applies simplistically where the ASD individual cannot understand the basic underlying facts and consequences of personal conduct.⁴²

Whilst both recommendations serve as milestones in a positive direction, neither provides the necessary degree of completeness when considering the three-dimensional nature of ASD symptomology. This serves to highlight a severe research gap in this area. This article examines the need for an ASD-specific defence in Australia, as applicable to ASD symptomology: not a catch-all 'autism defence' merely by virtue of having such a diagnosis, without regard to any causal link stemming from the condition.

³⁹ See generally Heather Strickland, 'Autism and Crime: Should Autistic Individuals Be Afforded the Use of an "Autism" Defense?' (2011) 14 *The University of the District of Columbia Law Review* 1.

⁴⁰ See generally Brian Wauhop, 'Mindblindness: Three Nations Approach the Special Case of the Criminally Accused Individual with Asperger's Syndrome' (2009) 27(3) *Penn State International Law Review* 959.

⁴¹ Strickland (n 39) 13.

⁴² Wauhop (n 40) 988–9. But see Christine Cea, 'Autism and the Criminal Defendant' (2014) 88(7) *St John's Law Review* 495, 509–17, 529, which rejects ASD being used as an affirmative defence in general, except for use in specific 'minor crimes', under the arguably defeatist, inappropriate rationales that: (1) ASD is a spectrum disorder and thus an ASD defence would be too 'difficult' to 'draw the line' in legislating for; (2) a conviction and sentencing is required for rehabilitation; and (3) the mere availability of an ASD defence would somehow neglect 'moral blameworthiness' of all ASD individuals. This article asserts that to apply an ASD defence to 'minor crimes' would be to pre-emptively peer into a crystal ball in legislating what 'minor crimes' are/are not excusable for ASD individuals, and without knowledge of the specific factual circumstances, as not all ASD individuals express identical ASD symptoms in the same exact way, by virtue of it being a spectrum disorder.

Part II of this article will review the literature on the intersection between ASD symptomology and offending behaviour, before discussing five Australian cases involving an ASD defendant to highlight the contemporary experience of ASD individuals caught up in the CJS. Part III will then analyse and apply the four key defences used by ASD individuals in the cases discussed in Part II, to shed light on their inadequacies. Lastly, Part IV will offer a drafted model ASD defence scheme and propose reforms to promote equality for ASD individuals caught up in the CJS.

II ASD SYMPTOMOLOGY AND CASE STUDIES

The current standardized criteria for ASD are found in the *DSM-5*.⁴³ A distillation of these diagnostic criteria gives rise to three overarching ASD symptoms: an inability to read or respond to social cues and social naivety; hypersensitivities; and obsessive interests.

A *Inability to Read or Respond to Social Cues and Social Naivety*

The social naivety and immaturity that is symptomatic of ASD gives rise to a pervasive vulnerability to being 'set up' by peers, who encourage and influence ASD individuals to engage in offending behaviour.⁴⁴ This susceptibility to being influenced is by virtue of their neurological differences, causing them to crave friendship and social acceptance.⁴⁵ Thus, they are more likely to be the prey in any predator-prey relationship.⁴⁶

It is well-established that ASD individuals tend to be impaired in understanding and responding to social cues, meaning that they tend to struggle with cognitive empathy,⁴⁷ in being unable to interpret or understand emotions in others.⁴⁸ Further, they tend to express deficits with engaging in reciprocal conversation, comprehending and utilising non-verbal communicative techniques including, but not limited to, eye-contact, body language and facial expressions, understanding

⁴³ *DSM-5* (n 31) 299.0.

⁴⁴ Daniel Murrie et al, 'Asperger's Syndrome in Forensic Settings' (2002) 1(1) *International Journal of Forensic Mental Health* 59, 64, 69.

⁴⁵ Wing (n 27) 176; Patricia Howlin, *Autism and Asperger Syndrome: Preparing for Adulthood* (Routledge, 2nd ed, 2004) 306, cited in Gabrielle Wolf, 'Growing Enlightenment: Sentencing Offenders with Autism Spectrum Disorder in Australia' (2021) 44(4) *UNSW Law Journal* 1701, 1706.

⁴⁶ Murrie (n 44) 64, 69.

⁴⁷ As distinguished from emotional empathy.

⁴⁸ See Monica Mazza et al, 'Affective and Cognitive Empathy in Adolescents with Autism Spectrum Disorder' (2014) 8 *Frontiers in Human Neuroscience* 791.

sarcasm, and understanding when and how to “read between the lines” instead of interpreting speech literally.⁴⁹

As a corollary of their social naivety and immaturity, ASD individuals tend not to harm others with intent.⁵⁰ This naivety can also reduce their ability to comprehend and apply laws relevant to their situation.⁵¹ To exacerbate their direly vulnerable disposition, they can lack impulse control, coping and conflict resolution skills, and the ability to forecast the impact of their actions, along with exhibiting high anxiety deriving from their characteristic social naivety.⁵²

Research suggests that offending by ASD individuals can arise from inaccurately presuming that they are in danger and need to defend themselves, due to an inability to interpret and predict the intentions, actions, and speech of others.⁵³ Moreover, ASD individuals may offend while conducting a psychological experiment to explore another person’s reactions that they do not understand, thereby learning social skills.⁵⁴ Some ASD individuals may ruminate over past injustices and seek resolution or revenge against perceived immorality via illegal means.⁵⁵

There are four contemporary theories with substantial empirical research providing a unified understanding of the symptomatic expressions of ASD.⁵⁶ The first is the Theory of Mind (‘ToM’), referring to their lack of capacity to recognise, understand and predict the beliefs, thoughts, emotions, intentions, and behaviour of others,⁵⁷ or ‘mindblindness’.⁵⁸ The second is the Theory of Executive Dysfunctions (‘EF’), referring to their lack of capacity to undergo higher order cognitive processes,⁵⁹

⁴⁹ Robertson (n 25) ch 2.1.1–2.1.2.

⁵⁰ Howlin (n 45) 303. Cf Marc Woodbury-Smith et al, ‘High Functioning Autistic Spectrum Disorders, Offending and Other Law-Breaking: Findings from a Community Sample’ (2006) 17(1) *Journal of Forensic Psychiatry & Psychology* 108, 116: Exceptions arise where the individual forms a desire to avenge social rejection or bullying, which can provoke intentional offending.

⁵¹ Wing (n 27) 175; Robertson (n 25) ch 3.3.2.1.

⁵² Berryessa, ‘Attitudes’ (n 25) 2797–8; Freckelton and List, ‘Culpability’ (n 30) 21; Howlin (n 45) 302; Ian Freckelton, ‘Asperger’s Disorder and the Criminal Law’ (2011) 18(4) *Journal of Law and Medicine* 677, 680, 693; Robertson (n 25) chs 3.3.2.2, 3.3.2.5; ‘Hippler Brief’ (n 27) 775.

⁵³ Grant (n 25) 66; Robertson (n 25) ch 3.3.2.6.

⁵⁴ Tony Attwood, *The Complete Guide to Asperger’s Syndrome* (Jessica Kingsley Publishers, rev ed, 2015) 348.

⁵⁵ Ibid 347, 352, citing Digby Tantam, ‘Adolescence and Adulthood of Individuals with Asperger Syndrome’ in Ami Klin, Fred Volkmar and Sara Sparrow (eds), *Asperger Syndrome* (New York: Guilford Press, 2000) 367.

⁵⁶ Fred Volkmar et al, ‘An Introduction to Autism and the Autism Spectrum’ in Fred Volkmar et al (eds), *Handbook of Autism Spectrum Disorder and the Law* (Springer, 2021) 1, 11 (‘Volkmar Introduction’).

⁵⁷ Attwood (n 54) 124.

⁵⁸ See Simon Baron-Cohen, *Mindblindness: An Essay on Autism and Theory of Mind* (MIT Press, 1995) (‘Essay ToM’).

⁵⁹ Volkmar Introduction (n 56) 12.

including working memory, flexibility, inhibition, organising, planning, and initiating behaviour.⁶⁰

The third is the Weak Central Coherence Theory, referring to an ASD individual's deficits in processing information and drawing meaning from their environment.⁶¹ This theory states that ASD individuals tend to concentrate on detailed parts rather than the whole of input.⁶² The fourth is the Extreme Male Brain Theory, which is based on the premise that ASD individuals present with an extreme form of the male brain — increased systemising and decreased empathising.⁶³

B Hypersensitivities

Research confirms an unusually delicate pattern of sensory perception and reaction in ASD individuals.⁶⁴ For ASD individuals, the most common hypersensitivity is to specific sounds, yet hypersensitivity also exists towards tactile experiences and light intensity, including the taste and texture of food and specific aromas.⁶⁵ Hypersensitivity can also exist in ASD individuals towards pain and discomfort.⁶⁶

Research demonstrates that the senses of ASD individuals can be easily overloaded,⁶⁷ and in situations that are not perceived as aversive or are even enjoyable for neurotypical individuals.⁶⁸ ASD individuals are especially prone to 'sensory overload',⁶⁹ or 'meltdowns', wherein the ASD individual temporarily loses control of their behaviour,⁷⁰ for they tend to be hyperattentive to objects or environmental stimuli that others either selectively filter out or fail to notice.

⁶⁰ Elisabeth Hill, 'Executive Dysfunction in Autism' (2004) 8(1) *Trends in Cognitive Sciences* 26.

⁶¹ Volkmar Introduction (n 56) 13.

⁶² Uta Frith, 'Autism and "Theory of Mind"' in Christopher Gillberg (ed), *Diagnosis and Treatment of Autism* (Springer, 1989) 33. See, eg, James Hoy et al, 'Weak Central Coherence: A Cross-domain Phenomenon Specific to Autism?' (2004) 8(3) *Autism* 267.

⁶³ Volkmar Introduction (n 56) 13: systemising is the drive to analyse and study the world and the details that make it up, to understand how its system operates.

⁶⁴ James Harrison and Dougal Hare, 'Brief Report: Assessment of Sensory Abnormalities in People with Autistic Spectrum Disorders' (2004) 34 *Journal of Autism and Developmental Disorders* 727, 727–30. See also Michelle Suarez, 'Sensory Processing in Children with Autism Spectrum Disorders and Impact on Functioning' (2012) 59(1) *Pediatric Clinics of North America* 203.

⁶⁵ Attwood (n 54) 283–4. See also *DSM-5* (n 31) 50, 54; Wing (n 27) 47–8, 50–2.

⁶⁶ Attwood (n 54) 284.

⁶⁷ See generally Suarez (n 64). See also Jewel Crasta et al, 'Sensory Processing and Attention Profiles Among Children with Sensory Processing Disorders and Autism Spectrum Disorders' (2020) 14(22) *Frontiers in Integrative Neuroscience* 1, 7.

⁶⁸ Jo Bromley et al, 'Mothers Supporting Children with Autistic Spectrum Disorders: Social Support, Mental Health Status and Satisfaction with Services' (2004) 8(4) *Autism* 409: eg supermarkets, school corridors, city centres, and playgrounds.

⁶⁹ Osborne (n 2) 15.

⁷⁰ 'National Autistic Society', *Meltdowns* (Web Page, 20 August 2020) <<https://www.autism.org.uk/advice-and-guidance/topics/behaviour/meltdowns>> ('*Meltdowns*').

Further, pursuant to the Weak Central Coherence Theory,⁷¹ they possess a deficiency in shifting focus from smaller details to their larger environment.⁷²

Sensory overload can trigger extreme symptoms, including restlessness, anxiety and fear; irritability or anger; over-excitement, muscle tension, increased heart rate, rapid breathing, sweating, hypervigilance, covering of the ears or eyes to block stimulus input; and not wanting to be touched or approached.⁷³

ASD-typical reactions to sensory overload include:⁷⁴ sensory-avoidant behaviours (ie, escaping from stimuli); sensory-seeking behaviours; self-stimulatory behaviours (stimming) to self-soothe (repetitive behaviours such as rocking, spinning, pacing or the repeating of words or phrases);⁷⁵ and distraction behaviours (engaging intensely with a favourite sensation).

As for offending, ASD individuals are more likely to overreact and become distressed and upset when their structure or routines are interrupted or deviated from,⁷⁶ or when unexpected change occurs, which can come with high anxiety.⁷⁷ This overreaction, which can result in aggression, predisposes ASD individuals to the commission of offences that the individual had not contemplated,⁷⁸ and thus, causing a result that the ASD individual did not intend.⁷⁹

The emotional intensity of expression can increase in severity rapidly, often in response to an objectively trivial event, due to inhibited emotional regulation,⁸⁰ rather than increase gradually as seen in neurotypical individuals.⁸¹ Accordingly, when feeling angry, there is often an instantaneous physical response without

⁷¹ Volkmar Introduction (n 56) 13.

⁷² Crasta (n 67) 7; Frith (n 62) 33.

⁷³ See generally Stefan Schevdt and Ian Needham, 'Possible Signs of Sensory Overload' (2017) 44(3) *Psychiatrische Praxis* 128.

⁷⁴ Carolyn McCormick et al, 'Sensory Symptoms in Children with Autism Spectrum Disorder, Other Developmental Disorders and Typical Development: A Longitudinal Study' (2016) 20(5) *Autism* 572, 572.

⁷⁵ Zsanett Péter, 'Motor Stereotypies: A Pathophysiological Review' (2017) 11(171) *Frontiers in Neuroscience* 1, 4.

⁷⁶ Wauhop (n 40) 965. *DSM-5* (n 31) 50, 54; Wing (n 27) 47–8, 50–2.

⁷⁷ Tony Attwood and Michelle Garnett, 'Attwood & Garnett Events', *Understanding Challenging Behaviour in Classic Autism* (Web Page, 2022) <<https://www.attwoodandgarnettevents.com/blogs/news/understanding-challenging-behaviour-in-classic-autism>>.

⁷⁸ Howlin (n 45) 306; Wauhop (n 40) 965.

⁷⁹ Wauhop (n 40) 965.

⁸⁰ Attwood (n 54) 157. This is speculated to be caused by a dysfunction of the amygdala in ASD individuals — which functions in the perception and regulation of emotions, especially fear and anger.

⁸¹ *Ibid* 155.

careful thought, due to a blind rage, whilst being unable to see the signals indicating that it would be appropriate to stop.⁸²

In conflict, strategies of negotiation, compromise and co-operation may not be obvious to ASD individuals, who may rely on immature strategies of confrontation and the use of threats or acts of violence to control their experience, in circumstances where the ASD individual may not know what else to do.⁸³

C Obsessive Interests

ASD individuals often have a highly restricted, repetitive range of behaviours, with an unusual level of intensity and fixation on their interests or focus.⁸⁴ Accordingly, they often present as having narrow, unusual or eccentric fields of interests.⁸⁵ This is characteristically coupled with an obsessive desire to accumulate and catalogue collectables such as objects, facts and/or information associated with their 'special interest', with the interest tending to dominate the individual's free time or conversation.⁸⁶

As the number of collectables accumulate, ASD individuals grow a need to develop a cataloguing system, which can be logical yet idiosyncratic.⁸⁷ The logical ordering and symmetry is calming to ASD individuals, who find difficulty coping with changing patterns or expectations in life.⁸⁸ Due to their weak central coherence, their interests are an attempt to achieve elusive coherence out of apparent chaos.⁸⁹

ASD special interests have several functions outside of pleasure (through being linked to a memory of a happier or simpler time,⁹⁰ or mastering a skill to provide personal validation and growth).⁹¹ These functions can be to: provide relaxation, comfort and security, ensure greater predictability and certainty in life which they crave to allay anxiety, help understand the physical world (rather than the social

⁸² Ibid.

⁸³ Ibid 156.

⁸⁴ *Equal Justice Bench Book* (n 9) 219.

⁸⁵ Government of Western Australia, Department of Health, 'Healthy WA', *Asperger syndrome* (Web Page) <https://www.healthywa.wa.gov.au/Articles/A_E/Asperger-syndrome>, cited in *Equal Justice Bench Book* (n 9) 220.

⁸⁶ Attwood (n 54) 184–5.

⁸⁷ Ibid 191.

⁸⁸ Ibid 197.

⁸⁹ Ibid.

⁹⁰ Ibid 195, citing Tantam (n 55).

⁹¹ Céline Mercier, Laurent Mottron and Sylvie Belleville, 'A Psychosocial Study on Restricted Interest in High Functioning Persons with Pervasive Developmental Disorders' (2000) 4(4) *Autism* 406, 413, 416.

one),⁹² create a sense of identity with self-esteem,⁹³ occupy time, facilitate conversation and indicate intellectual ability.⁹⁴

Unfortunately, where the special interest pertains to something of a criminal nature, such as child exploitation material ('CEM'),⁹⁵ fire,⁹⁶ weapons, or drugs, or when said obsession simply renders them more susceptible to committing crimes, such as obsessive interests in people (and thus stalking or harassment),⁹⁷ or theft (to fund the special interest),⁹⁸ then the ASD individual may find themselves inadvertently caught up in the CJS.⁹⁹ For example, coding can become a special interest of ASD individuals, which can lead to charges for hacking, and which may have been committed as an intellectual exercise and not necessarily to steal money.¹⁰⁰ Risks can also arise from the intensity of ASD special interests, as the denial of access to the source material can lead to anger and extreme agitation, which can result in the ASD individual conflicting with the law.¹⁰¹

The extremity of the fixation on the ASD special interest leads to a tendency to ignore social and legal consequences.¹⁰² Fortunately, steps can be taken to terminate, replace, or at the very least, modify the interest.¹⁰³ An inability to control the time devoted to the special interest can be indicative of the development of an obsessive-compulsive disorder, which is common amongst ASD individuals.¹⁰⁴

⁹² Ami Klin et al, 'Circumscribed Interests in Higher Functioning Individuals with Autism Spectrum Disorders: An Exploratory Study' (2007) 32(2) *Research and Practice for Persons with Severe Disabilities* 89, 98.

⁹³ Kerri Nowell et al, 'Characterization of Special Interests in Autism Spectrum Disorder: A Brief Review and Pilot Study Using the Special Interests Survey' (2021) 51(8) *Journal of Autism and Developmental Disorders* 2711, 2712.

⁹⁴ Attwood (n 54) 199, 212.

⁹⁵ See, eg, *Cluett v The Queen* [2019] WASCA 111; *Vucemillo v Western Australia* [2017] WASCA 37. See also Clare Allely, Sally Kennedy and Ian Warren, 'A Legal Analysis of Australian Criminal Cases Involving Defendants with Autism Spectrum Disorder Charged with Online Sexual Offending' (2019) 66 *International Journal of Law and Psychiatry* 1, 1.

⁹⁶ See, eg, *Davies v The Queen* [2019] VSCA 66.

⁹⁷ Attwood (n 54) 199, 212.

⁹⁸ *Ibid* 201.

⁹⁹ Tom Oliver, 'Autism is Not a Crime' (TED Talk, TEDxMandurah, 19 October 2021) 00:06:29-00:06:49 <https://www.youtube.com/watch?v=i_j5jOadcVc&t=1s>.

¹⁰⁰ Attwood (n 54) 350.

¹⁰¹ See generally Chen (n 11).

¹⁰² See Barbara Haskins and Arturo Silva, 'Asperger's Disorder and Criminal Behavior: Forensic-Psychiatric Considerations' (2006) 34(3) *The Journal of the Academy of Psychiatry and the Law* 374, 378.

¹⁰³ Carol Gray, 'Social Stories and Comic Strip Conversations with students with Asperger Syndrome and High-Functioning Autism' in Eric Schopler, Gary Mesibov and Linda Kuncie (eds), *Asperger Syndrome or High-Functioning Autism* (Plenum Press, 1988) 167.

¹⁰⁴ Attwood (n 54) 212.

D Case Studies: Facts and Expert Evidence

Five Australian cases wherein ASD individuals were charged with criminal offences have been chosen covering each of the three overarching ASD characteristics: an inability to read or respond to social cues and social naivety; hypersensitivities; and obsessive interests.¹⁰⁵ As such, the selected cases involve a variety of offences. All the judgments were delivered in the year 2017 and onwards and involve a defendant diagnosed with ASD before the judgment was delivered.

1 Inability to read or respond to social cues and social naivety

(a) *Vucemillo v Western Australia*

*Vucemillo v Western Australia*¹⁰⁶ involved one count of using electronic communication with intent to procure a person believed to be under 16 to engage in sexual activity, and one count of possession of CEM under the *Criminal Code Act Compilation Act 1913 (WA)* ('*Criminal Code (WA)*'),¹⁰⁷ and a conviction after trial.¹⁰⁸ The appellant placed an advertisement on Craigslist for young girls, and police responded by posing as a 14-year-old girl to obtain evidence of sexually explicit conversations.¹⁰⁹ The appellant was arrested during an arranged meeting with the 'young girl',¹¹⁰ and CEM was later discovered in his house.¹¹¹ The appellant was sentenced to 2 years and 6 months imprisonment, and he appealed his sentence after having been diagnosed with ASD.¹¹²

Expert evidence was submitted by a psychiatrist, Dr Brett, and a psychologist, Ms Zuin, both of whom concurred that the appellant believed he was communicating with an adult role-playing as a 14-year-old girl, as the website was for adults only, due to his stunning naivety and inability to comprehend unwritten rules.¹¹³ Further, the appellant found it easier to communicate with others through his computer, due to difficulties interpreting non-verbal gestures,¹¹⁴ and a demonstrated lack of ToM.¹¹⁵ Regardless, the appeal from sentence was dismissed.¹¹⁶

¹⁰⁵ *DSM-5* (n 31) 299.0.

¹⁰⁶ [2017] WASCA 37.

¹⁰⁷ *Criminal Code Act Compilation Act 1913 (WA)* ss 204B(2)(b), 220 ('*Criminal Code (WA)*').

¹⁰⁸ *Vucemillo v Western Australia* [2017] WASCA 37, [67].

¹⁰⁹ *Ibid* [5]–[14].

¹¹⁰ *Ibid* [11].

¹¹¹ *Ibid* [13].

¹¹² *Ibid* [30].

¹¹³ *Ibid* [17], [33].

¹¹⁴ *Ibid*.

¹¹⁵ *Ibid* [33].

¹¹⁶ *Ibid* [57].

(b) R v Wilson

*R v Wilson*¹¹⁷ involved one count of aggravated robbery,¹¹⁸ in the company of a co-offender who was under the age of 18.¹¹⁹ The victim was lured by the two offenders to a fictitious address using an internet dating site, where the user claimed to be a 15-year-old girl, and the victim knew he was being “set-up”, but wanted to expose the person doing so.¹²⁰ At the fictitious address, the co-offender threatened the victim with a steak knife while aggressively calling the victim a ‘paedophile’.¹²¹

Both offenders demanded money, before walking the victim to an ATM where he withdrew \$100.¹²² The co-offender told the victim that he would contact him within a week to collect a further \$200, or else threatened to expose the victim as a paedophile.¹²³ The offender pled guilty,¹²⁴ and expressed remorse for his actions.¹²⁵ The offender was sentenced to imprisonment for 12 months, suspended for 12 months subject to good behaviour.¹²⁶

Professor Boer submitted the offender had a provisional diagnosis of ASD, ADHD,¹²⁷ and a history of recent suicide attempts.¹²⁸ Boer also found that the offender’s ASD symptoms resulted in a difficulty in understanding the negative intentions of his co-accused.¹²⁹ Unusually though, his Honour concluded that the offender’s unmedicated ADHD, paranoid schizophrenia and depression, as opposed to his ASD, was the cause of the offender acting as the follower in the offending, despite established ASD literature on this characteristic.¹³⁰

¹¹⁷ [2022] ACTSC 7.

¹¹⁸ *Criminal Code 2002* (ACT) s 310.

¹¹⁹ *R v Wilson* [2022] ACTSC 7, [1].

¹²⁰ *Ibid* [2].

¹²¹ *Ibid* [5].

¹²² *Ibid* [6], [7].

¹²³ *Ibid* [8].

¹²⁴ *Ibid* [27].

¹²⁵ *Ibid* [19].

¹²⁶ *Ibid* [33]–[34].

¹²⁷ *Ibid* [20].

¹²⁸ *Ibid*.

¹²⁹ *Ibid*.

¹³⁰ *Ibid* [20], [29]; Attwood (n 54) 347; Murrie (n 44) 69.

2 *Hypersensitivities*

(a) *Shortland v Stone*

*Shortland v Stone*¹³¹ involved one charge of wilfully driving a motor vehicle in a reckless manner and one charge of escape from lawful custody,¹³² for which the appellant was sentenced to 6 months and 2 years imprisonment, respectively, served concurrently, after pleading guilty.¹³³

The appellant was driving a rental car at 2:15 am, which had been reported as stolen.¹³⁴ He was stopped by police, who parked in front of and behind him.¹³⁵ After the appellant repeatedly refused to leave and unlock the rental car, Senior Constable Herbert reached through the window to open the door, before the appellant wound his window up and started the vehicle.¹³⁶ Herbert subsequently sprayed pepper spray through a small gap in the window.¹³⁷ The appellant reversed his rental car, accelerating heavily, before striking a police vehicle, causing significant damage to it.¹³⁸ He then fled and dumped the rental car, before surrendering to police.¹³⁹

Whilst the appellant knew that the vehicle was lawfully hired, he nonetheless feared being arrested.¹⁴⁰ The appellant had ASD, and his counsel contended that this rendered him unable to read people and caused difficulties in expressing himself.¹⁴¹ Undesirably however, the defence failed to provide the Court with any medical reports, and so his Honour was not satisfied that there was a nexus between the appellant's ASD and the offending.¹⁴²

¹³¹ [2019] WASC 217.

¹³² See *Road Traffic Act 1974* (WA) s 60(1A)(b); *Criminal Code* (WA) (n 107) s 146.

¹³³ *Shortland v Stone* [2019] WASC 217, [1].

¹³⁴ *Ibid* [6].

¹³⁵ *Ibid*.

¹³⁶ *Ibid*.

¹³⁷ *Ibid*.

¹³⁸ *Ibid*.

¹³⁹ *Ibid*.

¹⁴⁰ *Ibid* [7].

¹⁴¹ *Ibid* [7], [37].

¹⁴² *Ibid* [37].

(b) R v Chapman

*R v Chapman*¹⁴³ involved one count of manslaughter,¹⁴⁴ for which the accused was sentenced to 6 years imprisonment with a non-parole period of 3 years,¹⁴⁵ after pleading guilty.¹⁴⁶ One evening, after repeatedly ignoring his parents calling him to dinner,¹⁴⁷ 20-year-old Daniel Chapman emerged to explain that he would come when he was ready, as he was participating in an online game.¹⁴⁸ After increasing frustration,¹⁴⁹ when Daniel's father went to his bedroom to remove the cables from his computer,¹⁵⁰ Daniel picked up a knife from his medieval weaponry collection,¹⁵¹ and stabbed his father.¹⁵² Daniel's mother reported that Daniel and his father had physical altercations in the past,¹⁵³ and that his father 'was not a good father'.¹⁵⁴ Further, his Honour was satisfied that Daniel would not re-offend.¹⁵⁵

Dr Nielssen reported that Daniel suffered from a depressive illness, ASD,¹⁵⁶ and possible emerging psychotic illness.¹⁵⁷ Dr Nielssen remarked that the combination of his ASD and depressive illness together with possible Selective Serotonin Reuptake Inhibitor ('SSRI') withdrawal led to an abnormality of mind such that he was unable to consider the potential consequences of his actions, nor control his actions.¹⁵⁸ Dr Nielssen confirmed that Daniel's ASD caused him to view the events in a more catastrophic way than another person, thereby causing an extreme overreaction.¹⁵⁹

¹⁴³ [2018] NSWSC 1741.

¹⁴⁴ *Crimes Act 1900* (NSW) s 24.

¹⁴⁵ *R v Chapman* [2018] NSWSC 1741, [42].

¹⁴⁶ *Ibid* [30].

¹⁴⁷ *Ibid* [7].

¹⁴⁸ *Ibid* [1]–[2], [7].

¹⁴⁹ *Ibid* [8].

¹⁵⁰ *Ibid* [9].

¹⁵¹ *Ibid* [4], [21].

¹⁵² *Ibid* [9].

¹⁵³ *Ibid* [14].

¹⁵⁴ *Ibid* [16].

¹⁵⁵ *Ibid* [28].

¹⁵⁶ See also *ibid* [5].

¹⁵⁷ *Ibid* [22].

¹⁵⁸ *Ibid*.

¹⁵⁹ *Ibid* [37]. Cf *ibid* [23]: Professor Greenberg, who did not examine Daniel, expressed that Daniel's anger was not irrational but was goal-directed towards his father, with there being no causal connection between his conditions and the offending.

3 Obsessive Interests

(a) Cluett v The Queen

*Cluett v The Queen*¹⁶⁰ involved one count of possession of CEM, and two counts of using a carriage service to access child pornography material.¹⁶¹ The 61-year-old appellant was of prior good record.¹⁶² He pled guilty,¹⁶³ and was sentenced to 9 months imprisonment,¹⁶⁴ to be released after 6 months.¹⁶⁵ The appellant appealed on the ground that immediate imprisonment was manifestly excessive,¹⁶⁶ and was released forthwith.¹⁶⁷

The appellant was sitting outside a delicatessen in a hunched over position, watching a video on his phone.¹⁶⁸ Police drove past, parking nearby, and the appellant walked away but was stopped.¹⁶⁹ On the phone, police observed a video of a young girl without clothing from the waist down.¹⁷⁰ The appellant asserted that the video was in relation to 'study'.¹⁷¹

Data extraction of his mobile phone located 28 images of CEM.¹⁷² The phone also contained images of Nazi death camps depicting naked and undernourished adults and children, including piles of bodies.¹⁷³

Psychiatrist Dr Bala concurred with other experts in indicating a likely diagnosis of ASD,¹⁷⁴ in having:¹⁷⁵

1. *deficits in developing, maintaining and understanding relationships: which resulted in him preferring his own company and engaging in solitary activities;*¹⁷⁶

¹⁶⁰ [2019] WASCA 111.

¹⁶¹ See *Criminal Code (WA)* (n 107) s 220; *Criminal Code (Cth)* s 474.19(1)(a)(i).

¹⁶² *Cluett v The Queen* [2019] WASCA 111, 2.

¹⁶³ *Ibid* [21].

¹⁶⁴ *Ibid* [1].

¹⁶⁵ *Ibid* [2], through a recognisance order.

¹⁶⁶ *Ibid* [3].

¹⁶⁷ *Ibid*.

¹⁶⁸ *Ibid* [7].

¹⁶⁹ *Ibid*, after repeated requests.

¹⁷⁰ *Ibid* [9].

¹⁷¹ *Ibid* [10].

¹⁷² *Ibid* [12]–[13].

¹⁷³ *Ibid* [14].

¹⁷⁴ *Ibid* [30], [32], [35].

¹⁷⁵ *DSM-5* (n 31) 299.0.

¹⁷⁶ *Cluett v The Queen* [2019] WASCA 111, [32] para (a).

2. *restricted, repetitive patterns of behaviour and interests*: in his stereotyped motor movements, eccentric fixation on young children, childhood trauma, war and military, and a preoccupation with researching and writing about this;¹⁷⁷ and
3. some intellectual impairment.¹⁷⁸

Dr Bala stated that he possessed a small amount of CEM, accessed through a mainstream website, rather than a CEM specific website or forum.¹⁷⁹ The Court accepted that the appellant's offences were not motivated by a sexual attraction towards children,¹⁸⁰ and instead found that the fixation on his 'research' led him to access the CEM.¹⁸¹ Whilst there was no rational basis for viewing the CEM for that purpose, the appellant's lack of rationality was a product of his ASD.¹⁸²

III COMMON ASD DEFENCES, DEFICIENCIES THEREOF

This article will now introduce the main defences commonly open to ASD individuals, being insanity, mistake of fact, accident, and self-defence. As three of the five key cases analysed happen to have been from the Western Australian jurisdiction, the *Criminal Code (WA)* will be the focus of the analysis for the various defences.

A Insanity

Per s 27 of the *Criminal Code (WA)*, a defendant is not criminally responsible for an act or omission on account of unsoundness of mind if, at the time of the impugned act or omission, the defendant was in a state of mental impairment such that there was an absence of the:¹⁸³

1. capacity to understand what they are doing;
2. capacity to control their actions; or
3. capacity to know that they ought not to do the act or make the omission.

¹⁷⁷ Ibid [32] para (b).

¹⁷⁸ Ibid [32] para (c).

¹⁷⁹ Ibid [33].

¹⁸⁰ Ibid [68].

¹⁸¹ Ibid [74].

¹⁸² Ibid. See also ibid [34].

¹⁸³ *Criminal Code (WA)* (n 107) s 27(1).

One of these capacities must be absent for the defence to apply,¹⁸⁴ and evidence of insanity is admissible to negate the specific intention element of the offence.¹⁸⁵ The first capacity relates to the inability to understand the physical effects of one's act(s). The second capacity, to control one's actions, relates to conduct that is independent of the exercise of will; it accepts the 'uncontrollable' or 'irresistible' impulse medical theory as falling into the insane category.¹⁸⁶ The third consideration assesses the capacity to know that the act (or omission) was against the moral standards of the community, 'having regard to the everyday standards of reasonable people'.¹⁸⁷

Every person is presumed to be of sound mind at any time, until the contrary is proved,¹⁸⁸ on the balance of probabilities.¹⁸⁹ Contrastingly, for all other defences, the evidentiary onus is on the accused, and subsequently, the persuasive onus is on the prosecution to disprove the defence beyond reasonable doubt.¹⁹⁰ If the defence is successful, a verdict of 'not guilty by reason of unsoundness of mind' is to be returned,¹⁹¹ and the individual will be given a custody order, a community supervision order, or an order that they be released unconditionally.¹⁹²

B Mistake of Fact

The mistake of fact defence arises from section 24 of the *Criminal Code (WA)*, the elements of which are that a person does, or omits to do, an act under an honest and reasonable, albeit mistaken, belief in the existence of any state of things. Where all these elements are met, the person is not criminally responsible for any act or omission to any greater extent than if the real state of things had been as the person believed them to exist.¹⁹³

There exists conflicting authority on whether the state of things must be in the 'present'.¹⁹⁴ Further, the accused person must have had an actual, positively held

¹⁸⁴ See generally *Hawkins v R* (1994) 179 CLR 500.

¹⁸⁵ Ibid [13]. See also Ian Freckelton, 'Autism Spectrum Disorder: Forensic Issues and Challenges for Mental Health Professionals and Courts' (2013) 26(5) *Journal of Applied Research in Intellectual Disabilities* 420, 428–9, 431 ('Forensic').

¹⁸⁶ *R v Moore* (1908) 10 WALR 64, 66; *Wray v R* (1930) 33 WALR 67.

¹⁸⁷ *R v Porter* (1933) 55 CLR 182, 190. See also *Sodeman v R* (1936) 55 CLR 192, 215; *Stapleton v R* (1952) 86 CLR 358.

¹⁸⁸ *Criminal Code (WA)* (n 107) s 26.

¹⁸⁹ *R v Falconer* (1990) 171 CLR 30, 42.

¹⁹⁰ *Loveday v Ayre* [1955] St R Qd 264, 267–8; *R v Taiters* [1997] 1 Qd R 333, 338.

¹⁹¹ *Criminal Procedure Act 2004 (WA)* s 146.

¹⁹² *Criminal Law (Mental Impairment) Act 2023 (WA)* ss 45, 249.

¹⁹³ *Criminal Code (WA)* (n 107) s 24.

¹⁹⁴ See, eg, *R v Gould and Barnes* [1960] Qd R 283; *R v Pacino* (1998) 105 A Crim R 309, 320. See also Haskins (n 102) 378: the defence can be used where the operative mistake relates to the future consequences/outcomes of an ASD individual's actions, such as on another person's mental state.

belief when subjectively and objectively assessed.¹⁹⁵ Albeit, a person who is ignorant of 'the state of things' cannot use this defence.¹⁹⁶ Finally, a mistake will not be reasonable if the belief is not based on any solid information.¹⁹⁷

C Accident

This defence is prescribed in s 23B(2) of the *Criminal Code (WA)* such that: 'A person is not criminally responsible for an event which occurs by accident.' Said 'event' refers to the result or consequence of the person's conduct.¹⁹⁸ Three elements emerge from *Kaparonovski v The Queen*,¹⁹⁹ being that the mistake was:

1. not intended by the accused;
2. not foreseen by the accused; and
3. not reasonably foreseeable.

When testing the reasonable foreseeability element, a jury is to be directed that, in considering the possibility of an outcome, it should exclude possibilities that are no more than remote or speculative.²⁰⁰

D Self-defence

A harmful act is lawful if the act is done in self-defence.²⁰¹ A person's harmful act is done in self-defence, if:²⁰²

1. they believe their act is necessary to defend themselves, or another person, from a harmful act, including a harmful act that is not imminent;
2. their harmful act is, subjectively, a reasonable response in the circumstances as they believe them to be; and
3. there are objectively reasonable grounds for those beliefs.

¹⁹⁵ *G J Coles & Coy Ltd v Goldsworthy* [1985] WAR 183. See also *Daniels v The Queen* (1990) 2 WAR 435.

¹⁹⁶ See, eg, *Larsen v G J Coles and Co Ltd* (1984) 13 A Crim R 109. But see *R v TS* (2008) EWCA Crim 6, [34], which acts as authority for the proposition that evidence of a defendant's ASD would help a court in understanding why a defendant acted under an honest and reasonable belief in what the defendant believed the situation to be, even where the facts are as the victim said they were.

¹⁹⁷ See *Larsen v G J Coles and Co Ltd* (1984) 13 A Crim R 109.

¹⁹⁸ *Kaparonovski v The Queen* (1973) 133 CLR 209, 231.

¹⁹⁹ *Ibid*. See also *R v Taiters* [1997] 1 Qd R 333, 338.

²⁰⁰ *R v Taiters* [1997] 1 Qd R 333. See also *Stanik v The Queen* (2001) 125 A Crim R 372; *R v Seminara* (2002) 128 A Crim R 567.

²⁰¹ *Criminal Code (WA)* (n 107) s 248(2).

²⁰² *Ibid* s 248(4).

E Case Studies: Defences

This article will now evaluate whether ASD individuals are adequately protected by these four common defences, using each of the five key cases, where ASD symptomology is the cause of offending. Most of the publicly available judgments used are appeals of sentencing, and so if defences are not explicitly raised in a case, this article will nonetheless test the application of defences that are open, based on ASD symptomology and the impugned offence.

1 *Inability to read or respond to social cues and social naivety*

(a) *Vucemillo v Western Australia*

Interestingly, the appellant, upon receiving his ASD diagnosis post-sentencing, opted to appeal his sentence. Had the appellant appealed his criminal liability, insanity and mistake of fact could have been considered, albeit this article submits both would have been unsuccessful.

(i) *Insanity*

The appellant had the capacity to understand the physical effects of what he did, despite the appellant's deficits in socio-emotional reciprocity, in making conversation and in non-verbal communication.²⁰³ These deficits saw him spending much of his time on his computer to interact with the world around him.²⁰⁴ Nonetheless, the appellant was not perceiving a different subjective reality and thus an altered state of mind.²⁰⁵

As for the capacity of control, despite operating under what Dr Brett described as 'stunning naivety',²⁰⁶ and a 'limited range of interests',²⁰⁷ it is unlikely that his conduct would be declared a result of any 'irresistible impulse',²⁰⁸ or 'overwhelming compulsion' from his ASD.²⁰⁹

In terms of the capacity to understand the wrongfulness of his conduct, despite Dr Brett submitting that the appellant is a stickler for rules whilst not understanding unwritten rules, he would be found as having been rationally able to understand why

²⁰³ *Vucemillo v Western Australia* [2017] WASCA 37, [57], [33] (Dr Brett).

²⁰⁴ *Ibid.*

²⁰⁵ Justin Barry-Walsh and Paul Mullen, 'Forensic Aspects of Asperger's Syndrome' (2004) 15(1) *The Journal of Forensic Psychiatry & Psychology* 96, 98.

²⁰⁶ *Vucemillo v Western Australia* [2017] WASCA 37, [40].

²⁰⁷ *Ibid* [33].

²⁰⁸ *Wray v R* (1930) 33 WALR 67. See also *R v Moore* (1908) 10 WALR 64, 66.

²⁰⁹ Alexander Westphal and Rachel Loftin, 'Autism Spectrum Disorder and Criminal Defense' (2017) 47(12) *Psychiatric Annals* 584, 586.

ordinary people deem his actions to be wrong.²¹⁰ Concerningly, this is despite common sense dictating that if one cannot understand basic unwritten rules, one cannot understand morality (also unwritten). Further, the appellant had a demonstrated lack of ToM,²¹¹ which is vital for moral reasoning capacity.²¹² Moreover, studies show that ASD individuals can be unaware of the impact of CEM offences on victims,²¹³ and can even fail to consider CEM as being illegal.²¹⁴

(ii) Mistake of fact

A 'state of things' is present here, in the appellant's mistaken belief that the 'young girl' was an adult simply role-playing as a 14-year-old.²¹⁵

However, the Court found that the appellant's mistaken belief was not an honest one,²¹⁶ and did so in direct contradiction to Dr Brett's submission,²¹⁷ which Dr Brett supported by citing the appellant's 'stunning naivety',²¹⁸ in believing that the website was for adults only, as an example of how his ASD brain functions.²¹⁹ This is due to his ToM deficiency, which equated to an inability to conceive that another person would breach the website's rule of having to be an adult to use it, seeing as the appellant himself rigidly adheres to learnt rules.²²⁰

Necessarily, the Court did not need to consider the reasonableness of the appellant's mistake, which would have unlikely been met anyhow.²²¹ This is asserted as the standard of the objective test in it being reasonable for the individual to have made the mistake, is unlikely to be reduced for individuals whose capacity for reasonable judgement is limited or impaired, but which does not amount to insanity.²²² This

²¹⁰ Ibid. See also *R v Chaulk* (1991) 62 CCC (3d) 193; *Willgoss v R* (1960) 105 CLR 295.

²¹¹ Ibid.

²¹² Grant (n 25) 66–70, 73; Robertson (n 25) ch 7.

²¹³ Allely (n 95) 1.

²¹⁴ Gary Mesibov and Melissa Sreckovic, 'Child and Juvenile Pornography and Autism Spectrum Disorder' in Lawrence Dubin and Emily Horowitz (eds), *Caught in the Web of the Criminal Justice System: Autism, Developmental Disabilities, and Sex Offenses* (Jessica Kingsley Publishers, 2017) 64, 76.

²¹⁵ *Vucemillo v Western Australia* [2017] WASCA 37, [17].

²¹⁶ Ibid [41], [51].

²¹⁷ Ibid [33].

²¹⁸ Ibid [40].

²¹⁹ Ibid [33].

²²⁰ Wing (n 27) 175; *Myths* (n 27) 39; 'Hippler Brief' (n 27) 777.

²²¹ See, eg, *Hopper v The Queen* [2003] WASCA 153, which acts as authority for the proposition that ASD-attributable impairments cannot excuse misinterpreting clear and unequivocal commands. But see *R v TS* (2008) EWCA Crim 6, [34]: except for when the situation is sufficiently vague enough that the defendant's ASD could compromise the defendant's ability to adequately understand the victim's intention.

²²² *R v Richards and Gregory* [1998] 2 VR 1. See also *R v Mrzljak* [2004] QCA 420, [24]; *Aubertin v Western Australia* [2006] WASCA 229, [42].

view is bolstered by the extreme rarity of instances wherein a mistake of fact defence is successful for accused individuals with a mental impairment,²²³ even though ‘disabilities’ are relevant to an assessment of reasonableness for the defence.²²⁴

(b) *R v Wilson*

Had the offender not pled guilty, only insanity could have been considered, albeit this article submits that it would have been unsuccessful.

(i) *Insanity*

The capacity of the offender to understand the physical effects of what he did was unlikely to be found as absent,²²⁵ for the offender’s deficits in ‘social relatedness’ and communication²²⁶ were unlikely to amount to the offender having perceived a different subjective reality and thus an altered state of mind.²²⁷

The offender also had the capacity to control his actions.²²⁸ Despite the offender’s difficulty in navigating social cues, this did not amount to any ‘irresistible impulse’ or ‘overwhelming compulsion’ arising from his ASD.²²⁹

What is most contentious is whether the offender had the capacity to understand the wrongfulness of his conduct. The expert evidence suggested that the offender had deficits in ‘social relatedness’ and communication, including ‘a potential inability to understand the negative intentions of his co-accused.’²³⁰ This was in circumstances where his Honour found the offender to have been the follower rather than the leader in the offending.²³¹

Ultimately, the offender would have rationally been found to have been able to understand why ordinary people deem his actions to be wrong:²³² especially seeing

²²³ *R v Mrzljak* [2004] QCA 420, [24] (McMurdo P): ‘I have been able to find no example since the passing of the *Criminal Code Act 1899* (Qld) where a person who makes an honest mistake of fact because of a natural mental infirmity causing the person to do an act which would otherwise constitute an offence has been able to avoid criminal responsibility’.

²²⁴ See *Aubertin v Western Australia* [2006] WASCA 229, [43].

²²⁵ The same three elements of insanity apply in the ACT jurisdiction as they do in WA: *Criminal Code 2002* (ACT) s 28.

²²⁶ *R v Wilson* [2022] ACTSC 7, [20].

²²⁷ Barry-Walsh (n 205) 98.

²²⁸ This is notwithstanding the offender’s unmedicated ADHD which causes the offender ‘hyperactivity-impulsivity’: *R v Wilson* [2022] ACTSC 7, [20].

²²⁹ Westphal (n 209) 586.

²³⁰ *R v Wilson* [2022] ACTSC 7, [20].

²³¹ *Ibid* [5], [20]. This proclivity is consistent with ASD literature on offending: Attwood (n 54) 347; Murrie (n 44) 64, 69.

²³² *R v Porter* (1933) 55 CLR 182, 190.

as the offender expressed remorse for his actions in the legal proceedings,²³³ notwithstanding this remorse likely being mutually exclusive of the offender's capacity for remorse at the time of the offending, due to ToM deficiencies.²³⁴

2 *Hypersensitivities*

(a) *Shortland v Stone*

Had the appellant not pled guilty, insanity, accident, and self-defence could have been considered, albeit this article submits that these defences would have been unsuccessful.

(i) *Insanity*

The appellant had the capacity to understand the physical effects of what he did, for the appellant's inability to 'read people'²³⁵ did not amount to the appellant having perceived a different subjective reality and thus an altered state of mind.²³⁶

What is most contentious here is that the appellant had the capacity to control his actions, despite the appellant's symptomatically-ASD hypersensitivities.²³⁷ The appellant being sprayed with pepper spray, after Constable Herbert reached through the appellant's vehicle window, would have caused great pain and discomfort to which ASD individuals are notoriously hypersensitive.²³⁸ ASD individuals symptomatically overreact and become distressed upon experiencing a sensory overload.²³⁹ This drove the appellant to adopt the sensory-avoidant behaviour of escaping from the stimuli,²⁴⁰ hence why he accelerated away from the sensory input, and thereby committed a crime he had not contemplated,²⁴¹ due to his loss of control.²⁴² The fact that the appellant surrendered to police later that day is consistent with this. Nonetheless, this is unlikely to have been found to amount to any 'irresistible impulse', or 'overwhelming compulsion' arising from his ASD.²⁴³

²³³ *R v Wilson* [2022] ACTSC 7, [19].

²³⁴ *Essay ToM* (n 58) 51. See also Henry Schlinger, 'Theory of Mind: An Overview and Behavioural Perspective' (2009) 59(3) *The Psychological Record* 435, 436.

²³⁵ *Shortland v Stone* [2019] WASC 217, [37].

²³⁶ Barry-Walsh (n 205) 98.

²³⁷ Sally Rogers and Sally Ozonoff, 'Annotation: What Do We Know About Sensory Dysfunction in Autism? A Critical Review of the Empirical Evidence' (2005) 46(12) *Journal of Child Psychology and Psychiatry* 1255, 1255–68. See also Suarez (n 64).

²³⁸ Attwood (n 54) 284.

²³⁹ See generally Suarez (n 64). See also Crasta (n 67) 7.

²⁴⁰ McCormick (n 74) 574.

²⁴¹ Howlin (n 45) 306; Wauhop (n 40) 965.

²⁴² *Meltdowns* (n 70).

²⁴³ Westphal (n 209) 586.

The appellant would also be found to have had the capacity to understand the wrongfulness of his conduct. It is dubious how the defendant could have grasped the immorality of his actions if he failed to interpret Herbert's actions in the first place,²⁴⁴ perhaps due to reduced ToM capacity,²⁴⁵ which is vital for moral reasoning.²⁴⁶ Nonetheless, the appellant would be found to be capable of understanding why ordinary people deem his actions to be wrong.²⁴⁷

(ii) Accident

In respect of the reckless driving charge being an accident, the appellant intended to escape from what he found as the overwhelming sensory stimulus of Herbert reaching into the appellant's vehicle window and spraying pepper spray at the appellant. In escaping, he adopted a sensory-avoidant behaviour to cope with his sensory overload.²⁴⁸

Likewise, the appellant did not foresee, at the time of his mistake, that he could cause damage to the police vehicle, due to losing control temporarily of his behaviour from the pain and discomfort to which he was hypersensitive.²⁴⁹ This would have clouded his judgement of being able to escape without driving in such a reckless manner. This is especially so when ASD symptomatically renders deficiencies in foreseeing the impact of one's actions.²⁵⁰

However, the appellant's mistake that he could escape the overwhelming sensory input without driving in a reckless manner, was reasonably foreseeable, as objectively, there were police vehicles both in front of and behind the appellant's vehicle.

(iii) Self-defence

Research suggests that ASD offending can arise from inaccurately presuming that they are in danger and need to defend themselves, due to an inability to interpret and predict the intentions, actions, and speech of others.²⁵¹ Here, the appellant knew that the vehicle was not stolen, yet he nonetheless feared being arrested,²⁵² and due to difficulties in expressing himself, he was unable to convey this to police.²⁵³

²⁴⁴ *Shortland v Stone* [2019] WASC 217, [7], [37].

²⁴⁵ See *Essay ToM* (n 58) 51. Schlinger (n 234) 436.

²⁴⁶ Grant (n 25) 66–70, 73; Robertson (n 25) ch 7.

²⁴⁷ *R v Porter* (1933) 55 CLR 182, 190.

²⁴⁸ McCormick (n 74) 574.

²⁴⁹ Attwood (n 54) 284.

²⁵⁰ See Wauhop (n 40) 965, 983; Strickland (n 39) 13.

²⁵¹ Grant (n 25) 66; Robertson (n 25) ch 3.3.2.6.

²⁵² *Shortland v Stone* [2019] WASC 217, [7].

²⁵³ *Ibid* [7], [37].

Further, the fact that five police officers arrived at the scene incrementally would have been especially intimidating for the appellant. Thus, when Herbert reached into his vehicle window and sprayed him with pepper spray, the appellant was perceiving a different subjective reality,²⁵⁴ to the effect that he was in danger and needed to escape.²⁵⁵

The appellant's senses tritely became overstimulated when he was sprayed with pepper spray.²⁵⁶ This was quickly channelled into aggression and an instantaneous physical response without careful thought,²⁵⁷ thus, causing him to strike a police vehicle in the course of escaping from lawful custody.²⁵⁸ Nonetheless, self-defence was not viable here, including because escaping from lawful custody or reckless driving are not 'reasonable' harmful acts for the purposes of self-defence.²⁵⁹ Furthermore, Herbert's pepper spraying here was likely a lawful act in the course of Herbert's role as a police officer.²⁶⁰

(b) *R v Chapman*

Had Daniel not pled guilty, insanity and self-defence could have been considered. Whilst his Honour found that the control element of the insanity defence was satisfied, this article argues that a plea of self-defence would have been unsuccessful.

(i) *Insanity*

His Honour observed that the insanity defence was irrelevant in this case due to the plea of guilty to manslaughter, rather than murder.²⁶¹ Insightfully, his Honour concluded that Daniel was unable to control himself in what was 'a momentary lapse that resulted from accumulated frustrations over many years' with his father, which was 'particularly associated' with his ASD, SSRI withdrawal and depressive illness.²⁶²

Accordingly, *R v Chapman*²⁶³ operates as an extremely rare instance wherein an Australian court acknowledges that ASD-associated symptoms resulted in a defendant being unable to control offending behaviour. While spasmodic, it

²⁵⁴ Barry-Walsh (n 205) 98.

²⁵⁵ Grant (n 25) 66; Robertson (n 25) ch 3.3.2.6.

²⁵⁶ *Shortland v Stone* [2019] WASC 217, [6].

²⁵⁷ Attwood (n 54) 155.

²⁵⁸ *Shortland v Stone* [2019] WASC 217, [6].

²⁵⁹ *Criminal Code (WA)* (n 107) s 248(4)(b).

²⁶⁰ *Ibid* s 248(5).

²⁶¹ *R v Chapman* [2018] NSWSC 1741, [36].

²⁶² *Ibid*.

²⁶³ See generally *ibid*.

demonstrates the potential for insanity to be a successful defence for ASD individuals.

(ii) Self-defence

Daniel's senses evidently became overwhelmed, causing him to overreact on account of distress and high anxiety,²⁶⁴ which stemmed from the frustration, irritation and discomfort of his father removing the cables from his computer whilst he was in the middle of a computer game,²⁶⁵ to which he was hypersensitive.²⁶⁶ This was quickly channelled into aggression and an instantaneous physical response without careful thought,²⁶⁷ which saw him stab his father with his medieval weapon.²⁶⁸ Nonetheless, self-defence was not viable here, as Daniel's act of stabbing was not objectively reasonable in the circumstances.²⁶⁹

3 *Obsessive interests*

(a) Cluett v The Queen

Had the appellant not pled guilty, only insanity could have been considered, albeit it is submitted that insanity would have been unsuccessful.

(i) Insanity

It is unlikely that the appellant lacked the capacity to understand the physical consequences of his actions, for his deficits in 'understanding relationships' with 'some intellectual impairment'²⁷⁰ were unlikely to amount to the appellant having perceived a different subjective reality and thus an altered state of mind.²⁷¹

The appellant's capacity for control, which is the most contentious element, was also unlikely to be found as being non-existent, as despite his obsessive preoccupation with researching young children, childhood trauma, war, and the military,²⁷² this is unlikely to have been found as amounting to an 'irresistible impulse', or 'overwhelming compulsion' arising from his ASD.²⁷³

²⁶⁴ Wauhop (n 40) 965. See also *DSM-5* (n 31) 50, 54; Wing (n 27) 47–8, 50–2.

²⁶⁵ *R v Chapman* [2018] NSWSC 1741, [9].

²⁶⁶ Attwood (n 54) 284.

²⁶⁷ *Ibid* 155.

²⁶⁸ *R v Chapman* [2018] NSWSC 1741, [4], [9], [21].

²⁶⁹ *Crimes Act 1900* (NSW) s 418(2)(a).

²⁷⁰ *Cluett v The Queen* [2019] WASCA 111, [32].

²⁷¹ Barry-Walsh (n 205) 98.

²⁷² *Cluett v The Queen* [2019] WASCA 111, [32].

²⁷³ Westphal (n 209) 586.

Ultimately, the Court found that his fixation on his 'research' led him to obtain access to the CEM.²⁷⁴ This is consistent with the literature, in that the extremity of the fixation on the ASD obsessive interest leads to a tendency to ignore social and legal consequences.²⁷⁵ It is unlikely, however, that the Court would have found an absence of his capacity for control, as a corollary of finding his ASD to have been a mere 'contributing factor' to his offending.²⁷⁶ That said, an inability to control the time devoted to an obsessive interest is indicative of the development of an obsessive-compulsive disorder, which is common in ASD individuals.²⁷⁷ As can be observed in *People v McCollum*, where according to one Dr Tarle, Darius McCollum thought about the transit system '85 percent of the time. He says he tried to stop. He can go about a month and then the urge is too great, he has to do it again.'²⁷⁸

As for the appellant's capacity to understand the wrongfulness of his conduct, he 'experience[d] limited sexual pleasure and failed to understand the greater impact of his decision to download [CEM], as he does not complicate life with emotions'.²⁷⁹ This is consistent with the literature, which shows that ASD individuals can be unaware of the impact of CEM offences on victims,²⁸⁰ and can even fail to consider CEM as being illegal.²⁸¹ Further, as is symptomatic of ASD,²⁸² the appellant's CEM-based research developed from a curiosity to understand relationships and emotions.²⁸³

Unfortunately for the appellant, he remarked that he could not have achieved this research by any legal means and was going to delete the CEM.²⁸⁴ This awareness meant that he was found as 'appreciat[ing] the illegality of his conduct'.²⁸⁵ Again, this was despite reduced ToM capacity in ASD individuals,²⁸⁶ which is vital for moral reasoning.²⁸⁷

²⁷⁴ *Cluett v The Queen* [2019] WASCA 111, [74].

²⁷⁵ See Haskins (n 102) 378.

²⁷⁶ *Cluett v The Queen* [2019] WASCA 111, [74].

²⁷⁷ Attwood (n 54) 212.

²⁷⁸ 2018 NY Slip Op 51424(U), 16.

²⁷⁹ *Cluett v The Queen* [2019] WASCA 111, [35] (Ms Sweeny's psychological report).

²⁸⁰ Allely (n 95) 1.

²⁸¹ Mesibov (n 214) 76.

²⁸² Attwood (n 54) 205.

²⁸³ *Cluett v The Queen* [2019] WASCA 111, [19], [36].

²⁸⁴ Ibid.

²⁸⁵ Ibid [74].

²⁸⁶ *Essay ToM* (n 58) 51. See also Schlinger (n 234) 436.

²⁸⁷ Grant (n 25) 66–70, 73; Robertson (n 25) ch 7.

IV FINDINGS, PROPOSED REFORMS AND NOVEL ASD DEFENCE

A Defence Availability for ASD Symptomology Based on Key Cases

1 Insanity

Pursuant to the key cases analysed in this article, not only is it most difficult for ASD individuals to meet the ‘complete deprivation’ threshold for any of the three insanity capacities, additionally, ASD is unlikely to be found as a mental impairment within the insanity defence in the first place. For instance, according to the common law, the term ‘mental impairment’ in s 27(1) of the *Criminal Code (WA)* encompasses mental diseases or psychoses, such as schizophrenia.²⁸⁸ The concept of mental impairment has even been extended to: psychomotor epilepsy;²⁸⁹ hyperglycaemia;²⁹⁰ arteriosclerosis;²⁹¹ and *delirium tremens*.²⁹² Ultimately, research demonstrates that insanity caters predominantly to those with psychotic illnesses, and is not designed to address ASD.²⁹³ This is despite the fact that as many as a quarter of all ASD individuals develop a psychotic illness.²⁹⁴ Nonetheless, insanity remains the most suitable existing defence for ASD individuals.

The analysis of all five key cases found that no ASD individual perceived a different subjective reality and thus possessed an altered state of mind,²⁹⁵ in respect to the absence of the capacity to understand, despite ToM deficiencies.²⁹⁶ As for the control capacity, the ‘irresistible impulse’ standard was too high a threshold to meet.²⁹⁷ Albeit, per *R v Chapman*,²⁹⁸ rare examples do exist wherein Australian courts acknowledge that ASD-associated symptoms can result in a defendant being unable to control offending behaviour.²⁹⁹ As for the capacity to understand the wrongfulness of their acts or omissions, even where the ASD individual was unable to distinguish right from wrong,³⁰⁰ they were nonetheless rationally able to at least understand why ordinary people deemed their actions to be wrong.³⁰¹

²⁸⁸ See *Bratty v Attorney-General (Northern Ireland)* [1963] AC 386, 412.

²⁸⁹ *Ibid*.

²⁹⁰ See *R v Hennessy* [1989] 2 All ER 9, 14.

²⁹¹ See *R v Kemp* [1957] 1 QB 399.

²⁹² A disease associated with alcohol ingestion. See, eg, *Dearnley v R* [1947] St R Qd 51, 61.

²⁹³ Westphal (n 209) 586.

²⁹⁴ *R v Chapman* [2018] NSWSC 1741, [22] (Dr Nielssen).

²⁹⁵ Barry-Walsh (n 205) 98.

²⁹⁶ See *Essay ToM* (n 58) 51.

²⁹⁷ *Wray v R* (1930) 33 WALR 67. See also *R v Moore* (1908) 10 WALR 64, 66.

²⁹⁸ [2018] NSWSC 1741.

²⁹⁹ *Ibid* [36].

³⁰⁰ Allely (n 95) 8.

³⁰¹ *R v Porter* (1933) 55 CLR 182, 190.

This article found that in the cases of *Vucemillo v Western Australia*³⁰² and *R v Wilson*,³⁰³ which involved offences caused by the social naivety ASD symptom, the capacity to understand the wrongfulness of one's act was the most favourable and contentious element for the ASD individuals. This is consistent with the literature on ASD individuals symptomatically lacking ToM capacity,³⁰⁴ with ToM being vital for any moral reasoning capability.³⁰⁵

As for the offending in *Shortland v Stone*³⁰⁶ and *R v Chapman*,³⁰⁷ which was caused by the hypersensitivity ASD symptom, the capacity for control was the most contentious element. This is also consistent with the literature showing that ASD individuals symptomatically overreact and become distressed upon experiencing a sensory overload,³⁰⁸ which predisposes the ASD individuals to committing crimes not contemplated,³⁰⁹ and thus causing an unintended result,³¹⁰ due to their loss of control.³¹¹

Likewise, the offending in *Cluett v The Queen*³¹² was caused by the obsessive interest symptom, and the capacity for control was the most contentious element. This is consistent with literature demonstrating that ASD obsessive interests are coupled with the obsessive desire to accumulate and catalogue objects, facts or information associated with one's special interest,³¹³ so much so that legal risks arise from the intensity and nature of the obsessive interest.³¹⁴

Moreover, an inability to control the time devoted to an obsessive interest is indicative of the development of an obsessive-compulsive disorder, which is common in ASD individuals.³¹⁵ Accordingly, the literature disagrees with the Court's finding in *Cluett v The Queen*,³¹⁶ such that his ASD was the *cause* rather than a mere

³⁰² [2017] WASCA 37.

³⁰³ [2022] ACTSC 7.

³⁰⁴ See *Essay ToM* (n 58) 51. See also Schlinger (n 234) 436.

³⁰⁵ Grant (n 25) 66–70, 73; Robertson (n 25) ch 7.

³⁰⁶ [2019] WASC 217.

³⁰⁷ [2018] NSWSC 1741.

³⁰⁸ See generally Suarez (n 64). See also Crasta (n 67) 7.

³⁰⁹ Howlin (n 45) 306; Wauhop (n 40) 965.

³¹⁰ Wauhop (n 40) 965.

³¹¹ *Meltdowns* (n 70).

³¹² [2019] WASCA 111.

³¹³ Attwood (n 54) 184.

³¹⁴ See, eg, Chen (n 11).

³¹⁵ Attwood (n 54) 212.

³¹⁶ [2019] WASCA 111.

contributing factor.³¹⁷ Overall, insanity is deficient for use by ASD individuals, with rare success.³¹⁸

2 *Mistake of fact*

The mistake of fact defence is also inadequate for ASD use.³¹⁹ The ASD individual may not meet the honest belief element due to ToM deficiencies, which can cause the ASD individual to be ignorant of 'the state of things'.³²⁰ Unsuitably, the reasonable belief element serves as the major hurdle, as the standard for the objective test is unlikely to be reduced for ASD individuals,³²¹ and the mistake is unlikely to be based on any solid information,³²² due to ToM deficits and difficulties in understanding social cues.³²³ Ultimately however, punishing a lack of foresight based upon an honest mistake of facts is an unacceptable goal for the CJS.³²⁴

3 *Self-defence*

Self-defence is unfeasible for ASD use, as the third element, the need for objectively reasonable grounds for the belief in the reasonableness of the response, is unlikely to be met.³²⁵ This can be explained by the fact that an ASD individuals' emotional intensity of expression can increase rapidly, often in response to an objectively trivial event, due to faulty emotional regulation.³²⁶ This is coupled with their inability to see the signals indicating that it would be appropriate to stop.³²⁷ Hence why they are susceptible to committing a 'harmful act' that is not objectively reasonable on account of an overreaction caused by hypersensitivities.³²⁸

Alternatively, ASD individuals are prone to inaccurately presuming that they are in danger and need to defend themselves, due to an inability to interpret and predict the intentions, actions, and speech of others,³²⁹ which could cause a harmful act to be committed from a perceived need for self-defence.

³¹⁷ Ibid [74].

³¹⁸ See Westphal (n 209) 586; Strickland (n 39) 14.

³¹⁹ See, eg, *Vucemillo v Western Australia* [2017] WASCA 37.

³²⁰ See, eg, *Larsen v G J Coles and Co Ltd* (1984) 13 A Crim R 109.

³²¹ *R v Richards and Gregory* [1998] 2 VR 1. See also *R v Mrzljak* [2004] QCA 420, [24]. But see *Aubertin v Western Australia* [2006] WASCA 229, [42].

³²² See *Larsen v G J Coles and Co Ltd* (1984) 13 A Crim R 109.

³²³ See, eg, *Vucemillo v Western Australia* [2017] WASCA 37, [33].

³²⁴ See Victor Tadros, *Criminal Responsibility* (Oxford University Press, 2005) 251.

³²⁵ See, eg, *Shortland v Stone* [2019] WASC 217; *R v Chapman* [2018] NSWSC 1741.

³²⁶ Attwood (n 54) 157.

³²⁷ Ibid 155.

³²⁸ Ibid 283–4. See also *DSM-5* (n 31) 50, 54; Wing (n 27) 47–8, 50–2.

³²⁹ Grant (n 25) 66; Robertson (n 25) ch 3.3.2.6.

For instance, in *Shortland v Stone*,³³⁰ the ASD individual's act of escaping from lawful custody does not qualify as a 'reasonable' harmful act,³³¹ and the police officer was acting lawfully and so his actions were not harmful.³³² Whilst in *R v Chapman*,³³³ Daniel stabbing his father in response to his father unplugging his computer cables was not objectively reasonable.³³⁴ Evidently, the stars need to align for self-defence to be open on the facts for ASD individuals, in there needing to be a harmful act, and a harmful act in self-defence, that is reasonable.

4 Accident

The defence of accident is also deficient for ASD use, as whilst ASD individuals' mistakes tend to be unintended, due to difficulties in foreseeing the impact of their actions,³³⁵ mistakes can be made in the course of being overwhelmed by sensory stimuli, that are deemed as reasonably foreseeable. An example can be seen in *Shortland v Stone*,³³⁶ where the ASD individual's mistaken belief that he could escape the overwhelming sensory input without driving in a reckless manner, was reasonably foreseeable. This belief was reasonably foreseeable, as there were police vehicles both in front of and behind his vehicle.

B Proposed Novel ASD Defence Scheme

This article has found that pre-existing defences are deficient or non-applicable to ASD individuals.³³⁷ Hence why an affirmative, specific, three-limbed novel defence, catering to each of the three overarching ASD symptoms, ought to be available where an individual's ASD symptoms are the underlying cause of their crimes,³³⁸ as drafted below. However, where none of the major ASD symptoms act as the cause of offending,³³⁹ the novel defence would be non-applicable, moral culpability would exist, and criminal liability will be inevitable.

³³⁰ [2019] WASC 217.

³³¹ *Criminal Code (WA)* (n 107) s 248(4)(b).

³³² *Ibid* s 248(5).

³³³ [2018] NSWSC 1741.

³³⁴ *Crimes Act 1900 (NSW)* s 418(2).

³³⁵ See Wauhop (n 40) 965, 983; Strickland (n 39) 13.

³³⁶ [2019] WASC 217.

³³⁷ See also Westphal (n 209) 586.

³³⁸ Not where a stereotypical ASD offence or 'minor crime' was committed, as is recommended in Cea (n 42) 509–17, 529. Ideally, this prospectively introduced defence scheme would be adopted into the Australian state, territory, and commonwealth criminal codes.

³³⁹ See, eg, *Davies v The Queen* [2019] VSCA 66, [632], [683].

When successful, such a defence would trigger an order being given to treat the underlying symptom causing the offending, as ASD individuals require specialised services to meet their specific responsivity needs.³⁴⁰ For instance, by way of obsessive interests causing offending, research demonstrates that whilst not an easy task,³⁴¹ steps can be taken to terminate, replace, or at the very least, modify the interest.³⁴² Albeit, due to the hitherto limited research into ASD offending, in the words of legal theorist Roger Cotterrell, 'rules cannot achieve perfect clarity in advance of all applications of them'.³⁴³

Moreover, critics in favour of criminal liability even where ASD is the cause of offending, might raise concerns to the effect that imprisonment is a necessity,³⁴⁴ yet studies show that ASD individuals do not respond effectively, nor even adequately, to mainstream correctional settings.³⁴⁵ They are also at an extremely high risk of manipulation, victimisation and bullying from other prisoners on account of their eccentricities and deficits in social communication.³⁴⁶

Other sceptics may ponder that if we have a specific ASD defence, that, as a matter of consistency, there should be a specific ADHD, acquired brain injury, or diabetes-related defence, or any other medical category that is ill-served by current criminal defences. Such sceptics may question why one of the pre-existing defences, such as insanity (the most viable defence for ASD use), cannot be amended to attend to the contemporary scientific knowledge existent on ASD.

³⁴⁰ Strickland (n 39) 14.

³⁴¹ Attwood (n 54) 204.

³⁴² Gray (n 103) 167.

³⁴³ Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (Oxford University Press, 2nd ed, 2003) 131.

³⁴⁴ Jill Pozzo, Matthew Roche and Steven Silverstein, 'Violent Behavior in Autism Spectrum Disorders: Who's at Risk?' (2018) 39 *Aggression and Violent Behaviour* 53, 53.

³⁴⁵ Donald Andrews and James Bonta, *The Psychology of Criminal Conduct* (Anderson Publishing, 5th ed, 1994); Ann Browning and Laura Caulfield, 'The Prevalence and Treatment of People with Asperger's Syndrome in the Criminal Justice System' (2011) 11(2) *Criminology & Criminal Justice* 165, 173. See also Lauren E Gook, 'Offenders with Autism Spectrum Disorder: Screening, Characteristics and Staff Awareness' (PhD Thesis, Deakin University, 2014) 68.

³⁴⁶ Jospeter Mbuba, 'Lethal Rejection: Recounting Offenders' Experience in Prison and Societal Reaction Post Release' (2012) 92(2) *The Prison Journal* 231; Gook (n 345) 68. See, eg, *Cluett v The Queen* [2019] WASCA 111, [76]. See also *R v Chapman* [2018] NSWSC 1741, [33], [38], wherein the ASD individual had been bashed by an inmate, rendering him hospitalised for six days, needing twelve stitches in his mouth and lip, with a broken tooth, and bruising.

By way of a response, this article's scope has strictly focused on defences open to ASD individuals and has demonstrated that, along with the rise in the number of accused persons raising ASD diagnoses,³⁴⁷ pre-existing defences are deficient or non-applicable to ASD individuals, where their symptoms are the underlying cause of their offending.³⁴⁸ If such literature exists on other conditions, as has been set out for ASD in this article, then this article recommends that such reforms be advocated for.

Secondly, this article's proposed ASD defence is not idiosyncratic or unprecedented in the sense that the defence of insanity caters to psychotic illnesses, such as schizophrenia,³⁴⁹ and has been extended to: psychomotor epilepsy,³⁵⁰ hyperglycaemia,³⁵¹ arteriosclerosis,³⁵² and *delirium tremens*.³⁵³ However, the legal definition has not advanced significantly since 1843.³⁵⁴ This is also not the first article to propose a novel ASD defence.³⁵⁵

Moreover, as has been highlighted, the three established capacities comprising the insanity defence are deficient for ASD use as, even where offending is caused by one of the three overarching ASD symptoms, none of the three insanity capacities are found to be absent, per the aforementioned. Accordingly, there is no room to amend the insanity defence to cater for ASD individuals, without major upheaval.

Conceptually, attention is needed towards enhancing the accessibility of criminal defences, such that they are responsive to the diversity of human experience, of which ASD is one element. That enhancement has already been achieved for the process of sentencing ASD individuals, via the Verdins principles.³⁵⁶

³⁴⁷ Robertson (n 25) ch 6.1; Berryessa, 'Attitudes' (n 25) 2770; Grant (n 25) 65.

³⁴⁸ Westphal (n 209) 586.

³⁴⁹ See *Bratty v Attorney-General (Northern Ireland)* [1963] AC 386, 412.

³⁵⁰ *Ibid.*

³⁵¹ See *R v Hennessy* [1989] 2 All ER 9, 14.

³⁵² See *R v Kemp* [1957] 1 QB 399.

³⁵³ See, eg, *Dearnley v R* [1947] St R Qd 51, 61.

³⁵⁴ *M'Naghten's Case* [1843] All ER Rep 229.

³⁵⁵ See, eg, Strickland (n 39); Wauhop (n 40).

³⁵⁶ See Wolf (n 45) 1736; *R v Verdins* (2007) 16 VR 269. See also Jamie Walvisch, 'Mandated Treatment as Punishment: Exploring the Second Verdins Principle' in Claire Spivakovsky, Kate Seear and Adrian Carter (eds), *Critical Perspectives on Coercive Interventions: Law, Medicine and Society* (Routledge, 1st ed, 2018) 185, 186.

C Model ASD Defence

1. An ASD individual is not criminally responsible for an act or omission, where appropriately qualified expert evidence deems that a nexus exists between the individual's ASD symptomology and their offending, such that the dominant cause of their offending is attributable to at least one of the following three ASD symptoms:
 - (a) **an inability to read or respond to social cues or general social naivety**, such that the individual is unaware of the wrongfulness of their act or omission at the time it was committed, which can include:
 - (i) the individual's literal interpretation of any input;
 - (ii) an inability to decipher the intentions, actions, speech, emotions, or the wrongful or immoral acts of another;
 - (iii) an inability to comprehend or forecast the impact or consequences of their actions;
 - (iv) an inability to comprehend the basic underlying facts pertaining to their actions; or
 - (v) any other presentation associated with an inability to read or respond to social cues or general social naivety.
 - (b) **hypersensitivities**, such that the individual temporarily loses control of their behaviour by being unable to cope, from the individual's senses being prone to overload from hyper-attentiveness to environmental stimuli that non-ASD individuals can filter out or fail to notice. Said overstimulating environmental stimuli can include:
 - (i) specific sounds, tactile experiences, light intensity, food texture, or specific aromas;
 - (ii) pain or discomfort;
 - (iii) an unexpected change or interruption to their structure or routine; or
 - (iv) any other stimulus the individual is hypersensitive towards.

The individual's act or omission can be an un contemplated and unintended overreaction to objective triviality, such that in the course of sensory-avoidant, sensory-seeking, self-stimulatory, or sensory distraction behaviours, the individual initiates an instantaneous physical response (to prevent further sensory input), such as in the form of pre-emptive self-defence.

- (c) **obsessive interests**, such that the individual is unable to control their offending due to the individual's highly restricted, fixed interest that is of abnormally high intensity, which causes the individual to ignore the social and legal consequences of their act or omission.

The individual's act or omission can be committed as a result of engaging in their obsessive interest, either through the obsessive interest being of an offending nature, or merely through the obsessive interest rendering the individual more susceptible to offending behaviour.

2. If any of subsections (1)(a), (b), or (c) are met, then the ASD individual is to be given a mandatory order, without any conviction, as tailored to treat the relevant ASD symptom that rendered the ASD individual susceptible to their offending.

D Further Recommendations for Law Reform

1 Expert evidence

As demonstrated by *Shortland v Stone*,³⁵⁷ it is crucial that medical reports are submitted by an ASD individual's counsel, for judicial officers to be able to assess the culpability of the ASD individual in terms of the nexus between the individual's ASD and their offending,³⁵⁸ or else pleading any defences will be futile.

Further, as a matter of common sense, this article asserts that judicial officers and juries are not as qualified nor equipped to determine whether a causal nexus exists between ASD and offending, as psychiatrists or psychologists are. Thus, this article recommends judges and juries be precluded, or at least limited, in making findings in direct contradiction to expert evidence as to the nexus between an individual's

³⁵⁷ [2019] WASC 217, [37].

³⁵⁸ Freckelton, 'Forensic' (n 185) 431.

ASD and their offending, where such evidence is unequivocally asserted,³⁵⁹ unlike what unjustly occurred in *Vucemillo v Western Australia*.³⁶⁰

2 Self-defence accessibility

Contrary to the Tasmanian Law Reform Institute's view that a delusion arising from a mental illness cannot be the basis for self-defence on account of insanity being for that purpose,³⁶¹ this amounts to ASD individuals remaining unprotected from liability when ASD individuals can symptomatically overreact in defending themselves, due to hypersensitivities to sensory input which can overwhelm them.³⁶²

Insofar as self-defence could be accessible for ASD individuals, this article submits that ASD would need to be recognised, with expert evidence presented, to bridge the gap between the legal requirements of self-defence and the ASD individual's evidence.³⁶³ In this way, this article recommends special recognition that ASD individuals are more likely than non-ASD individuals to possess a heightened perception of risks to their safety, which can amount to pre-emptive strikes,³⁶⁴ in assessing the tests for necessity and reasonableness in self-defence.

By way of comparison, expert evidence relating to the battered spouse syndrome has been held to be admissible in respect of self-defence.³⁶⁵ The Tasmanian Law Reform Institute has previously proposed to broaden the range of evidence presented where self-defence is raised in family violence situations.³⁶⁶ Thus,

³⁵⁹ Cf *R v Turner* [1975] QB 834, 841 (Lawton LJ): 'The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors'. See also *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442, which held that courts are not bound to accept the evidence of an expert witness, even where it has not been controverted by other expert or factual evidence, and the expert was not cross-examined.

³⁶⁰ [2017] WASCA 37, [17], [20], [33], [41], [51], wherein both the psychiatrist and the psychologist were directly contradicted by the Court as to the assertion that the appellant's 'autistic brain' caused him to believe that the website was an adults-only website, and thereby precluding a mistake of fact defence.

³⁶¹ Peta Carlyon, 'Law Reform Spotlight on Self-defence in Domestic Violence Cases', *ABC News* (online, 17 October 2015) <<https://www.abc.net.au/news/2015-10-16/law-reform-spotlight-on-self-defence-in-domestic-violence-cases/6861946>>.

³⁶² See generally Suarez (n 64). See also Crasta (n 67) 7; Howlin (n 45) 306; Wauhop (n 40) 965.

³⁶³ See also Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Securing Fair Outcomes for Battered Women Charged with Homicide: Analysing Defence Lawyering in *R v Falls*' (2014) 38(2) *Melbourne University Law Review* 666, 691, on self-defence as it applies to domestic violence.

³⁶⁴ Attwood (n 54) 158.

³⁶⁵ *Osland v R* [1998] HCA 75, [50]–[60]; *R v Secretary* (1996) 86 A Crim R 119. See also *Crimes Act 1958* (Vic) s 322M. See generally Sheehy (n 363).

³⁶⁶ Carlyon (n 364).

meaning their overreaction is not necessarily taken as that which negates self-defence. This article recommends an analogous outcome for ASD individuals.

3 *Sentencing: unsustainable post-conviction mercy*

Sentencing considerations are an alternative way of addressing the injustice where ASD symptomology is the cause of offending, and it is also the most common one in recent years.³⁶⁷ This requires the judiciary to be cognisant of ASD as a mitigating factor that lessens moral culpability. Concerningly though, recent Australian research found marked deficiencies in judicial officers' understanding of ASD symptoms, along with their forensic relevance.³⁶⁸ It even found that notwithstanding any willingness to rely on expert evidence, the judiciary sentenced ASD individuals in an inconsistent and unenlightened manner.³⁶⁹

This article submits that dealing with ASD in sentencing post-conviction, where ASD symptomology is the cause of offending, is highly injurious, for it involves the ASD individual procuring a criminal record and relying on unpredictable post-conviction mercy, which is dependent upon a random judge, is not legally reliable, and is inconsistently awarded.³⁷⁰

For example, in *R v Wilson*,³⁷¹ the ASD individual pled guilty,³⁷² and his sentence was suspended for the full term of his imprisonment anyhow.³⁷³ This, however, was not an appropriate means nor end, seeing as the ASD individual procured a criminal record, thereby hindering his ability to gain meaningful employment in circumstances where 18.2% of ASD individuals are unemployed, almost six times the rate of individuals without a disability.³⁷⁴ Thus, rendering it an unsustainable mechanism through which to achieve justice for ASD individuals caught up in the CJS.

³⁶⁷ Freckelton, 'Forensic' (n 185) 431.

³⁶⁸ See generally Wolf (n 45).

³⁶⁹ Ibid.

³⁷⁰ Cf Cea (n 42) 511.

³⁷¹ [2022] ACTSC 7.

³⁷² Ibid [27].

³⁷³ Ibid [33]–[34].

³⁷⁴ Australian Bureau of Statistics, *Survey of Disability, Ageing and Carers: Summary of Findings, 2022* (11 October 2024).

V CONCLUSION

All five key cases explored in this article entailed ASD symptomology as the cause of offending,³⁷⁵ and yet the embedded requirement for objective reasonability thematically functioned as an untenable obstacle for ASD individuals invoking defences, including mistake of fact,³⁷⁶ self-defence,³⁷⁷ and accident.³⁷⁸ Insanity was the only remaining viable defence in the ASD individuals' artillery without an objective element, which nonetheless posed a tantalising, yet unreachable hurdle.³⁷⁹

The outcome of this doctrinal legal analysis is consistent with previous cross-jurisdictional research, which found that even where expert evidence espoused ASD symptomology as the cause of offending, an exculpatory defence was not advanced, notwithstanding a realistic possibility of success.³⁸⁰ Case in point: the ASD individuals in all five key cases pled guilty to their offences and did not attempt to plead any defences. Instead, defence lawyers opted for a risk-averse early plea of guilty and its associated sentence reduction benefits.³⁸¹

This could be because defence lawyers do not have faith in the likelihood of success of any pre-existing defences to 'roll the dice' with,³⁸² or they loathe the consequences that follow from an insanity determination.³⁸³ It could also be due to defence lawyers, the judiciary, or even prosecutors possessing a limited understanding of ASD symptomology.³⁸⁴ Regardless of the cause for defence lawyers failing to advance feasible, exculpatory defences for ASD clients, this practice is impeding upon, if not halting, the growth of this research area, and the longer this trend perpetuates, the longer ASD individuals will go without accessibility to criminal defences.

³⁷⁵ See also Berryessa, 'Judiciary Views' (n 26) 98.

³⁷⁶ See, eg, *Vucemillo v Western Australia* [2017] WASCA 37.

³⁷⁷ See, eg, *Shortland v Stone* [2019] WASC 217; *R v Chapman* [2018] NSWSC 1741.

³⁷⁸ See, eg, *Shortland v Stone* [2019] WASC 217.

³⁷⁹ See *Vucemillo v Western Australia* [2017] WASCA 37; *R v Wilson* [2022] ACTSC 7; *Shortland v Stone* [2019] WASC 217; *Cluett v The Queen* [2019] WASCA 111. Cf *R v Chapman* [2018] NSWSC 1741.

³⁸⁰ See Barry-Walsh (n 205) 104. See, eg, *Vucemillo v Western Australia* [2017] WASCA 37, [33], wherein the appellant, upon receiving an ASD diagnosis, opted to appeal his sentence as opposed to his criminal liability, despite expert evidence linking ASD to his offending.

³⁸¹ See, eg, *Sentencing Act 1995* (WA) s 9AA.

³⁸² See Westphal (n 209) 586; Strickland (n 39) 14.

³⁸³ Freckelton and List, 'Culpability' (n 30) 32.

³⁸⁴ See, eg, Slavny-Cross (n 11) 908: This study, of defence lawyers from 12 nations who had defended an ASD client, found that the participants indicated that 59% of prosecutors and 46% of judges said or did something during the trial that made the defence lawyers concerned for the judiciary's inadequate understanding of ASD. See also Keeley Blanchard, 'Defending Someone on the Autism Spectrum Who Has Been Charged with a Crime', *Blanchard Law* (Blog Post, 26 June 2018) <<https://blanchard.law/defending-autism-spectrum-charged-crime>>: hiring someone with experience in defending ASD individuals is sometimes not possible.

Interestingly, the ASD individuals in all five key cases had a limited prior record of offending, if any at all. This further adds credence to this article's analysis that ASD individuals are both more likely to be victims than perpetrators,³⁸⁵ and tend to commit offences inadvertently as caused by ASD symptomology they are born with.

This assertion is supported by the fact that the ASD individuals in the cases explored by this research tended to believe, to a lesser or greater extent, that their actions were appropriate and justified under the circumstances,³⁸⁶ or they belatedly came to the realisation that it was wrong,³⁸⁷ which was perceived as a lack of remorse.³⁸⁸ This is consistent with past research.³⁸⁹

Alarming, as police often lack knowledge of ASD and may not recognise potentially subtle ASD symptoms as requiring consideration,³⁹⁰ most ASD individuals are not diagnosed until after they have been arrested and charged with an offence,³⁹¹ and no standardised screening assessments are currently used in any jurisdiction to screen for ASD at any stage of the CJS.³⁹² Accordingly, further research is urgently needed in this field, as for justice to be served, ASD needs to be diagnosed for expert evidence to be submitted in the first place, on the nexus between the individual's ASD and their offending.

³⁸⁵ Mayes (n 29) 94.

³⁸⁶ See, eg, *Cluett v The Queen* [2019] WASCA 111, [36]; *Vucemillo v Western Australia* [2017] WASCA 37, [20], [52].

³⁸⁷ *R v Chapman* [2018] NSWSC 1741, [31]; *R v Wilson* [2022] ACTSC 7, [19]. See also *Shortland v Stone* [2019] WASC 217, [6]: the ASD individual turned himself in to police, but a belated 6 days after his offending.

³⁸⁸ See, eg, *Vucemillo v Western Australia* [2017] WASCA 37, [20], [52].

³⁸⁹ Barry-Walsh (n 205) 105.

³⁹⁰ Brenda Stoesz, 'Review of Five Instruments for the Assessment of Asperger's Disorder in Adults' (2011) 25(3) *The Clinical Neuropsychologist* 376, 378; Gook (n 345) 68.

³⁹¹ Wauhop (n 40) 990.

³⁹² Isabella Michna and Robert Trestman, 'Correctional Management and Treatment of Autism Spectrum Disorder' (2016) 44(2) *The Journal of the American Academy of Psychiatry and the Law* 253, 254.