

CASE NOTE

*DPP (VIC) V O'NEILL**

**SENTENCING OFFENDERS WITH PERSONALITY
DISORDERS: A CRITICAL ANALYSIS OF
*DPP (VIC) V O'NEILL***

JAMIE WALVISCH[†] AND ANDREW CARROLL[‡]

In DPP (Vic) v O'Neill, the Victorian Court of Appeal held that personality disorders do not constitute an 'impairment of mental functioning', and so should not mitigate an offender's sentence. In doing so, it significantly limited the scope of the Verdins principles: the principles that govern the sentencing of offenders with mental health problems in all Australian jurisdictions, as well as in New Zealand. This article critiques the O'Neill decision. It argues that the Court's approach misunderstands the nature of personality disorders and improperly relies on a definition of 'impaired mental functioning' that fails to take into account the diverse ways in which mental health problems may be relevant to the sentencing process. It suggests a different approach to sentencing offenders with personality disorders.

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* (2015) 47 VR 395.

[†] BA (Hons), LLB (Hons), PhD (Monash); Lecturer, Faculty of Law, Monash University.

[‡] MA (Cantab), BM, BCh (Oxon), MMedSci, FRCPsych, FRANZCP; Associate Professor (Adjunct), Centre for Forensic Behavioural Science, Swinburne University of Technology, Consultant Psychiatrist, Victorian Institute of Forensic Mental Health.

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I INTRODUCTION

Early in the morning of Wednesday 4 December 2013, Michael O’Neill and his partner of 16 years, Stuart Rattle, were in bed together in their South Yarra apartment.¹ Mr Rattle attempted to initiate a sexual encounter with Mr O’Neill, but was rejected. He called Mr O’Neill a ‘frigid bitch’, prompting him to leave the bedroom to go and make breakfast. Shortly afterwards Mr O’Neill returned, carrying a steel pan in his hand. Mr Rattle again called him a ‘frigid bitch’, and described him as selfish. This caused Mr O’Neill to ‘snap’. He hit Mr Rattle on the head with the pan, and then strangled him with a dog lead he picked up from the floor.

For five days following the killing, Mr O’Neill pretended that Mr Rattle was still alive. He told friends and colleagues that he was unwell, made telephone calls impersonating him, and sent text messages on his behalf. On Sunday 8 December, he placed two lit candles near some curtains in their apartment, and went out. The apartment caught fire, and emergency services attended the scene, discovering Mr Rattle’s charred corpse. Mr O’Neill initially claimed that the fire had started accidentally, and that Mr Rattle had died in the fire. However, after five hours of police questioning, he confessed to killing Mr Rattle and starting the fire. He pleaded guilty to one count of murder and one count of arson.

During his sentencing hearing, evidence was given by Mr O’Neill’s treating psychologist, Dr Barth, that he met the DSM-5 criteria for ‘Dependent Personality Disorder with Prominent Features of Narcissistic Personality

¹ This fact summary is taken from *DPP (Vic) v O’Neill* (2015) 47 VR 395, 398–401 [4]–[20] (Warren CJ, Redlich and Kaye JJA). It is ‘largely drawn from [Michael O’Neill’s] account of what occurred ... [and] was accepted by the sentencing judge’ at his hearing: at 399 [9].

Disorder.² It was Dr Barth's view that Mr O'Neill's 'significant personality pathology, particularly his intense interpersonal dependency combined with feelings of inadequacy and failure ... underpinned the devastating act of interpersonal aggression and violence which he perpetrated against Mr Rattle'.³ Defence counsel argued that Mr O'Neill's crimes were mitigated by the existence of his personality disorder, and that a lesser sanction should be imposed. As the prosecution did not contest this, the sentencing judge moderated Mr O'Neill's sentence accordingly.⁴

On appeal, the Director of Public Prosecutions argued that moderating a sentence on the basis of a personality disorder is 'inappropriate and contrary to public policy', and that Mr O'Neill's sentence should not have been reduced.⁵ The Victorian Court of Appeal agreed, holding that Mr O'Neill's personality disorder did not constitute an 'impairment of mental functioning', and so should not have been considered a mitigating factor.⁶ In doing so, it significantly limited the scope of the *Verdins* principles: the principles that govern the sentencing of offenders with mental health problems in all Australian jurisdictions,⁷ as well as in New Zealand.⁸

² Ibid 402 [29]. See also American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (American Psychiatric Publishing, 5th ed, 2013) 669–70, 675 ('DSM-5'). The DSM-5 defines the essential feature of dependent personality disorder as '[a] pervasive and excessive need to be taken care of that leads to submissive and clinging behavior and fears of separation': at 675. See also n 60 and accompanying text for more information about this disorder.

³ O'Neill (n 1) 402 [29].

⁴ Ibid 404–5 [37]–[38]. The sentencing judge found that Mr O'Neill's personality disorder reduced his moral culpability, moderated the need for general and specific deterrence, and made it likely that he would find time in prison more burdensome than other offenders. She also found that the disorder could be exacerbated by the experience of imprisonment. The judge took all of these factors into account in sentencing Mr O'Neill to a total effective sentence of 18 years' imprisonment, with a non-parole period of 13 years: at 397 [2], 404–5 [37]–[38].

⁵ Ibid 405 [40]–[41].

⁶ Ibid 413 [71], 421 [100]. While the Court agreed with the substance of the Director's submissions in this regard, it ultimately rejected the appeal on other grounds: at 417–18 [85]–[88].

⁷ See, eg, *R v Verdins* (2007) 16 VR 269; *R v Goodger* [2009] QCA 377, [19]–[20] (Keane JA); *Cooper v Corvisy [No 2]* (2010) 5 ACTLR 151, 164–5 [88]–[89] (Refshauge J); *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1, 43–4 [177]–[178] (McClellan CJ at CL); *R v Morton* (2010) 27 NTLR 114, 126 [50] (Mildren J); *R v Yost* [2010] SASCF 4, [21]–[22] (Kelly J); *Startup v Tasmania* [2010] TASC 5, [6] (Evans, Tennent and Wood JJ); *Krijestorac v Western Australia* [2010] WASCA 35, [17]–[19] (Wheeler JA).

⁸ See, eg, *E (CA689/10) v The Queen* (2011) 25 CRNZ 411, 423–4 [70] (Glazebrook J); *De La Hunt v The Queen* [2014] NZHC 1144, [24] (Gendall J).

This article analyses the Court's approach to sentencing offenders with personality disorders. It is divided into three parts. Part II examines the current law, providing an overview of the *Verdins* and *O'Neill* decisions. Part III outlines several problems with the approach taken by the Court in *O'Neill*: it lacks clarity; it fundamentally misunderstands the nature of personality disorders; it wrongly holds that personality disorders do not constitute an 'impairment of mental functioning'; and it improperly relies on a definition of 'impaired mental functioning' that fails to take into account the diverse ways in which mental health conditions may be relevant to the sentencing process. Part IV suggests a different approach to sentencing offenders with personality disorders.

It is important to emphasise that the issues addressed in this article are not marginal ones. Although it is difficult to know the precise proportion of offenders who suffer from mental health problems, it is clear that it is exceedingly high.⁹ This includes a significant number of individuals with personality disorders. For example, in their study of mental disorders amongst prisoners in New South Wales, Butler and colleagues found that 43% suffered from a personality disorder.¹⁰ Of the 916 prisoners surveyed, 27% were diagnosed with a Cluster A personality disorder (paranoid, schizoid or schizotypal personality disorder), 31% with a Cluster B personality disorder (antisocial, borderline, histrionic or narcissistic personality disorder), and 29% with a Cluster C personality disorder (avoidant, dependent or obsessive-compulsive personality disorder).¹¹ Tye and Mullen found similarly high rates of personality disorders amongst female prisoners in Victoria: 33% were diagnosed with paranoid personality disorder, 26% with borderline personality disorder, 6% with histrionic personality disorder, 30% with antisocial personality disorder and 12% with narcissistic personality disorder.¹² In their systematic review of surveys from seven countries that reported on any personality

⁹ See World Health Organization, *Trenčín Statement on Prisons and Mental Health* (adopted 18 October 2007) <www.euro.who.int/en/health-topics/health-determinants/prisons-and-health/publications/2007/trencin-statement-on-prisons-and-mental-health>, archived at <<https://perma.cc/85ZF-ZLXA>>. In 2007, the World Health Organization estimated that of the nine million prisoners worldwide, at least one million suffered from a significant mental disorder, and even more suffered from common mental health problems such as depression and anxiety: at 5.

¹⁰ Tony Butler et al, 'Mental Disorders in Australian Prisoners: A Comparison with a Community Sample' (2006) 40 *Australian and New Zealand Journal of Psychiatry* 272, 275.

¹¹ For elaboration on the personality types, see DSM-5 (n 2) 649–84.

¹² Christine S Tye and Paul E Mullen, 'Mental Disorders in Female Prisoners' (2006) 40 *Australian and New Zealand Journal of Psychiatry* 266, 268.

disorder in prison populations between January 1966 and January 2001, Fazel and Danesh found even higher prevalence rates: 65% of the men and 42% of the women surveyed were diagnosed with such a disorder.¹³ Given the high incidence of personality disorders amongst offenders, it is crucial to ensure that sentencers are provided with a clear, principled framework for sentencing offenders who suffer from such disorders.

II THE CURRENT LAW

A *The Verdins Principles*

In *Verdins* the Victorian Court of Appeal identified six ways in which an offender's mental health problems may be relevant to the sentencing process.¹⁴ Such problems may:

- 1 reduce the offender's moral culpability, thereby affecting the punishment that is just in the circumstances and the importance of denunciation as a sentencing consideration;
- 2 influence the kind of sentence that should be imposed, or the conditions under which it should be served;
- 3 moderate or eliminate the need for general deterrence as a sentencing consideration;
- 4 moderate or eliminate the need for specific deterrence as a sentencing consideration;
- 5 make a sentence weigh more heavily on the offender than on a person in normal health, thereby affecting the determination of a proportionate sentence; or
- 6 create a serious risk of imprisonment having a significant adverse effect on the offender's mental health, suggesting the need to reduce the sanction.

¹³ Seena Fazel and John Danesh, 'Serious Mental Disorder in 23,000 Prisoners: A Systematic Review of 62 Surveys' (2002) 359 *Lancet* 545, 545. While Fazel and Danesh conducted a systematic review of 62 surveys that reported on mental disorder in prison populations of Western countries between January 1966 and January 2001 (covering 22,790 prisoners from 12 countries), only 9 of those surveys (conducted in Australia, England, Finland, New Zealand, Norway, the United States, and Wales) reported on personality disorders generally. There were many more surveys (28) that reported specifically on antisocial personality disorder. Those surveys found that 47% of the men and 21% of the women surveyed were diagnosed with such a disorder: at 545–8.

¹⁴ *Verdins* (n 7).

These principles have been held to apply to any proceeding in which the ruling body has disciplinary powers,¹⁵ and where ‘the offender is shown to have been suffering at the time of the offence (and/or to be suffering at the time of sentencing) from a mental disorder or abnormality or an impairment of mental function.’¹⁶

Prior to *Verdins*, it had been suggested that only ‘[s]erious psychiatric illness[es]’ needed to be taken into account by a sentencing judge.¹⁷ However, in *Verdins* the Court made it clear that there is no need for an offender to suffer from a diagnosable mental illness, or for that condition to be of a particular level of gravity, for the relevant principles to apply.¹⁸ The offender’s mental health problems also do not need to be permanent.¹⁹ What matters is ‘what the evidence shows about the nature, extent and effect of the mental impairment experienced by the offender at the relevant time.’²⁰ In particular, sentencing courts need to consider ‘how the particular condition (is likely to have) affected the mental functioning of the particular offender in the particular circumstances — that is, at the time of the offending or in the lead-up to it — or is likely to affect him/her in the future.’²¹

The Court intended that the phrase ‘mental disorder or abnormality or an impairment of mental function’ be interpreted broadly, to cover a wide range of conditions.²² In subsequent cases it has been held to cover schizophrenia, depression, bipolar disorder, dysthymia, acquired brain injury, intellectual disability, postnatal depression and post-traumatic stress disorder.²³ In some cases, courts have taken the offender’s mental health condition into account even without a specific diagnosis. For example, in *R v Hill* the judge noted that although there was ‘difficulty in establishing a firm diagnosis’ in relation to the offender’s mental health, it was clear that the condition ‘had an impact’ on his

¹⁵ *Quinn v Law Institute of Victoria Ltd* (2007) 27 VAR 1, 8–9 [35]–[36] (Maxwell P); *Burgess v McGarvie (Legal Services Commissioner)* [2013] VSCA 142, [55]–[56] (Nettle and Neave JJA).

¹⁶ *Verdins* (n 7) 271 [5].

¹⁷ See, eg, *R v Tsiaras* (1996) 1 VR 398, 400 (Charles, Callaway JJA and Vincent AJA).

¹⁸ *Verdins* (n 7) 271 [5], [8].

¹⁹ *Ibid* 276 [32].

²⁰ *Ibid* 271 [8]. See also *Charles v The Queen* (2011) 34 VR 41, 63–4 [141]–[143] (Robson AJA).

²¹ *Verdins* (n 7) 272 [13] (Maxwell P, Buchanan and Vincent JJA).

²² *Ibid* 271 [5], [7].

²³ See Jamie Walvisch, ‘Sentencing Offenders with Impaired Mental Functioning: Developing Australia’s “Most Sophisticated and Subtle” Analysis’ (2010) 17 *Psychiatry, Psychology and Law* 187, 188.

behaviour.²⁴ He therefore concluded that the offender should ‘not ... be sentenced as someone who functions well in the world.’²⁵

However, the Court has made it clear that not all mental health conditions constitute a ‘mental disorder or abnormality or an impairment of mental functioning.’²⁶ For example, it has been held that this phrase does not cover paedophilia,²⁷ emotional immaturity,²⁸ and impairments that arise from the ordinary pressures of daily life (such as work, financial and marital pressures).²⁹ Following the case of *O’Neill*, it now seems that it also does not cover personality disorders.

B DPP (Vic) v O’Neill

Prior to the *O’Neill* decision, there was a marked lack of clarity about whether personality disorders fell within the scope of the *Verdins* principles. In a number of cases judges simply accepted that the principles applied to such disorders, and/or moderated the offenders’ sentences accordingly.³⁰ For example, in *Stensholt v The Queen*, the sentencing judge held that the accused’s borderline personality disorder would have impaired her ability to make rational judgements under stress, and so the *Verdins* principles applied.³¹ However, in other cases judges have seemingly held that personality disorders do not attract the sentencing considerations discussed in *Verdins*.³²

²⁴ [2012] VSC 353, [39] (Robson J).

²⁵ *Ibid.*

²⁶ *Verdins* (n 7) 271 [5].

²⁷ *Reid v The Queen* (2014) 42 VR 295, 304 [49] (Priest JA).

²⁸ See *Tran v The Queen* [2011] VSCA 252, [29]–[31] (Hansen JA).

²⁹ *R v Margach* [2008] VSC 255, [35] (Nettle JA). For a critical analysis of these exclusions, see Walvisch (n 23) 188–9.

³⁰ See, eg, *R v Robazzini* [2010] VSCA 8, [38]–[51] (Neave JA); *R v Hamilton* [2011] VSC 77, [13], [20] (Curtain J); *DPP (Vic) v Tate* [2011] VSC 173, [26] nn 1–2 (Whelan J); *R v Wallis* [2013] VSC 721, [32]–[34] (Curtain J); *R v West* [2013] VSC 737, [31], [42] (Curtain J); *R v Hollow* [2013] VSC 141, [20]–[21] (T Forrest J); *Stensholt v The Queen* [2014] VSCA 171, [15], [21]–[22] (Redlich JA). See also *O’Neill* (n 1) 404 [36], which discusses King J’s statement in *R v Miller* [2015] VSC 180 regarding the frequency with which the *Verdins* principles are applied in plea mitigation.

³¹ *Stensholt* (n 30) [15] (Redlich JA). The sentencing judge’s decision in this regard was reported (with approval) by the Court of Appeal.

³² See, eg, *R v Zhang* [2009] VSCA 236, [13] (Buchanan JA); *R v Bayley* [2013] VSC 313, [42]–[43] (Nettle JA); *DPP (Vic) v Anderson* (2013) 228 A Crim R 128, 143 [59] (Maxwell P, Neave JA and Kaye AJA); *DPP (Vic) v Hicks* [2014] VSC 266, [67]–[68] (Kaye J); *R v Perry* [2014] VSC 534, [53] (Hollingworth J).

For example, in *R v Bayley* the sentencing judge stated that ‘it could not properly be contended’ that the offender’s borderline personality disorder ‘was such as to engage any of the ameliorating sentencing considerations adumbrated in *R v Verdins*’.³³ Instead, that disorder was found to provide a context which explained (without excusing) the offender’s behaviour.

Despite this lack of clarity, in *O’Neill* the Director of Public Prosecutions accepted that under the current law, personality disorders could enliven the *Verdins* principles. He submitted, however, that the law in this regard should be changed. He argued that *Verdins* had substantially ‘lower[ed] the bar’ with respect to the mental health problems that could affect an offender’s sentence, to the point where ‘any abnormality or psychological idiosyncrasy causally linked to the offending behaviour is to be regarded as warranting a moderation in sentence’.³⁴ This had resulted in ‘common and widely prevalent idiosyncrasies’ being found to moderate otherwise appropriate sentences — a consequence which the Director considered to be ‘inappropriate and contrary to public policy’.³⁵

The Court agreed that there was an issue of general importance that needed to be addressed, and sought to clarify the scope of the *Verdins* decision. In doing so, it highlighted the fact that the *Verdins* principles ‘are enlivened only where the offender suffers from an impairment of mental functioning’, and held that Mr O’Neill’s personality disorder did not reach that threshold:

It is important to keep in mind that, in *Verdins*, and in this Court’s subsequent application of *Verdins*, the Court has consistently stated that the principles in *Verdins* relate to offenders who suffered from ‘mental impairment’ or ‘impaired mental functioning’, whether at the time of the offending or at the time of sentence. While the Court in *Verdins* regarded the particular diagnostic label as not being determinative, the principles expressed have always been confined to cases in which the offender suffered an impairment of his or her mental functioning. *They do not apply to personality disorders such as those from which the respondent suffered*.³⁶

Although Mr O’Neill should have been precluded from relying on the *Verdins* principles, the Court made it clear that that did not mean that his personality

³³ *Bayley* (n 32) [43] (Nettle JA).

³⁴ *O’Neill* (n 1) 405 [41].

³⁵ *Ibid.*

³⁶ *Ibid* 413 [71] (emphasis added); see also at 413 [70].

disorder should have been completely disregarded by the sentencing judge. Evidence that he suffered from such a disorder was relevant to assessing his moral culpability, as it helped to explain why he exploded in a fit of rage and killed Mr Rattle. In light of Dr Barth's evidence, it was open to the judge to find 'that the murder ... was not premeditated, vindictive or gratuitous, but, rather, was the result of a very complex and conflicted personality structure that had developed as a result of the respondent's confused and difficult sense of his own life'.³⁷ However, the Court was careful to emphasise that this explanation 'did not attract the level of mitigation of sentence that must be allowed where *Verdins* principles are applicable'.³⁸

III PROBLEMS WITH THE CURRENT LAW

A An Unresolved Ambiguity in the Law: Which Personality Disorders Are Excluded?

While it is clear that the Court did not consider Mr O'Neill's personality disorder to fall within the scope of the *Verdins* principles, it is not clear whether the Court intended to exclude *all* personality disorders from the scope of those principles (the 'broad interpretation'), or only personality disorders that are similar in some way to dependent personality disorder (the 'narrow interpretation'): the Court's statement that the *Verdins* principles do not apply to personality disorders 'such as those from which the respondent suffered' is ambiguous in this regard.³⁹ It is possible, for example, that the Court viewed Mr O'Neill's personality disorder as one which affected his volitional (rather than cognitive) capacities (as it caused him to 'snap' and kill Mr Rattle in response to his taunts), and that it only intended to exclude personality disorders that solely affect an offender's volitional capacities, rather than those which also affect an offender's cognitive capacities.⁴⁰

Some aspects of the Court's judgment could be considered to support the narrow interpretation. For example, when explaining why Mr O'Neill's personality disorder did not meet the threshold criteria of *Verdins*, the Court noted that Dr Barth's report did not contain any evidence that he suffered from an impairment of mental functioning:

³⁷ Ibid 421 [100].

³⁸ Ibid.

³⁹ Ibid 413 [71].

⁴⁰ On the distinction between volitional and cognitive capacities, see Part III(B).

He did not opine that the respondent was unable to appreciate the wrongfulness of his conduct or exercise appropriate judgment or make a rational choice, or, alternatively, how the respondent's personality disorder might have obscured his intention to commit the offence of murder.⁴¹

It could be inferred from this passage that the problem for Mr O'Neill was *not* that he suffered from a personality disorder, but that the evidence did not show that his particular personality disorder affected him in an appropriate way (for example, by affecting his ability to appreciate the wrongfulness of his conduct). Had Dr Barth expressed the view that Mr O'Neill's personality disorder impaired his mental functioning in such a way, then perhaps he would have been free to rely on the *Verdins* principles.⁴²

A similar inference could also be drawn from the Court's discussion of past decisions in which the *Verdins* principles were applied to offenders with personality disorders:

It is unnecessary to examine whether in any of those cases there was evidence of an impairment to the offender's mental functioning *but in those cases where there was no such evidence*, the finding that the *Verdins* principles applied must be viewed as *per incuriam*.⁴³

It is possible to infer from this passage that: (i) there are some personality disorders which *do* impair an offender's mental functioning; and (ii) such personality disorders are not excluded from the scope of the *Verdins* principles.

However, strong support for the broad interpretation is provided by the fact that in the paragraph immediately following the ambiguous statement about personality disorders, the Court noted that the Queensland Court of Appeal had addressed this 'very issue' in *R v Hayes*,⁴⁴ and quoted the following passage:

There is no substance in the submission the applicant's borderline personality was not taken into account in determining the appropriate sentence. It was irrelevant. A prisoner's mental illness which reduces her capacity for judgment or understanding, or ability to control behaviour, and therefore reduces the moral blameworthiness in the offending is rightly regarded as an important mitigating

⁴¹ *O'Neill* (n 1) 418 [85].

⁴² It is not clear whether the Court would consider this to be possible given its understanding of the nature of personality disorders: see Part III(C).

⁴³ *O'Neill* (n 1) 414 [73] (emphasis added).

⁴⁴ [2010] QCA 96.

factor in the sentencing process. *It is my understanding that the law has never regarded personality disorders as having this effect.* This is for the reason that they are not illnesses which impact upon the capacity of the sufferer to perceive the world around her and respond to it. A personality disorder is a description of a personality type, or the traits which define the person and the person's predominant modes of behaviour. The personality type becomes a disorder when the traits become manifest in behaviour which 'deviates markedly from the expectations of the (person's) culture', and leads to 'distress or impairment'.⁴⁵

It can be seen from this passage that the majority in *Hayes* did not equivocate about personality disorders — they clearly held that personality disorders differ from other types of mental disorder in a fundamental way, and consequently no personality disorders of any type should mitigate a sentence.⁴⁶ By finding it 'convenient' to quote this passage in full, the Victorian Court of Appeal appears to be endorsing this view. This is also the view adopted in the Supreme Court of Victoria's summary of the *O'Neill* judgment, which states that '*Verdins* principles do not apply to personality disorders'.⁴⁷

Since the *O'Neill* judgment was handed down, it has been discussed in six higher court cases involving offenders with personality disorders. Unfortunately, these cases have failed to authoritatively resolve this ambiguity:

- The narrow interpretation has been applied in one case, which involved an offender who suffered from narcissistic personality disorder and depression.⁴⁸ The Tasmanian Court of Criminal Appeal held that the case was 'quite different' to *O'Neill*, and that it was open to the sentencing judge to apply the *Verdins* principles to the offender's personality disorder.⁴⁹

⁴⁵ Ibid [28] (Chesterman JA, with whom Ann Lyons J agreed), quoted in *O'Neill* (n 1) 413–14 [72] (emphasis added).

⁴⁶ In the minority, Holmes JA agreed that the applicant's personality disorder was not a mitigating factor in the case before the Court but did not want to draw the broader conclusion that personality disorders can never mitigate a sentence: *Hayes* (n 44) [1].

⁴⁷ 'Summary of Judgment: *Director of Public Prosecutions (Vic) v O'Neill* [2015] VSCA 325; *Supreme Court of Victoria* (Web Page, 2 December 2015) 2 <<http://assets.justice.vic.gov.au/supreme/resources/83885823-8683-4f79-a380-e2ade4ca0d8b/judgment+summary+for+dpp+v+o'neill.pdf>>, archived at <<https://perma.cc/4VRV-HZSU>>.

⁴⁸ *DPP (Acting) (Tas) v CBF* [2016] TASCRA 1, [18]–[20] (Porter J).

⁴⁹ Ibid [41]. The Court did not spell out the ways in which the cases significantly differed. It is also not clear to what extent the Court's decision was affected by the fact that the offender suffered from depression in addition to his personality disorder. However, at no point does the Court suggest that had the offender solely been suffering from a personality disorder, he would have been precluded from relying on the *Verdins* principles.

- The broad interpretation has been applied in two cases: one involving an offender who suffered from a mixed personality disorder with dependent and histrionic features,⁵⁰ and the other involving an offender who was diagnosed with antisocial personality disorder.⁵¹ In both cases Lasry J clearly held that the *Verdins* principles do not apply to any personality disorders, as such disorders do not constitute an ‘impairment of mental functioning’.⁵²
- In three cases the offender was precluded from relying on the *Verdins* principles, but it was not clear whether this was due to the nature of the offender’s specific personality disorder, or because all offenders with personality disorders are precluded from doing so.⁵³

It therefore remains unclear which interpretation of *O’Neill* represents the law. At present, it seems that in Tasmania it is the narrow interpretation which applies, whereas in Victoria it is the broad interpretation. Unfortunately, the Court’s general approach to personality disorders (as reflected in both interpretations) suffers from serious flaws, as outlined below.

B *The First Misunderstanding: Personality Disorders Do Not Affect Cognitive or Volitional Capacities*

The first problem with the Court’s approach in *O’Neill* is that it seems to misunderstand the nature of personality disorders: it seems to assume that personality disorders do not affect an individual’s cognitive or volitional capacities. This can be clearly seen in the passage from *Hayes* reproduced above (and relied on by the Court in *O’Neill*), in which it is stated that personality disorders ‘are not illnesses which impact upon the capacity of the sufferer to perceive the world around her and respond to it’.⁵⁴ It was for this reason that the Queensland Court of Appeal held that the offender’s personality disorder was not a mitigating factor.

Unless the notion of ‘capacity to perceive and respond to the world’ is interpreted in a very narrow sense, as referring to psychotic-level disturbances

⁵⁰ *R v Liao* [2015] VSC 730, [31] (Lasry J).

⁵¹ *R v Price* [2016] VSC 105, [68] (Lasry J).

⁵² *Ibid* [78]; *Liao* (n 50) [35].

⁵³ See *DPP (Vic) v Kunduraci* [2015] VSC 707, [75]–[81] (Jane Dixon J); *DPP (Vic) v Thomas* [2016] VSC 8, [39]–[42] (J Forrest J); *DPP (Cth) v Watson* [2016] VSCA 73, [54]–[58] (Redlich and Beach JJA).

⁵⁴ *Hayes* (n 44) [28] (Chesterman JA).

(delusional thinking and/or hallucinatory phenomena and/or severe disorganisation of mental processes), this assertion is deeply flawed from a clinical perspective. The intrinsic features of many kinds of personality disorder *can* in fact adversely affect a person's perception of the world (cognitive capacity) and their responses to the world (particularly the interpersonal world) around them (volitional capacity).

This is evident from the criteria for the personality disorders listed in the DSM-5. The key defining features of most of those disorders include features that may impact on an individual's capacity to perceive and respond to the world (see Table 1).⁵⁵ It is precisely such features that generally result in the affected individual's functional impairment.

⁵⁵ The information in Table 1 has been taken from DSM-5 (n 2) 645–84.

Table 1: DSM-5 Criteria relating to an Impaired Capacity to Perceive and Respond to the World

Diagnosis with DSM-5 code	Summary of criteria relating to an impaired capacity to perceive and respond to the world
Paranoid Personality Disorder (301.0)	A pervasive distrust and suspiciousness of others such that their motives are interpreted as malevolent
Schizoid Personality Disorder (301.20)	A pervasive pattern of detachment from social relationships and a restricted range of expression of emotions in interpersonal settings
Schizotypal Personality Disorder (301.22)	A pervasive pattern of social and interpersonal deficits marked by acute discomfort with, and reduced capacity for, close relationships as well as by cognitive or perceptual distortions and eccentricities of behaviour, beginning by early adulthood and present in a variety of contexts
Borderline Personality Disorder (301.83)	<p>A pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity, beginning by early adulthood and present in a variety of contexts</p> <p>A pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation</p> <p>Inappropriate, intense anger or difficulty controlling anger (eg frequent displays of temper, constant anger, recurrent physical fights)</p> <p>Transient, stress-related paranoid ideation or severe dissociative symptoms</p>
Histrionic Personality Disorder (301.50)	A pervasive pattern of excessive emotionality and attention seeking; features include suggestibility (ie being easily influenced by others or circumstances) and a tendency to consider relationships to be more intimate than they actually are
Avoidant Personality Disorder (301.82)	A pervasive pattern of social inhibition, feelings of inadequacy, and hypersensitivity to negative evaluation
Dependent Personality Disorder (301.6)	A pervasive and excessive need to be taken care of that leads to submissive and clinging behaviour and fears of separation

While it is clear from Table 1 that many personality disorders can affect an individual's capacity to perceive and respond to the world, that is not the case for all personality disorders. In particular, the diagnostic criteria for antisocial personality disorder (301.7), narcissistic personality disorder (301.81) and obsessive-compulsive personality disorder (301.4) do not clearly contain features that have such an effect. The key features of these disorders generally relate to the affected individual's behaviours, rather than their cognitive or volitional capacities. For example, the diagnostic criteria for antisocial personality disorder essentially comprise a list of behaviours indicative of a pattern 'in which the basic rights of others or major age-appropriate societal norms or rules are violated'.⁵⁶ The fact that these three disorders do not usually affect an individual's cognitive or volitional capacities may have significant consequences for the ways in which they should be taken into account in sentencing (see Part IV(B)).

C The Second Misunderstanding: Personality Disorders Do Not Constitute an Impairment of Mental Functioning

In *O'Neill*, the Court made it clear that the key concept governing the sentencing of offenders with mental health problems is 'impaired mental functioning': it is only offenders who suffer from a condition which impairs their mental functioning in some way who should obtain the benefit of the *Verdins* principles.⁵⁷ Unfortunately, the Court did not explain exactly what this phrase means, or when an offender's mental functioning should be considered to be 'impaired'. Instead, it simply asserted that personality disorders, such as those from which Mr O'Neill suffered, do not constitute an 'impairment of mental functioning'.⁵⁸

It is not clear why the Court did not consider Mr O'Neill's mental functioning to be 'impaired', especially in light of the directive given in *Verdins* to interpret the phrase 'mental disorder or abnormality or an impairment of mental function[ing]' broadly.⁵⁹ At a narrow level, it seems that the mental functioning of a person who suffers from dependent personality disorder (as Mr O'Neill did) is impaired. Such a person is defined as suffering from

⁵⁶ DSM-5 (n 2) 659.

⁵⁷ *O'Neill* (n 1) 413 [71], 417–18 [85].

⁵⁸ *Ibid.*

⁵⁹ *Verdins* (n 7) 271 [5], [7].

[a] pervasive and excessive need to be taken care of that leads to submissive and clinging behavior and fears of separation, beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) of the following:

- 1 Has difficulty making everyday decisions without an excessive amount of advice and reassurance from others.
- 2 Needs others to assume responsibility for most major areas of his or her life.
- 3 Has difficulty expressing disagreement with others because of fear of loss of support or approval ...
- 4 Has difficulty initiating projects or doing things on his or her own (because of a lack of self-confidence in judgment or abilities rather than a lack of motivation or energy).
- 5 Goes to excessive lengths to obtain nurturance and support from others, to the point of volunteering to do things that are unpleasant.
- 6 Feels uncomfortable or helpless when alone because of exaggerated fears of being unable to care for himself or herself.
- 7 Urgently seeks another relationship as a source of care and support when a close relationship ends.
- 8 Is unrealistically preoccupied with fears of being left to take care of himself or herself.⁶⁰

While many of us may occasionally experience some of these symptoms to a limited extent, to be diagnosed with dependent personality disorder those symptoms need to exist in combination and be *pervasive and excessive*. By definition this indicates that an affected individual's mental functioning differs from the general population in a negative way — which would seem to qualify as an 'impairment'.

Similarly, from a broader perspective (focusing on personality disorders generally) it appears that the mental functioning of *all* people who suffer from personality disorders is impaired. This is because personality disorders, by definition, include traits that 'are inflexible and maladaptive and cause significant functional impairment or subjective distress.'⁶¹ Contrary to the

⁶⁰ DSM-5 (n 2) 675.

⁶¹ *Ibid* 647.

prosecution's characterisation of such disorders as mere 'idiosyncrasies',⁶² people who live with such disorders suffer from an

enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.⁶³

The serious nature of personality disorders can also be seen in the 'Alternative DSM-5 Model for Personality Disorders', which is set out in Section III of the DSM-5. That model refers to 'pathological personality traits',⁶⁴ making it clear that personality traits may be considered pathological once a certain point of inflexibility and/or maladaptiveness is exceeded.

It is true that the distinction between normality and abnormality (and thus between ordinary personality traits and personality disorders) is not always clear-cut: the position of the American Psychiatric Association, articulated in its standard text on the subject of personality disorders, is that '[p]ersonality functioning and personality traits exist along continuous spectra, from healthy to unhealthy and from adaptive to maladaptive'.⁶⁵ In other words, personality disorders are extremes on a dimensional continuum with normality; in this sense they differ conceptually from more clearly neurobiologically based 'brain diseases' such as schizophrenia.⁶⁶ This dimensionality, however, does not invalidate the notion that personality functions/traits of a certain degree and nature may cause clinically significant impairment and be reflective of clinical disorder. Many clinical constructs, both psychiatric (for example, depression of mood) and biomedical (for example, high blood pressure) are dimensional, but nonetheless clinically valid, with meaningful clinical disorders apparent towards the extremes.

Considering the concept of impairment more broadly in clinical discourse, it is clear that the term has acquired various meanings. The classic World Health Organization definition states that '[i]n the context of health experience, an impairment is any loss or abnormality of psychological, physiologi-

⁶² O'Neill (n 1) 405 [40]–[41].

⁶³ DSM-5 (n 2) 645.

⁶⁴ Ibid 762.

⁶⁵ John M Oldham, Andrew E Skodol and Donna S Bender (eds), *The American Psychiatric Publishing Textbook of Personality Disorders* (American Psychiatric Publishing, 2nd ed, 2014) xix.

⁶⁶ Paul R McHugh and Phillip R Slavney, 'Mental Illness: Comprehensive Evaluation or Checklist?' (2012) 366 *New England Journal of Medicine* 1853, 1855.

cal, or anatomical structure or function.⁶⁷ Inflexible, maladaptive personality traits would meet this criterion: by definition, they are personality features that are considered by clinicians to be an ‘abnormality’. Clinical discourse and related research also makes use of the concept of ‘functional impairment’, which is more akin to the World Health Organization’s notion of ‘disability’: ‘any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being’.⁶⁸ Importantly, such ‘activities’ would include dealing with interpersonal relationships and the inherent stressors therein. Again therefore, those who are diagnosed with personality disorders would frequently show significant impairment in this sense.

It is important to note that while the Court in *O’Neill* did not accept that personality disorders constitute an impairment of mental functioning, in other cases it has been willing to do so. For example, in *R v Chambers* the Court accepted that certain personality traits found in borderline personality disorder can impair an offender’s ability to deal with stress, and hence be deemed to reduce their moral culpability.⁶⁹ That case involved an offender who was convicted of two counts of arson causing death. It was typical (in terms of the psychological dynamics) of cases involving serious offenders with personality disorders: escalating interpersonal conflict over a period of some months that culminated in an imprudent, ill-judged act of offending in the setting of anger, high arousal and intoxication. The key expert evidence was given by a forensic psychiatrist, Dr Lester Walton, who expressed the following opinion in his report:

In my opinion [the appellant] is suffering from a borderline personality disorder with significant compensatory narcissism to offset what is a fundamental failure to develop a stable sense of identity. *This is among the most primitive and severe types of personality disorder, in many respects, more disabling than many types of actual psychiatric illness.* There are characteristic features of miserable self-esteem, repeated self-mutilation, repeated relationship failures and marked instability of mood, especially rage reactions and depressed mood. Borderline

⁶⁷ World Health Organization, *International Classification of Impairments, Disabilities, and Handicaps*, WHA Res 29.35, 29th mtg (May 1976) 27 <http://apps.who.int/iris/bitstream/10665/41003/1/9241541261_eng.pdf>, archived at <<https://perma.cc/L66Q-ZVYH>>.

⁶⁸ *Ibid* 28.

⁶⁹ (2005) 152 A Crim R 164, 173 [31] (Charles JA).

personality disorders may be associated with brief psychotic-like episodes and at times it seems that ‘the appellant’ has had a flimsy grasp on reality.⁷⁰

Dr Walton emphasised the grave effect borderline personality disorder can have on an individual’s mental functioning in his oral evidence, stating: ‘the disability, the impairment of the person, in my view, and I think this would be generally accepted, is often more severe than people who do attract straightforward diagnoses of illness rather than personality disorder.’⁷¹ Dr Walton added that the appellant’s disorder

would be generally regarded as the most severe type of personality disorder, but it is clearly not regarded as an illness ... persons suffering from this type of personality disorder are not well-equipped to cope with demands to adapt and the normal vicissitudes of life are often beyond them in terms of coping skills ... the more difficult external circumstances are, the more likely maladaptive behaviour is to occur.⁷²

This evidence was accepted by the Court, which held:

All of this evidence, none of which was really challenged in the prosecutor’s cross-examination of Dr Walton, did, I think, establish that the appellant suffered a disorder which was likely to cause him to react maladaptively to the stressful situation in which he found himself, and that he was accordingly likely to behave quite irrationally in his conflict with [the victim] because of that disorder. In this situation in my view the evidence of Dr Walton did establish that the appellant was not a person able to make calm and rational choices about his conduct in the situation in which he found himself on the night of 17 October 2002 and that his disability contributed to some extent to his offending. It follows that the appellant’s moral culpability was reduced and there was certainly also evidence that imprisonment would be more onerous for him in consequence of his disability.⁷³

There is robust empirical data to support Dr Walton’s assertions about the potential severity of personality disorders. For example, a comprehensive study by Skodol and colleagues has demonstrated that functional impairment in borderline personality disorder and schizotypal personality disorder exceeds that of major depressive disorder, even after the possible confounding

⁷⁰ Ibid 172 [29] (emphasis in original).

⁷¹ Ibid 172–3 [30] (emphasis omitted).

⁷² Ibid 173 [30].

⁷³ Ibid 173 [31].

effect of comorbid mental illness is eliminated.⁷⁴ The Court's conclusion in *Chambers* that such personality disorders can impair an offender's mental functioning therefore seems preferable to the conclusion in *O'Neill* that such disorders do not constitute an impairment.

D *The Improper Influence of Culpability*

While it is not entirely clear why the Court did not consider Mr O'Neill's mental functioning to be impaired, the strongest indication of its reasoning can be gleaned from the passage (quoted above) in which it explained why Dr Barth's evidence did not meet the threshold criteria of *Verdins*.⁷⁵ In that passage the Court stated that Dr Barth's evidence did not include

any evidence that the respondent suffered from an impairment of mental functioning. He did not opine that the respondent was unable to appreciate the wrongfulness of his conduct or exercise appropriate judgment or make a rational choice, or, alternatively, how the respondent's personality disorder might have obscured his intention to commit the offence of murder.⁷⁶

The language in this passage clearly references the part of the *Verdins* decision in which the Court explained the ways in which an offender's mental health condition may affect his or her moral culpability. According to the Court in *Verdins*, an offender's moral culpability may be reduced if, at the time of the offence, his or her mental health condition had the effect of:

- 1 'impairing the offender's ability to exercise appropriate judgment';
- 2 'impairing the offender's ability to make calm and rational choices, or to think clearly';
- 3 'making the offender disinhibited';
- 4 'impairing the offender's ability to appreciate the wrongfulness of the conduct';
- 5 'obscuring the intent to commit the offence'; or

⁷⁴ Andrew E Skodol et al, 'Functional Impairment in Patients with Schizotypal, Borderline, Avoidant, or Obsessive-Compulsive Personality Disorder' (2002) 159 *American Journal of Psychiatry* 276.

⁷⁵ See *O'Neill* (n 1) 418 [85]. See also n 41 and accompanying text.

⁷⁶ *O'Neill* (n 1) 418 [85].

6 ‘contributing (causally) to the commission of the offence.’⁷⁷

By relying on these factors alone to explain why Mr O’Neill’s mental functioning was not impaired, the Court seems to be suggesting that it is *only mental health conditions that diminish an offender’s culpability* that constitute an ‘impairment of mental functioning.’ However, it is not clear why this should be the case. In *Verdins*, the Court identified six ways in which mental health problems could affect sentencing,⁷⁸ only one of which relates directly to culpability. There appears to be little reason for excluding the operation of the other five *Verdins* principles simply because the offender suffered from a condition which did not reduce his or her culpability for the offence. For example, why should an offender with a mental health condition which is likely to cause him or her to experience imprisonment as particularly severe (*Verdins* principle 5) be precluded from relying on that fact as a mitigating factor, simply because his or her culpability was not diminished by that condition?

In this regard, it is important to note that the Court in *Verdins* made it clear that the *Verdins* principles can apply even if the offender was not suffering from his or her mental health condition at the time of the offence: it is sufficient if the offender is affected by that condition at the time of sentencing, or is likely to be affected in the future.⁷⁹ There have been numerous cases in which an offender’s sentence has been moderated on the basis of the *Verdins* principles, despite his or her condition having developed after the offence was committed.⁸⁰ As an offender’s moral culpability logically *cannot* have been diminished by a condition which did not exist at the time of the offence, it is clear that under the current law diminished culpability is not (and should not be) a prerequisite for the *Verdins* principles to be enlivened.

A similar problem is apparent in the approach taken by the Queensland Court of Appeal in *Hayes*. It can be seen from the passage quoted above that the Court reasoned as follows:

⁷⁷ *Verdins* (n 7) 275 [26] (citations omitted).

⁷⁸ See Part II(A).

⁷⁹ *Ibid* 272 [13].

⁸⁰ See, eg, *DPP (Vic) v WRJ* [2009] VSCA 174, [22], [25], [28] (Maxwell P and Vincent JA); *R v RLP* (2009) 213 A Crim R 461, 470 [17], 471 [20], 473 [26] (Neave, Redlich JJA and Hollingworth AJA); *TRG v The Queen* [2011] VSCA 337, [42]–[47] (Weinberg JA, with whom Ashley JA agreed); *Nguyen v The Queen* [2013] VSCA 317, [16]–[24] (Weinberg and Coghlan JJA).

- Premise 1: Only mental health conditions that affect the capacity of individuals to perceive the world around them, or to respond to it, reduce moral blameworthiness.
- Premise 2: Personality disorders do not fall within this category.
- Conclusion: Therefore personality disorders should not be taken into account in sentencing.⁸¹

We have argued above that Premise 2 is flawed — that most personality disorders *can* affect an individual's cognitive and volitional capacities.⁸² However, even if Premise 2 is accepted, or is limited to those personality disorders which do not affect an individual's capacity to perceive or respond to the world (such as antisocial personality disorder), the Conclusion does not follow. The mere fact that a personality disorder does not reduce an offender's moral blameworthiness does *not* mean that it should be entirely disregarded as a sentencing consideration. It merely means that *Verdins* principle 1 does not apply, and the offender should be considered fully culpable for his or her actions. However, such a disorder may be relevant to the sentencing determination in at least five other ways: it may affect the kind of sentence that should be given or the conditions that should be imposed; the role of general or specific deterrence as sentencing considerations; the burden the sentence may impose on the offender; or the risk of the offender's mental health deteriorating as a result of imprisonment.⁸³ In addition, a mental health condition which does not reduce culpability may be taken into account if it affects the offender's prospects for rehabilitation,⁸⁴ or the need for community protection.⁸⁵

Remarkably, at the beginning of its analysis in *O'Neill*, the Court itself seems to have reached a similar conclusion. It emphasised the importance of understanding 'that the judgment in *Verdins* does not contain one, single, overarching principle concerning the relevance of an offender's mental state to

⁸¹ See n 45 and accompanying text.

⁸² See Part III(B).

⁸³ *Verdins* (n 7) 276 [31]–[32].

⁸⁴ See *DPP (Vic) v Weidlich* [2008] VSCA 203, [17] (Vincent and Weinberg JJA and Mandie AJA).

⁸⁵ See, eg, *DPP (Vic) v Moore* [2009] VSCA 264, [8] (Neave and Redlich JJA), [64] (Lasry AJA); *DPP v Terrick* (2009) 24 VR 457; *Miller v The Queen* [2012] VSCA 265, [24] (Ferguson AJA, with whom Nettle and Tate JJA agreed); *DPP (Vic) v Sokaluk* (2013) 228 A Crim R 189, 199 [42] (Maxwell P, Neave JA and Kaye AJA); *DPP (Vic) v Kemp* [2015] VSCA 108, [48] (Whelan, Santamaria and Beach JJA).

the determination of the appropriate sentence in the particular case.⁸⁶ Rather, it summarises six different aspects of the sentencing process. Consequently, the Court concluded that ‘the nature and degree of impaired mental functioning, which might be relevant, may well be different, depending upon the particular aspect of the sentencing process that is under consideration.’⁸⁷ However, the Court does not seem to have taken this conclusion into account when determining whether Mr O’Neill’s personality disorder constituted an ‘impairment of mental functioning’. Instead, it relied on a culpability-influenced definition of ‘impaired mental functioning’, and failed to consider the diverse ways in which mental health conditions may be relevant to the sentencing process.

IV A BETTER APPROACH TO SENTENCING OFFENDERS WITH PERSONALITY DISORDERS

A Do Not Exclude Personality Disorders from the Scope of the Verdins Principles

It should be clear from the discussion above that many personality disorders can seriously impair an individual’s mental functioning, affecting his or her cognitive and volitional capacities. Consequently, there is little justification for differentiating personality disorders from other mental disorders, such as depression. Not only does such an approach lack a principled basis, but in our view doing so is likely to run counter to the sentencing aims of rehabilitation and community protection. In this regard, we are particularly concerned about the exclusion of the second *Verdins* principle, which allows a mental health condition to influence the kind of sentence that should be imposed, or the conditions under which it should be served.⁸⁸ This principle facilitates the shaping of sentences according to the full breadth of a person’s mental impairment. Sentencing practices that only consider ‘mental illness’ in a narrow sense may miss the opportunity to tailor sentences based on the full constellation of an offender’s psychopathology.

For example, offenders with particular pathological personality traits (such as poor emotional regulation) that increase the risk of offending might usefully be given sentences that include specific psychologically based risk-

⁸⁶ O’Neill (n 1) 406 [43].

⁸⁷ Ibid 412 [66]–[67].

⁸⁸ *Verdins* (n 7) 276 [32].

reduction programs.⁸⁹ There is now considerable empirical evidence that such programs, which may be delivered in custodial or community settings, are effective in reducing the risk of reoffending.⁹⁰ By removing personality disorders from the purview of *Verdins*, there is a risk that counsel will not seek a sentence that involves such programs, or that sentencing judges will feel constrained from imposing such a sentence where the offender's only mental health condition is a personality disorder.

Instead, it is our view that the phrase 'mental disorder or abnormality or an impairment of mental functioning' should continue to be interpreted broadly (as was intended by *Verdins*), allowing all mental health conditions that affect an offender's mental functioning to enliven the *Verdins* principles. To ensure that those principles are not used inappropriately, the Court should:

- more clearly define the nature of each of the six principles, and outline the types of impairments that are relevant to each of those principles; and
- continue to require cogent expert evidence to be given, including evidence that demonstrates the link between the effects of the offender's impairment and the principles that are in issue.

B *Clearly Define the Nature of Each of the Verdins Principles*

While the Court in *Verdins* clearly set out the six different ways in which an offender's mental health problems may be relevant to the sentencing process, little attention has been paid to explicating the precise nature of these principles (despite those principles having been discussed in over 500 higher court cases in Victoria alone since 2007). For example, it is not entirely clear what types of impairment should moderate the need for general deterrence as a sentencing consideration, nor why the principle of general deterrence should be affected by an offender's mental health condition.⁹¹ This makes it very difficult to know whether an offender's particular disorder should qualify him or her for a sentencing reduction on this basis. A similar lack of clarity surrounds each of the other *Verdins* principles.⁹²

⁸⁹ The mechanisms for imposing such a sentence will differ according to the jurisdiction. See, eg, *Sentencing Act 1991* (Vic) pt 3A, which allows Victorian judges to impose a Community Correction Order with a requirement that the offender participate in such a program.

⁹⁰ Clive R Hollin, *Psychology and Crime: An Introduction to Criminological Psychology* (Routledge, 2nd ed, 2013) ch 11.

⁹¹ See Walvisch (n 23) 193.

⁹² *Ibid* 193, 198.

It is our view that rather than trying to limit the application of the *Verdins* principles by excluding certain mental health conditions (such as personality disorders) from its scope, the Court should focus on more clearly defining the nature of each principle. This could lead to a significant reduction in reliance on those principles. For example, if the Court specified that an offender's moral culpability will *only* have been diminished if his or her cognitive or volitional capacities were impaired at the time of the offence, an offender who solely suffered from antisocial personality disorder (the most common personality disorder amongst offenders) would not be able to rely on *Verdins* principle 1. This is because (as noted above) antisocial personality disorder — unlike most other personality disorders — does not affect an individual's capacity to perceive and respond to the world. While the *Verdins* principles would still be enlivened in such a case (as the offender's mental functioning is impaired), the offender would only be able to rely on the other five principles (depending on how they are defined).

C *Require Cogent Expert Evidence*

The Court has frequently emphasised that the *Verdins* principles should be regarded as exceptional, and should not be invoked in 'routine cases'.⁹³ Consequently, it has held that the principles in *Verdins* should be applied only 'after careful scrutiny and assessment, based on cogent evidence, of the relationship between the mental disorder and the offending and other matters'.⁹⁴ In our view, this is the best way to appropriately limit the application of the *Verdins* principles. Judges should continue to ensure that expert evidence is soundly based, relevant and clearly focuses on the link between the offender's mental health condition and the particular principles that are in issue.

Where a personality disorder is relevant to the sentencing process, the expert should acknowledge the inherent difficulties in making reliable and

⁹³ See, eg, *R v Vuadreu* [2009] VSCA 262, [37] (Ashley and Weinberg JJA). See also *Charles v The Queen* (2011) 34 VR 41, 69–70 [162] (Robson AJA, with whom Redlich and Harper JJA agreed).

⁹⁴ *Mune v The Queen* [2011] VSCA 231, [31] (Harper JA, with whom Hansen JA agreed). See also *Verdins* (n 7) 272 [13]; *R v Zander* [2009] VSCA 10, [29], [32] (Dodds-Streton JA, with whom Nettle JA agreed); *Carroll v The Queen* [2011] VSCA 150, [19] (Maxwell P, with whom Buchanan JA agreed); *O'Neill* (n 1) 413 [71], 416 [80]–[81].

valid diagnoses in the forensic context.⁹⁵ It is also important that the expert clarifies precisely what diagnosis has been made and which diagnostic framework has been used (for example, the DSM-5, DSM-5 Alternative Model, ICD-10). In addition, the empirical basis for making the diagnosis (for example, the weight given to various sources such as clinical interview, questionnaires, collateral data) needs to be explicit.⁹⁶ Such steps help to clarify the robustness or otherwise of the diagnostic formulation, and facilitate clarity around the grounds for differences where expert opinions diverge.

To assist the Court in its deliberations regarding considerations of reduced culpability (*Verdins* principle 1), experts need to clearly articulate the path of reasoning by which the pathological features of a particular personality disorder (with or without any comorbid mental illness or substance misuse) have made a material causal contribution to any offending behaviour. It is notable in passing that in *Hayes* the link between the various acts of offending and the offender's personality dysfunction was not clearly made out by any expert witness. The offending was premeditated and repeated white-collar crime, whereas the mental health evidence was that the offender's personality disorder was such as to render her 'reckless and dangerously impulsive.'⁹⁷ The judge consequently described the report of the expert as 'largely unhelpful'.⁹⁸

Similarly, to assist the court in its deliberations about the 'type of sentence' that should be imposed (*Verdins* principle 2), expert evidence should identify specific psychological deficits (such as impaired impulse control or emotional dysregulation) for which there is evidence in the specific offender, and which are known to be linked to a future risk of reoffending.⁹⁹ Such deficits could be targeted by specific evidence-based rehabilitative measures, such as risk reduction programs. It will be important for mental health experts to clarify for the court that such programs are distinct from,

⁹⁵ For example, the expert generally has only seen the offender on one occasion, under the stressful circumstances of a pre-sentence evaluation; collateral information may be limited; and if remanded, the stress of imprisonment may be confounding the clinical picture.

⁹⁶ To avoid circularity, it is essential that the expert consider collateral evidence that goes *beyond the offence itself*. For example, an impulsive offence in and of itself should not be used as the sole evidentiary ground for finding that the offender suffers from a pathological impairment in impulse control.

⁹⁷ *Hayes* (n 44) [6]–[17], [20] (Chesterman JA).

⁹⁸ *Ibid* [20].

⁹⁹ DA Andrews and James Bonta, *The Psychology of Criminal Conduct* (Anderson Publishing, 3rd ed, 2003), stating that such deficits are often considered to be a type of 'criminogenic need'.

although potentially complementary to, standard patient-centred clinical therapeutic interventions.

When reporting on the potential impact of imprisonment on the offender (*Verdins* principle 5) or the risk of the offender's mental health seriously deteriorating during the course of his or her punishment (*Verdins* principle 6), mental health experts must clarify which *specific* personality traits in this *specific* offender are likely to lead to such problems in a custodial environment. In this regard, it is notable that there is evidence that in the early stages after sentencing at least, for many offenders with mental disorders, imprisonment is associated with *improvement* in psychological wellbeing.¹⁰⁰

V CONCLUSION

It is possible that the approach taken to personality disorders by the Court in *O'Neill* was motivated by a concern that the *Verdins* principles are being relied upon too frequently. This is indicated by the fact that the Court began its analysis by referring to the case of *R v Miller*.¹⁰¹ In that case King J noted that the *Verdins* decision is now raised 'in almost every plea before the courts, certainly in the Supreme Court'.¹⁰² She suggested that this has made the task of sentencing judges more difficult, and implored the Court of Appeal to 're-examine this aspect of sentencing with a view to perhaps reining in the overuse of reliance upon *Verdins*'.¹⁰³

While King J's concern may be valid, the solution is not to prevent personality disorders from being taken into account in sentencing. Contrary to the prosecution's attempt in *O'Neill* to minimise the gravity of such disorders, it is clear that they can impair an individual's mental functioning to the same extent as any other type of mental disorder. Consequently, rather than excluding such disorders from the scope of the *Verdins* principles, the Court should take them seriously, and closely consider their relationship to each of the six *Verdins* principles.

In this regard, we strongly agree with the following statement made by the Court in *O'Neill*:

¹⁰⁰ See Lamiece Hassan et al, 'Prospective Cohort Study of Mental Health During Imprisonment' (2011) 198 *British Journal of Psychiatry* 37.

¹⁰¹ *Miller* (n 30).

¹⁰² *Ibid* [33].

¹⁰³ *Ibid*.

[I]t is inappropriate to apply a mechanistic approach that, because an offender is said to suffer from impaired mental functioning, the offender thus attracts the *Verdins* principles. Such an approach is overly simplistic, and erroneous. As this Court emphasised in *Verdins* and many later cases, careful consideration needs to be given to whether the evidence establishes that mental capacity has been impaired and which of the circumstances set out in *Verdins* are engaged. It requires a rigorous evaluation of the evidence.¹⁰⁴

However, we would go further and add that it is *also* inappropriate to apply a mechanistic approach that holds that offenders who suffer from certain types of disorder (such as personality disorders) are precluded from relying on the *Verdins* principles. Such an approach is also overly simplistic, given the diversity and breadth of the *Verdins* principles, and the degree of impairment often suffered by those with personality disorders. Instead, the Court should accept that all impairments of mental functioning (broadly interpreted) are potentially relevant to the sentencing process, and should carefully consider the evidence concerning the offender's alleged impairment, the nature and effects of the impairment in issue, and its interaction with each of the principles set out in *Verdins*.

¹⁰⁴ O'Neill (n 1) 412 [68].