Sentencing Advisory Council

Should Media Coverage Affect Sentencing?

Contents

VICTORIA State Government

Authored by Paul McGorrery

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Introduction

In sentencing an offender, courts take many factors into account, such as the seriousness of the offence, the offender's prior record, their age, whether they pleaded guilty and many others. In Australia, courts do this through an approach known as instinctive synthesis, meaning they consider all the factors that can justify a sentence being more or less severe and then arrive at a final outcome.[1] One of the factors that courts may take into account is whether the offender has already been punished in some fashion outside the criminal justice process.[2] Known as *extra-curial punishment*[3] (or extra-judicial[4] or natural[5] punishment) this can take various forms such as visa cancellation,[6] loss of chosen career,[7] injury to the offender[8] and hardship to the offender's family.[9] This report is concerned with just one form of extra-curial punishment: adverse media coverage,[10] in particular, of people.[11]

The media and the courts have an important and symbiotic relationship, but sometimes their interests can diverge. The media have an interest in reporting on criminal justice matters because they are often stories of considerable interest to their audiences. In reporting on those stories, the media often concentrate their attentions 'on the exceptional and unusual among serious crimes', which can lead to 'intense and often emotive media reporting' about sentencing.[12] This can run the risk of undermining, rather than promoting, confidence in the justice system.[13]

1. *Markarian v The Queen* [2005] HCA 25, [37].
2. This can be a 'mitigating factor' that is permissibly taken into account via section 5(2)(g) of the *Sentencing Act 1991* (Vic) and similar provisions in other jurisdictions: see, for example, *R v Galeano* [2013] QCA 51, [109]–[110].
3. The New South Wales Court of Criminal Appeal has defined extra-curial punishment as 'loss or detriment imposed on an offender by persons other than the sentencing court, for the purpose of punishing the offender for [the] offence or at least by reason of the offender having committed the offence': *Silvano v R* [2008] NSWCCA 118, [29]. See also *Christodoulou v R* [2008] NSWCCA 102, [5].
4. See, for example, *Al-Kateb v Godwin* [2004] HCA 37, [1].
5. See, for example, Andrew Ashworth, *Sentencing and Criminal Justice* (5th ed., 2010) 183–184.
6. *The Queen v Calica* [2021] NTSCFC 2, [178]; Sentencing Advisory Council, *Deportation and Sentencing: An Emerging Area of Jurisprudence* (2019).
7. *The Queen v Tran & Ors* [2013] VSC 363, [46]; *R v Gale* [2020] NSWDC 79, [65]–[81]; *Braimah-Mahamah v R* [2016] NSWDC 138, [44]–[45]. Contra *R v Hayne* [2021] NSWDC 242 ('I do accept that he has lost a playing contract, but that does seem to be a normal and natural consequence of a conviction for this offence').
8. *R v Davidson* [2009] QCA 283; *Caddies v Birchell* [2018] QDC 180. See also James Duffy, 'Roll the Dice, Rational Agent: Should Extra-Curial Punishment Mitigate an Offender's Sentence?' (2012) 31(1) *University of Queensland Law Journal* 115.
9. *Markovic v The Queen; Pantelic v The Queen* [2010] VSCA 105. See also Wendy Kukulies-Smith, 'Punishing Parents: A Study of Family Hardship in Australian Sentencing' (PhD Thesis, Australian National University, 2019); Tamara Walsh and Heather Douglas, 'Sentencing Parents: The Consideration of Dependent Children' (2016) 37(1) *Adelaide Law Review* 135.
10. This sentencing factor goes by multiple names, such as public opprobrium, adverse publicity and public shaming.
11. This report does not consider corporate offenders. The utility of publicity as a formal or extra-curial sanction in sentencing corporate offenders has been discussed elsewhere: see, for example, *R v Pilarinos* [2001] VSCA 9, [11]; *ASIC v Lindberg* [2012] VSC 332, [107]–[108]; *ASIC v McDonald (No 12)* (2009) 259 ALR 116, [308], [311]; Brent Fisse, 'The Use of Publicity as a Criminal Sanction Against Business Corporations' (1971) 8(1) *Melbourne University Law Review* 107; Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (3rd ed., 2014) 907–910.
12. Freiberg (2014), above n 11, 1, 262.
13. Sentencing Advisory Council, *Myths and Misconceptions: Public Opinion versus Public Judgment About Sentencing* (2006) 15–16; Sara S. Beale, 'The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness' (2006) 48(2) *William and Mary Law Review* 397, 446.

Courts in turn have an interest in having their decisions reported. Confidence in the judicial arm of the criminal justice system relies on a combination of community awareness about what courts do, the transparency of their work, and the apparent fairness of their decisions, which can only be scrutinised if there is transparency and community awareness.[14] Moreover, the sentencing purpose of general deterrence – whereby the sentencing of one offender is thought to deter other people from engaging in similar behaviour – is realistically only achievable (if at all) if the media and/or government[15] operate as the conduit between the courts and the community.[16] While some courts have taken the very laudable step of making most of their sentencing remarks publicly available,[17] many people do not even have time to read media summaries,[18] let alone original source material like sentencing remarks, especially in the social media age.[19] So the community realistically only becomes aware of sentencing decisions through the media. The difficulty is balancing the need for fair coverage (the courts' priority) with the need for interesting coverage (the media's priority).[20] Justice Harper has described the relationship as like a 'Greek tragedy' because '[e]ach is forced by its circumstances to face the other off, with neither having the flexibility necessary to reach a satisfactory working compromise'.[21]

14. Josh Bowers and Paul H. Robinson, 'Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility' (2012) 47(2) *Wake Forest Law Review* 211; *Rosales-Mireles v United States*, 138 S Ct 1897, 1908 (2018); Kevin Kwok-Yin Cheng et al., 'Enhancing the Legitimacy of Sentences in the Minds of the Public: Evidence from a Public Opinion Survey in Hong Kong (2020) 22(5) *Punishment & Society* 617; Sentencing Advisory Council, *Public Opinion About Sentencing: A Research Overview* (2018); Sentencing Advisory Council, *Predictors of Confidence: Community Views in Victoria* (2011).

15. *DPP v Russell* [2014] VSCA 308, [5] ('Courts have neither the expertise nor the resources to engage in the kind of sustained community education which is necessary if general deterrence is to be a reality. That is a task for government').

16. See Freiberg (2014), above n 11, 190, 254:

    > In many cases the sentence imposed is intended to 'send a message' to others … through the publication of the sentencing remarks or, in some cases, through media coverage … Courts often declare that they intend to 'send a message' to the community through the sentencing process that the behaviour in question 'will not be tolerated'. This assumes that the sentences, or reports of them in the media, will be known and understood.

    See also *WCB v R* [2010] VSCA 230, [42]–[43].

17. The County Court of Victoria, for example, published over 1,300 judgments in 2020: Australasian Legal Information Institute (AustLII), 'County Court of Victoria' (austlii.edu.au, 2020) <https://www.austlii.edu.au/cgi-bin/viewtoc/au/cases/vic/VCC/2020/> at 17 May 2022.

18. Keith R. Stamm and Daniel M. Jacoubovitch, 'How Much Do They Read in the Daily Newspaper: A Measurement Study' (1980) 57(2) *Journalism Quarterly* 234 (finding that readers typically read about 2.8 inches of a news article).

19. Maksym Gabielkov et al., 'Social Clicks: What and Who Gets Read on Twitter?', *Proceedings of the 2016 ACM SIGMETRICS International Conference on Measurement and Modeling of Computer Science* (2016) (finding that 59% of social media users did not click on news articles before sharing them online).

20. As one reporter recently said during a podcast about the relationship between the media and the courts, '[w]e cover cases because they're interesting, because we think people want to know about them': Supreme Court of Victoria, 'Episode 13: Reporting the Court – Part 2', *Gertie's* Law (Supreme Court of Victoria, 30 August 2019) <https://www.supremecourt.vic.gov.au/about-the-court/multimedia-on-demand/gerties-law-podcast> 17 May 2022. Similarly, Justice Kunc argues that media coverage of court proceedings 'is not an act of selfless public service but is motivated by the desire to earn a profit from the sale of newspapers or advertising': Francois Kunc, 'Current Issues: Sentencing and Media Coverage: Unintended Consequences?' (2016) 90(10) *Australian Law Journal* 687, 689.

21. David Harper, 'Sentencing: Public Perceptions, the Reality and Their Social Implications' (Kerferd Oration, Beechworth, 31 July 2011). See also the comments of Justice Bell in Supreme Court of Victoria, 'Episode 12: Reporting the Court – Part 1', *Gertie's Law* (Supreme Court of Victoria, 26 August 2019) <https://www.supremecourt.vic.gov.au/about-the-court/multimedia-on-demand/gerties-law-podcast> at 17 May 2022 ('I think there is institutional tension between the media and the courts … and I think it's perfectly understandable that those tensions might exist').

Beyond the educative and deterrent effect of media coverage about a particular case, it can also result in publicity about, and vilification of, an offender at a local, national or even international level. The consequences of media coverage on fair trial rights are well documented.[22] However, there has been relatively little analysis of the appropriate role that such publicity and vilification should have in the *sentencing* process. In 2019, Chief Judge Kidd wrote in *DPP v Pell* that 'the manner and extent to which extra-curial punishment and public opprobrium should be taken into account … [are] not entirely settled'.[23] In 2016, Chong et al. argued that studies on extra-curial punishment 'are sorely needed because of the continuing complexity and ambiguity surrounding both the definitional parameters of extra-curial punishment, and the way courts have applied these rules'.[24] In 2014, Freiberg wrote that '[t]he question of the relationship between the degree of adverse publicity and the level of sentence has received little attention in the sentencing cases'.[25] The Commonwealth Director of Public Prosecution's guidance on sentencing federal offenders describes the issue as one that 'remains to be authoritatively resolved'.[26] The Judicial College of Victoria's *Sentencing Manual* states that 'it is unclear whether opprobrium as a result of conviction may be considered by the court in sentencing'.[27] And the National Judicial College also says that '[i]t is unclear whether hardship resulting from public opprobrium may be taken into account as a mitigating factor at sentence'.[28] It has been more than 20 years since the High Court expressed conflicting views on this issue in *Ryan v R*.[29] Since then, the advent of social media has elevated the potential exposure for public opprobrium to unforeseen heights.[30] Yet the issue seems to remain as unsettled now as it did then.[31]

22. See, for example, Frank Vincent, *Open Courts Act Review* (2017) 16–17, 123; Roxanne Burd and Jacqueline Horan, 'Protecting the Right to a Fair Trial in the 21st Century: Has Trial by Jury Been Caught in the World Wide Web?' (2012) 36(2) *Criminal Law Journal* 103; Michael Chesterman et al., *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (2001); Allan Ardill, 'The Right to a Fair Trial: Prejudicial Pre-Trial Media Publicity' (2000) 25(1) *Alternative Law Journal* 3; *R v Glennon* [1992] HCA 16, [10]–[11]; *Mokbel v DPP (Cth)* [2021] VSCA 94, [56]–[57].
23. *DPP v Pell* [2019] VCC 260, [148], a point reiterated in *DPP v Pusey* [2021] VCC 478, [78].
24. Mark D. Chong et al., 'Sentencing the "Victimised Criminal": Delineating the Uncertain Scope of Mitigatory Extra-Curial Punishment' (2016) 35(2) *Sydney Law Review* 379, 379.
25. Freiberg (2014), above n 11, 909.
26. Commonwealth Director of Public Prosecutions, *Sentencing of Federal Offenders in Australia: A Guide for Practitioners* (5th ed., 2022) 92 (discussing the conflicting comments in the High Court decision of *Ryan v R* [2001] HCA 21, and the cases of *Sabel v R; R v Sabel* [2014] NSWCCA 101 and *Kenny v R* [2010] NSWCCA 6 where adverse media coverage was found to be irrelevant as a 'direct result' of the offending (*Sabel* at [211]), but relevant where it results in 'some physical or psychological effect on the offender' (*Kenny* at [49]).
27. Judicial College of Victoria, '7.8.1 – Public Opprobrium', *Victorian Sentencing Manual* (Judicial College of Victoria, 2020) <https://resources.judicialcollege.vic.edu.au/article/669236/section/843611> at 17 May 2022, 212 (also stating that opprobrium is typically only relevant when the publicity was 'significantly damaging').
28. National Judicial College of Australia, '4.1 Public Opprobrium', *Hardship to the Offender* (Commonwealth Sentencing Database, 2016) <https://csd.njca.com.au/principlespractice/general_sentencing_principles/s16a_specific_relevant_factors/hardship/> at 17 May 2022.
29. *Ryan v R* [2001] HCA 21. This case is discussed in more detail below.
30. Ruth M. Dunsby and Loene M. Howes, 'The NEW Adventure of the Digital Vigilante! Facebook Users' Views on Online Naming and Shaming' (2019) 52(1) *Australian & New Zealand Journal of Criminology* 41; Chris Cunneen and Sophie Russell, 'Vilification, Vigilantism and Violence': Troubling Social Media in Australia', in Kim D. Weinert et al. (eds), *Law, Lawyers and Justice* (2020) 82–105.
31. This is not unique to Australia. The appropriate role of media coverage in the sentencing process is also unsettled in the United States, with various courts taking diverse and contradictory approaches to media coverage as being an aggravating, mitigating or neutral factor: Mirko Bagaric and Peter Isham, 'A Rational Approach to the Role of Publicity and Condemnation in the Sentencing of Offenders' (2019) 46(2) *Florida State University Law Review* 239, 242.

The aim of this report is to analyse the last 20 years of judicial and academic commentary on media coverage as a sentencing factor in order to assist courts and practitioners in navigating the current case law on the issue. The report finds that most courts appear to take adverse media coverage into account but also that there is significant inconsistency in terms of whether it is taken into account, on what basis and to what extent.

The Council's approach

There were three stages to the Council's research. First, a literature review was undertaken of academic work relating to media coverage as an extra-curial sentencing factor, especially in Australia. This was conducted by searching for particular terms in academic databases.[32] Second, a review was undertaken of contemporary Australian case law (primarily 2010–) relating to the role of media coverage as a sentencing factor. This was conducted using AustLII, a publicly available legal database, again searching for particular terms.[33] Cases where courts accepted that the offender had experienced 'public humiliation' or similar, without reference to whether it was due to media coverage, were excluded.[34] Third, themes were identified in the literature and case law.

Literature and case law review

The literature review identified only a handful of academic articles and texts discussing the role of media coverage as a sentencing factor. A few additional texts were reviewed that discuss the role of extra-curial punishment generally. There were then 43 judgments identified in which an Australian court considered – in detail or otherwise – the role of media coverage in its sentencing synthesis. This is not intended to be an exhaustive account of such cases but rather a representative sample.

A number of interrelated issues emerge from the identified literature and case law.

- **Why is it relevant?**
  - On what basis is adverse media coverage relevant to sentencing? Does adverse media coverage achieve a legislated sentencing purpose somehow, or is there another basis for its relevance?
- **When is it relevant?**
  - Is it inherently punitive for an offender's case to receive *any* media coverage? Or does some feature of the coverage itself, or its effect on the offender, render it punitive?
  - In what way(s) can media coverage be punitive?
- **How relevant is it?**
  - How should courts assess the weight to be given to adverse media coverage in sentencing?

32. The search terms included 'extra curial' OR 'extra-curial' OR 'extracurial' OR 'publicity' OR 'public opprobrium' AND 'sentencing'.
33. The search terms were identical to those used for the literature review.
34. See, for example, *R v Standen* [2011] NSWSC 1422, [203].

A. Why should courts acknowledge adverse media coverage in sentencing?

Richards argues that extra-curial punishment, in general, can instil genuine remorse, operate as a form of punishment in its own right, have a specific deterrent effect on the offender[35] and have a general deterrent effect on other would-be offenders.[36] Similarly, Chong et al. argue that extra-curial punishment may, depending on the circumstances, be relevant to just about all the purposes of sentencing, because it may have 'deterred, reformed, rehabilitated, denounced and/or retributively punished the offender'.[37] These are all legitimate and legislated purposes of sentencing in Victoria[38] (and elsewhere), which would explain why achieving them extra-curially might reduce the need to achieve them curially. As the Queensland Court of Appeal wrote in *R v Hannigan*:

> [T]he theory which underlies the relevance of extra-curial punishment to sentence is that it deters an offender from re-offending by providing a reminder of the unhappy consequence of criminal misconduct … In such cases one can see that a purpose of sentencing by the court, deterrence or retribution, has been partly achieved.[39]

In contrast, Duffy argues that 'judges have been too quick to acknowledge extra-curial punishment as a factor in mitigation without identifying the sentencing goals or purposes that such an acknowledgement achieves', and in so doing risk 'erod[ing] the important symbolism involved in a court sanction'.[40] He suggests that allowing extra-curial punishment to influence the state-sanctioned punishment may have the effect of retrospectively imbuing extra-curial punishment with the quasi-approval of the state. This is because doing so suggests that the extra-curial punishment somehow legitimately (even if only partly) achieved some of the purposes of sentencing.[41] As one court said, '[i]nformal public shaming in the media … can never be a substitute for the formal expression by society through its courts that a member of that society has committed a wrong'.[42] Instead, Duffy argues that extra-curial punishment should only become relevant on the basis of *mercy*, not sentencing purposes such as deterrence and retribution.[43] Fellows and Chong make the same argument, that mercy provides a more appropriate philosophical foundation than deterrence does for allowing courts to acknowledge extra-curial punishment in appropriate cases.[44]

35. On the potential for media coverage to achieve specific deterrence, see *Elzahed v Kaban* [2019] NSWSC 1466, [65] ('The adverse publicity and community backlash already caused by reason of these proceedings have already operated as a strong disincentive to further similar offending').
36. Frank Richards, 'Extra-Curial Punishment and Mitigation of Sentence' (2009) 36 *Hearsay* [1].
37. Chong et al. (2016), above n 24, 387. The only purpose that doesn't appear to be included here is protection of the community: see *Veen v The Queen (No 2)* [1988] HCA 14.
38. *Sentencing Act 1991* (Vic) s 5(1).
39. *R v Hannigan* [2009] QCA 40, [25].
40. Duffy (2012), above n 8, 116, 119.
41. Ibid 115, 120–124.
42. *DPP v O'Reilly* [2010] VSC 138, [36].
43. Duffy (2012), above n 8, 129.
44. James D. Fellow and Mark D. Chong, 'Extra-Curial Punishment in Criminal Law Sentencing: A Principles-Based Approach' (2016) 18 *Southern Cross University Law Review* 55. They also argued that section 70(1)(e) of the *Sentencing Act 1991* (Vic) provides a legislative foundation for mercy to play a role in sentencing; however, that provision only applies if the sentence is going to be an adjourned undertaking, dismissal or discharge.

To date, there has been little academic discussion of the role that mercy plays in sentencing.[45] Mercy is, though, a well-established principle. In 2010, a five-judge bench of the Victorian Court of Appeal reiterated that '[t]here must always be a place in sentencing for the exercise of mercy'.[46] More recently, in 2020 the Victorian Court of Appeal expressly adopted the following statement from Brien, whose 1991 PhD thesis[47] revolved around mercy:

> Through its relationship to discretion and the place of discretion within the legal system, mercy is essential to the functioning and workability of the law, and, more generally, to the culture of the law. No theory of law, therefore, can be adequate without an account of mercy, both as a particular action and as a virtue of the system's officials. Not only has mercy a place within legal justice, but it must be maintained as a possibility and actively promoted, if the law is to operate in a morally acceptable manner and carry out the various functions that it has in our social arrangements. Therefore, rather than being in tension with the law as a system, mercy is an essential component of it.[48]

The Court of Appeal did, however, suggest that mercy is only relevant when there are *exceptional* circumstances.[49] In that sense, mercy may not be the most appropriate platform from which to argue adverse media coverage as a mitigating factor. Instead, it may be preferable to argue that there is less need for the sentence imposed to achieve 'just punishment'[50] – to reflect 'the moral sense of the community'[51] – because just punishment is not constrained by the requirement of exceptional circumstances. It might also be argued that there is less need to achieve specific deterrence if the adverse media coverage has reduced the risk of reoffending. But such a claim would benefit from some empirical foundation.[52]

45. See, however, Richard G. Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25(1) *Monash University Law Review* 1; Walsh and Douglas (2016), above n 9, 140–143.
46. *Markovic v The Queen; Pantelic v The Queen* [2010] VSCA 105, [1], citing *Cobiac v Liddy* [1969] HCA 26. See, subsequently, *DPP (Cth) v Masange* [2017] VSCA 204, [71]–[73]; *DPP v Milson* [2019] VSCA 55, [51]. See also Julian R. Murphy et al., 'An Ancient Remedy for Modern Ills: The Prerogative of Mercy and Mandatory Sentencing' (2021) 46(3) *Monash University Law Review* 252.
47. Andrew Brien, 'Mercy: The Concept and Its Moral Standing' (PhD Thesis, Australian National University, 1991). See also ibid 206–207, 209, at which Brien writes that 'mercy is justifiable within the legal system, and indeed any institution, if the actors charged with administering the system have discretionary powers … If there is some objection to the existence of discretionary powers within the legal system, such an objection will also constitute an objection to mercy'.
48. *DPP v Snow (A Pseudonym)* [2020] VSCA 67, [88], citing Andrew Brien, 'Mercy Within Legal Justice' (1998) 24(1) *Social Theory and Practice* 83, 105, as quoted in Fox (1999), above n 45, 23.
49. *DPP v Snow (A Pseudonym)* [2020] VSCA 67, [15], [93]. See also *DPP v Queale (A Pseudonym)* [2021] VCC 73, [59]–[60], citing *Snow* and *Markovic*. Some courts have also limited the relevance of adverse media coverage to exceptional cases: see, for example, *Church v R* [2012] NSWCCA 149, [34] ('I accept that the actions of the media can, *in extreme cases*, amount to extra-curial punishment') (emphasis added).
50. *Sentencing Act 1991* (Vic) s 5(1)(a).
51. *R v Williscroft & Ors* [1975] VR 292, 300.
52. At the date of writing, there is no apparent research on the effect of adverse media coverage and public opprobrium in specifically deterring offenders from engaging in further offending.

B. When should adverse media coverage become relevant?

In the 2001 case of *Ryan v R*,[53] each member of a five-judge High Court bench delivered a separate opinion. The case has since heralded legislative reforms as to the role of good character in sentencing when that good character in some way *facilitated* the offending.[54] A less discussed feature of the case was the division among the court about the appropriate role of public opprobrium in sentencing. Two justices thought it could be relevant, two thought otherwise and Gummow J[55] did not address the issue:

- **Callinan J** wrote that crimes committed by people of 'some prominence will often attract much greater vilification, adverse publicity' and 'public humiliation', and that sentencing courts should not ignore those consequences.[56] **Kirby J** agreed, saying that 'opprobrium, adverse publicity' and 'public humiliation' could be taken into consideration, but only '[i]f properly based on evidence'.[57] .
- **McHugh J** was not convinced that public opprobrium should entitle a person to a lesser sentence, because it would be too difficult to measure and taking it into account would unfairly benefit 'powerful' and 'well-known' people more than others.[58] He also hinted that there had not been 'full argument on the issue'.[59] **Hayne J** agreed, saying that society's reactions to an offender 'are matters which a sentencer should not take into account' because '[t]here is an irreducible tension between the proposition that offending behaviour is worthy of punishment and condemnation according to its gravity, and the proposition that the offender is entitled to leniency on account of that condemnation'.[60]

Since then, courts have often observed that 'the broader issue of public opprobrium or stigma being a mitigating factor at sentence remains to be authoritatively resolved'.[61] (Despite this, some have made clear that their preference lies with the McHugh/Hayne[62] reasoning, while 'the balance of authority'[63] leans towards the Callinan/Kirby reasoning.) In 2016, Bagaric et al. supported the McHugh/Hayne approach:

53. *Ryan v R* [2001] HCA 21.
54. See, for example, *Sentencing Act 1991* (Vic) s 5AA; Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Part VII–X* (2017) 292–299.
55. *Ryan v R* [2001] HCA 21, [61]–[73].
56. *Ryan v R* [2001] HCA 21, [177].
57. *Ryan v R* [2001] HCA 21, [123].
58. *Ryan v R* [2001] HCA 21, [52]–[55].
59. *Ryan v R* [2001] HCA 21, [55].
60. *Ryan v R* [2001] HCA 21, [157].
61. *R v Payne-Moore* [2021] ACTSC 125, [55]. See also *DPP v Pell* [2019] VCC 260, [148]; *R v Jones* [2011] QCA 147, [17].
62. See, for example, *R v Thornton* [2019] NSWDC 56, [127] ('I share the reservations expressed by McHugh J in *Ryan v The Queen*'). See also *Kenny v R* [2010] NSWCCA 6, [49]–[50] ('My initial reaction was that public humiliation that arises from the commission of the offence should not *alone* give rise to a mitigation of sentence without more … Insofar as in the present case his Honour was not prepared to take into account as a mitigating factor the public humiliation suffered by the applicant, I agree with that view. But even if it were wrong, the impact upon the sentence would be very slight').
63. Bagaric and Isham (2019), above 31, 268. See, for example, *R v Hayne* [2021] NSWDC 242; *SG v Tasmania* [2017] TASCCA 12, [13]; *R v Hough* [2002] WASCA 42, [93].

> Public opprobrium should be ignored as a sentencing consideration. Nearly all criminal guilt attracts some censure and condemnation; hence, to some extent, all sentenced offenders are subject to a degree of opprobrium. Condemnation is an intrinsic aspect of criminal guilt and it is not tenable to measure with any accuracy the level of opprobrium to which an individual is subjected. Further, the manner in which public scorn affects an offender is to a large degree within his or her control. Opprobrium, unlike a fine or incarceration, is intangible. Its impact can be diminished and, in fact negated by a resilient offender. The fact that high-profile offenders and those convicted of certain offences are subjected to more opprobrium is a matter of degree; it does not change the nature of the hardship … Given that sentencing aims to elicit denunciation and opprobrium, it is contradictory to claim that this very goal should, at the same time, be a basis for mitigation.[64]

These views are, however, in the minority. Of the 43 cases reviewed for this report, opprobrium had at least some, even if 'very slight',[65] weight in the vast majority (37 cases). Of the six cases in which opprobrium was given no weight, it was either because there was no evidence that the opprobrium had an effect on the offender[66] or because the opprobrium was a natural and probable consequence of the offending.[67] Taken together, those 43 cases suggest that adverse media coverage generally has some relevance to the sentencing exercise, but that the coverage or its consequences must somehow go above and beyond what would naturally be expected due to either the nature of the crime or the profile of the offender.

1. Something more than a natural and probable consequence

Duffy argues that extra-curial punishment should only become relevant if the harm or consequences are 'completely disproportionate' to the seriousness of the offending.[68] Chong et al. make a similar argument, that 'when the extra-curial punishment has taken the form of naturally occurring or inevitable deleterious consequences … mitigating an otherwise appropriate sentence would run contrary to the interests of the victim and the community in ensuring that the offender is justly and appropriately punished'.[69] Courts have also rejected extra-curial punishment as mitigating if it is premised on 'adverse consequences that flow *directly or naturally* from' the offending, instead requiring some exceptionality to the harm.[70]

64. Mirko Bagaric et al., 'The Irrelevance to Sentencing of (most) Incidental Hardships Suffered by Offenders' (2016) 39(1) *UNSW Law Journal* 47, 49, 73. Bagaric repeated this point three years later, that opprobrium should not mitigate sentence because (1) some people are unaffected by the opinion of others or their opinions can be ignored, (2) it is not feasible to measure the level of hardship caused by publicity and (3) the sentencing exercise should not 'turn on the vagaries and inclinations of journalists and other[s]': Bagaric and Isham (2019), above 31, 285–286.
65. *R v Gittany (No 5)* [2014] NSWSC 49, [88].
66. *R v Lane* [2011] NSWSC 289, [87]; *R v Jones* [2011] QCA 147, [20]–[21]; *DPP v Fergusson* [2020] VCC 1565, [46].
67. *Sabel v R; R v Sabel* [2014] NSWCCA 101, [211]; *R v Obeid (No 12)* [2016] NSWSC 1815, [103]; *R v Pieper* [2014] NSWDC 242, [46].
68. Duffy (2012), above n 8, 128.
69. Chong et al. (2016), above n 24, 402.
70. See, for example, *Whybrow v R* [2008] NSWCCA 270, [31]; *Sabel v R; R v Sabel* [2014] NSWCCA 101, [211]; *R v Obeid (No 12)* [2016] NSWSC 1815, [103]; *R v Pieper* [2014] NSWDC 242, [46]. On the 'exceptional circumstances' test in the context of family hardship, see *Markovic v The Queen; Pantelic v The Queen* [2010] VSCA 105.

The New South Wales Court of Criminal Appeal took this 'natural and probable consequence' approach in the specific context of adverse media coverage as a mitigating factor in *Sabel v R; R v Sabel*, writing that:

> [a]ny social embarrassment or consequence that the appellant may suffer from being convicted of accessing and possessing child pornography is a *direct result* of his offending conduct.[71]

The New South Wales Court of Criminal Appeal had made a similar observation two years earlier, that while 'having one's crimes exposed on national television could be gruelling and possibly deleterious to one's mental health … the applicant had undertaken an unusual and brazen crime'.[72] The court seemingly suggested that the nature of the offence rendered any media coverage and consequent psychological harm a foreseeable and less relevant consideration. Indeed, some courts have observed that sex offences, especially against children, are prone to result in not just media coverage but also high levels of opprobrium and shame.[73] And courts have observed that those offenders should expect a level of public humiliation after being convicted of sex offences, such that any mitigation due to adverse media coverage should be constrained unless there is some additional feature of the coverage and its consequences.

A pre-existing public profile can also enhance the likelihood of media coverage through what might be described as a celebrity effect. Some offenders' crimes attract media attention due entirely to the nature of the crimes themselves, such as those committed by Adrian Bayley and James Gargasoulas.[74] Other people, though, attract media attention (or *heightened* attention) because they already have some public profile or reputation, such as footballer Jarryd Hayne, cardinal George Pell, former Supreme Court Justice Marcus Einfeld or former parliamentarian Eddie Obeid.

A question arises about whether an offender's public profile should affect the extent to which they would reasonably *expect* heightened coverage and opprobrium as a natural and probable consequence of their offending (and therefore reduce any mitigation they have otherwise received due to adverse media coverage).[75] The Queensland Court of Appeal thought so in *Nuttall* in 2011, writing that:

> [t]he attainment of high public office brings with it public exposure and media scrutiny as well as power, fame and prestige. Criminal abuse of the office, if detected, will inevitably attract media attention.[76]

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71. *Sabel v R; R v Sabel* [2014] NSWCCA 101, [211]. See also *DPP v Heeraman* [2021] VCC 1210, [57]–[59] (finding that the public humiliation that the offender endured from adverse media coverage as a result of her theft offending was 'a consequence of [her] grossly dishonest conduct').
72. *Church v R* [2012] NSWCCA 149, [34]. See also *Scott v R* [2020] NSWCCA 81, [133] (finding that any damage to the offender's reputation amounted to natural 'consequences of the offending behaviour').
73. See, for example, *Sabel v R; R v Sabel* [2014] NSWCCA 101; *R v Payne-Moore* [2021] ACTSC 125, [56]–[57].
74. The court in *DPP v Gargasoulas* [2019] VSC 87 did not discuss whether adverse media coverage or opprobrium was relevant. Nor did courts in a number of other high-profile murder cases: *DPP v Todd* [2019] VSC 585; *DPP v Herrmann* [2019] VSC 694; *The Queen v Price* [2016] VSC 105; *The Queen v Bayley* [2013] VSC 313.
75. There is an analogy to be drawn here with the 'public figure' defence in United States defamation law, whereby public figures can only recover damages for defamation if there was actual malice: *New York Times v Sullivan* 376 US 254 (1964). This includes non-government officials, such as a university football coach and a retired army general, who invite close public scrutiny through their actions or role: *Curtis Publishing Co v Butts* 388 US 130 (1967).
76. *R v Nuttall; Ex parte Attorney-General (Qld)* [2011] QCA 120, [65]. See also *R v Liddy* [2002] SASC 306, [123] ('The appellant was a former prosecutor in the Crown Prosecutor's Office and a magistrate … he would have known of the public opprobrium which his offending would attract').

Similarly, in 2014 the New South Wales District Court did not take media coverage into account in sentencing a city councillor for offences of misconduct in public office, because it was no 'more than the usual degree of public opprobrium or publicity that occurs when any prominent citizen commits a crime'.[77] In 2016, a New South Wales court observed that media reports about a case were 'concerned with an issue of public importance, namely, political corruption' such that it would be 'incongruous that the consequential public humiliation should mitigate the sentence'.[78] And in 2020, a Victorian court sentencing a former 'motorcycle champion'[79] for cultivating a commercial quantity of cannabis wrote that 'it is entirely unclear to me that you have suffered any true loss of reputation … through the media coverage of your offending'.[80]

There is, however, a point at which heightened media scrutiny of criminal proceedings against people in the public eye can become disproportionate. In *R v Hayne*, for example, the sentencing court wrote:

> [t]his case has been, apparently the subject of intense media coverage, much of it, it is submitted, extending beyond the fair and accurate reporting of the case. I have seen some publications handed to me in the sentence proceedings, both from the mainstream media and in re-publications from other platforms. I tend to agree, to some extent, that Mr Hayne's privacy, but more egregiously that of his family, has been grossly and unnecessarily invaded beyond what would be expected, even in a high profile matter. I accept that, to some extent, the offender may have courted media attention for his own purposes in the past, but some of the reporting recently has been sensationalist, inaccurate and not the slightest bit informative. I fail to see how reporting stupid things that people post on social media sites, can be considered newsworthy or even vaguely informative.
>
> …
>
> In addition, I observe an article published in The Australian newspaper on 8 April this year entitled, 'Jarryd Hayne's Final Days of Freedom', which showed worryingly in my view, a photograph of the offender playing with his daughter on a beach on the Central Coast. No attempt was made to disguise the identity of the child and her presence was referred to in the article. This is an unnecessarily cruel and abusive intrusion onto the child's privacy. The press do not do themselves or their reputation any favours if they publish in these childish and disrespectful ways. I would hope that reporting from now on is done by a group of responsible adults.
>
> …
>
> I accept that the publicity and humiliation suffered by Hayne may be taken into account in ameliorating the need for specific deterrence, as a sentence for consideration.[81]

77. *R v Pieper* [2014] NSWDC 242, [46]. The court said that it would have been willing to take media coverage into account if 'the press's or the public's reaction [was] so great, for example where it may lead to death threats and the like'.
78. *R v Obeid (No 12)* [2016] NSWSC 1815, [101].
79. Rusty Woodger, 'Former Motorcycle Racer Adam Fergusson Jailed for Growing 110kg of Cannabis in Corio Rental Home', *Geelong Advertiser*, 29 September 2020 <https://www.geelongadvertiser.com.au/truecrimeaustralia/police-courts/former-motorcycle-racer-adam-fergusson-jailed-for-growing-110kg-of-cannabis-in-corio-rental-home/news-story/58309def91fe53b7484773bfbc935d6e> at 17 May 2022.
80. *DPP v Fergusson* [2020] VCC 1565, [46].
81. *R v Hayne* [2021] NSWDC 242. Note that the New South Wales Court of Criminal Appeal subsequently quashed the convictions; however, at the date of writing, the judgment is not yet available: Georgina Mitchell, 'Jarryd Hayne Sexual Assault Convictions Quashed on Appeal, Retrial Ordered', *Sydney Morning Herald*, 14 February 2022 <https://www.smh.com.au/national/nsw/jarryd-hayne-sexual-assault-convictions-quashed-on-appeal-retrial-ordered-20220214-p59w4n.html> at 17 May 2022.

Similarly, in *DPP v Pell* the County Court made 'some allowance' for the 'unprecedented level of public scorn and criticism' after Pell had 'endure[d] protests and verbal abuse' and was 'publicly pilloried, both in the media, and through the publication of a particular book'.[82] And in sentencing a Victorian magistrate for historical sex offences committed against two 17-year-olds, the County Court accepted that some mitigation was appropriate:

> Widespread publicity concerning crimes committed by people with important public responsibilities, or who are otherwise in the public gaze, is of course entirely proper. In many respects it helps serve the purpose of general deterrence, because it spreads the message throughout the community that persons who are popular, important, well-known or privileged are not free to commit crimes and will not escape detection, prosecution and appropriate punishment.
>
> …
>
> The fact is that the offender has suffered a deserved spectacular fall from grace which has wrought upon him embarrassment, shame and humiliation in the full public gaze which has been more extensive than would be suffered by other offenders charged with similar offences. Of course, this must be expected in a situation as unique as this, but it is still a relevant matter to be taken into account in assessing the extent of punishment the Court should inflict upon the offender.[83]

Further, in 2009 the New South Wales Supreme Court took into account the public opprobrium that a former judge, who had been found guilty of perjury, had experienced after 'extraordinary' media coverage, which 'had a devastating psychological effect on him'.[84] On appeal, though, the New South Wales Court of Criminal Appeal observed that while the offender's public status 'gave rise to a greater level of public opprobrium', it also 'gave rise to the heightened seriousness of the offence'.[85] That is, while the public role of the offender mitigated the sentence because it resulted in 'extraordinary' media coverage, it also aggravated it because the offender's position rendered the offence more objectively serious.

Indeed, sometimes the offender does not even need a *pre-existing* public profile for the abuse of their position to reasonably be expected to attract a certain amount of public attention and opprobrium. In *Punchard v Commissioner of Police*, a police officer unlawfully shared a domestic abuse victim's address with her former partner.[86] The police officer's offending resulted in considerable national media attention.[87] The District Court said that it did not 'place too much weight' on the media scrutiny because '[a]n offender who commits offences, *especially a police officer*, cannot complain about widespread publicity of his offences'.[88] As a point of contrast, though, in *DPP v Rossi* a police officer had used deception to try and claim possession of a number of vacant properties.[89]

82. *DPP v Pell* [2019] VCC 260, [141]–[148].
83. *DPP v Cooper* [2013] VCC 1763, [57], [84].
84. *Einfeld v R* [2009] NSWSC 119, [157]–[162]. See also *R v Obeid (No 12)* [2016] NSWSC 1815, [103] (the medical and testimonial material did not demonstrate that 'the adverse publicity … had any direct physical or psychological effect on [the offender]').
85. *Einfeld v R* [2010] NSWCCA 87, [101].
86. *Punchard v Commissioner of Police* [2020] QDC 211. The District Court's interference with the magistrate's original sentence was later overturned on appeal, but the basis of that appeal was unrelated to the issue of extra-curial punishment: *Commissioner of Police v Punchard* [2021] QCA 166.
87. See, for example, Ben Smee, 'Queensland Police Officer Who Leaked Domestic Abuse Victim's Address Resigns', *The Guardian*, 4 October 2021 <https://www.theguardian.com/australia-news/2021/oct/04/queensland-police-officer-neil-punchard-who-leaked-domestic-abuse-victims-address-resigns> at 17 May 2022.
88. *Punchard v Commissioner of Police* [2020] QDC 211, [91] (emphasis added).
89. *DPP v Rossi* [2020] VCC 1471.

Her case also attracted considerable media attention.[90] But where the court in *Punchard* considered criminal offending by police unlikely to attract much mitigation when the offending was related to their role, the court in *Rossi* took 'into account the public opprobrium that [she] precipitated upon [her]self' because her 'fall from grace has been dramatic, profound, public and gravely embarrassing'.[91] Just as having a public profile can increase the likelihood of piquing the public's interest, so too can having a position of public trust (at least in some cases), rendering media coverage more natural and probable.

A further issue arises about the heightened effect of media coverage in less populous areas. Even limited 'local publicity' can result in 'considerable public opprobrium in the area in which [offenders] live'.[92] As one court said, 'it is well-known that crimes committed by local citizens are given much more prominence in the media in small country towns than they are in metropolises like Sydney'.[93] For instance, an owner of a hardware store in Noosa (Queensland) who was active in the local community 'received resulting notoriety both on local television and in the local press over some months' after being found guilty of child pornography offences, and that notoriety was one of the reasons the Queensland Court of Appeal refused to increase his sentence on appeal.[94] Media coverage in a small town does not guarantee mitigation, though. For instance, a New South Wales police officer's conspiracy to falsify evidence got 'front-page' coverage in a local newspaper in Wagga Wagga (Victoria), and the court said that 'unless the public opprobrium is such as has the consequences [i.e. physical or psychological effects] referred to in *Kenny's* case the weight to be attached to this matter should not be significant'.[95] Similarly, in *R v Jones*, the Queensland Court of Appeal said the sentencing judge was correct to not place any weight on any public humiliation suffered as a result of a local newspaper article:

> The evidence was that the applicant was the subject of a front page article in the newspaper published in his local area. One can readily infer that such a publication was seen by, and discussed amongst, people who knew, or knew of, the applicant in the local area. It was not contended that this newspaper article was inaccurate, unfair or unduly inflammatory. It seems to me that if an accused would seek to persuade a sentencing judge that 'public shaming' is a relevant factor to be considered in a particular case, then something more is required[.][96]

Overall, the weight of authority suggests that both the nature of the crime and the public profile or public role of the offender (even if localised) can affect whether media coverage, opprobrium and shame will be 'natural and probable' consequences of being convicted. But even for morally outrageous crimes, or offenders of considerable fame or positions of public trust, the opprobrium can exceed what is natural and probable and reach a point of disproportion justifying *some* mitigation.

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90. Danny Tran, 'Former Victoria Police Sergeant Rosa Rossi, Who Claimed Vacant Houses in Property Scam, Has Jail Term Cut', *ABC News*, 3 November 2021 <https://www.abc.net.au/news/2021-11-03/rosa-rossi-police-sergeant-property-scam-jail-sentence/100590542> at 17 May 2022.
91. *DPP v Rossi* [2020] VCC 1471, [84].
92. *SG v Tasmania* [2017] TASCCA 12, [13]. Contra *R v Pieper* [2014] NSWDC 242, [44]–[46] (finding that despite the matter attracting 'a significant degree of local publicity', there was 'no evidence of the offender suffering any more than the usual degree of public opprobrium or publicity that occurs when any prominent citizen commits a crime').
93. *Church v R* [2012] NSWCCA 149, [34].
94. *R v Burdon; Ex parte Attorney-General (Qld)* [2005] QCA 147.
95. *R v Cox & Lucas* [2011] NSWDC 58, [36], [114], discussing *Kenny v R* [2010] NSWCCA 6. See also *Kontaxis v R* [2021] NSWCCA 72, [103] ('some of what is relied upon was an entirely foreseeable consequence of the revelation of the offending … the opprobrium that the child sexual assaults committed by the applicant attracted in a small town').
96. *R v Jones* [2011] QCA 147, [21].

2. The potential harms of adverse media coverage

A brief article that is published on an inside page of a weekday newspaper in a capital city, includes a bare recitation of the facts in a case, and results in no tangible opprobrium or harm to the offender, is unlikely to justify mitigation. So what is it that might push media coverage beyond the threshold of irrelevance to relevance? The cases seem to indicate that there are four bases that, in the right circumstances, can permissibly, often in tandem, found a submission in mitigation: stigmatisation and fear of community backlash, actual community backlash, psychological sequelae and/or sensationalist or inaccurate coverage.

- **Stigmatisation:** In *Ryan v R*, Kirby J suggested that the offender's 'stigma' arising from publicity added 'a significant element of shame and isolation' that could justify mitigation on the basis of adverse media coverage.[97] This was, for example, the case for a man who became housebound out of fear of community reprisals after the leniency of his sentence was widely criticised.[98]
- **Community backlash:** When *actual* community backlash is particularly severe (potentially even rising to vigilantism[99]), this can justify mitigation of sentence. This was, for example, the case for a young offender who beat a number of fairy penguins to death and had his social media feed flooded with abusive messages, even death threats.[100]

97. *Ryan v R* [2001] HCA 21, [123].
98. See, for example, *R v King* [2009] NSWCCA 117, [67]–[71] ('After his release … the respondent became for all intents and purposes housebound in his family's home because of his fear of personal attack by members of the public as a result of media coverage given to the sentence imposed and criticism of it').
99. See, for example, *R v Payne-Moore* [2021] ACTSC 125, [55]–[61] ('CCTV footage was played depicting what was submitted to be an assault on the offender involving an unknown woman throwing hot wax over the offender in a public bar … [she] had been speaking about the offences when she did so … the offender had also received anonymous telephone calls from people threatening to run his motorcycle off the road'); *R v Allpass* (1993) 72 A Crim R 561 ('The case has excited a deal of public attention … the respondent and his elderly wife were subjected to a campaign of abuse and harassment, involving threats of serious injury to person and property … It reached such a level that the respondent was forced into a psychiatric clinic for treatment, and, according to the evidence, he was pursued even there. The respondent and his wife have had to leave their home, removing their belongings under cover of darkness, and they now live elsewhere under assumed names. Quite apart from the decision of this Court, the respondent and his wife have paid a high price for his wrongdoing'); *R v Wilhelm* [2010] NSWSC 378, [22] ('the offender has been subject to an enormous amount of public derision that has stigmatised him and … led to death threats being sent to him by members of the community so whipped up have they been by the reporting of the incident'); *DPP v Finnin* [2019] VCC 2054, [70] ('Your case, I am told, was the subject of much media attention. I note also that you have been harassed by neighbours … You were on one occasion physically assaulted by a man who called you a paedophile. I am prepared to take this matter of extra curial punishment into account').
100. Alexis Carey, 'Members of the Public and Experts Slam Tasmanian Animal Abuser's "Light Sentence"' *Herald Sun*, 26 June 2018 <https://www.heraldsun.com.au/business/members-of-the-public-and-experts-slam-tasmanian-animal-abusers-light-sentence/news-story/bcea0a8d32743e0cc036cb2275c54a83> at 17 May 2022 ('The majority of comments seen by news.com.au are of a threatening nature against [the offender], and can't be published'). See also *R v AB (A Pseudonym) (No 2)* [2021] NSWDC 175, [96] ('I accept the offender's evidence of her being spat at in a shop and suffering a loss of friends (and even family) as a consequence of the media publicity and the Facebook posts. This goes beyond the normal public opprobrium which might naturally follow from disclosure of the offending'); *DPP v Finnin* [2019] VCC 2054, [70] ('You have been subjected to much harassment in the community by reason of your offending. Your case, I am told, was the subject of much media attention. I note also that you have been harassed by neighbours and that you have recently taken out a personal safety order against one of them').

- **Psychological sequelae:** One of the more common arguments about why media coverage is mitigating is that the offender has developed some psychological condition in response to the publicity.[101] In such cases, there can be difficulty disentangling the extent to which the offender's psychological condition is truly due to media coverage and not some other factors. For instance, one New South Wales court rejected a submission that the offender had suffered psychologically as a result of feeling 'crucified and humiliated by the media coverage', in part because the more likely cause of his depression was being caught and facing a prison sentence.[102]
- **Sensational/inaccurate coverage:** Finally, the media may sensationalise[103] or mischaracterise[104] some feature of the case, resulting in media coverage or vilification that is objectively disproportionate to the offending.[105] This may be especially so when the offender pleads guilty to substantially less serious charges than those that were initially prosecuted, retrospectively rendering the media coverage disproportionate.[106] One example is the prosecution of Harriet Wran, daughter of a former New South Wales premier.[107] She and two men had entered a man's home with the intention of stealing drugs and money. The two men attacked and stabbed one of the occupants, who later died. While Wran was originally prosecuted for murder, she pleaded guilty to being an accessory to murder (and robbery in company) on the basis that she later harboured the man who had committed the stabbing.

101. See, for example, *Kenny v R* [2010] NSWCCA 6, [49] ('Clearly there may be an exceptional case where [public humiliation] reaches such a proportion that it has had some physical or psychological effect on the person so that it could be taken into account as additional punishment'); *R v Wilhelm* [2010] NSWSC 378, [19] ('the offender has, over a long period of time, suffered from severe mental illness as a result of the allegations against him, *the publicity of them*, and the ramifications of what he has done') (emphasis added); *R v Cox & Lucas* [2011] NSWDC 58, [114] ('I incline to the view expressed by Howie J that unless the public opprobrium is such as has the consequences referred to in *Kenny's* case the weight to be attached to this matter should not be significant').
102. *R v Gittany (No 5)* [2014] NSWSC 49, [79]–[88].
103. See, for example, *DPP (Cth) v Samarakoon* [2017] VCC 1426, [72]–[73] ('you have endured embarrassment as a result of a media article which reported on this offending and on you … The article entitled "Millions rorted from government R&D scheme" was published by the Sydney Morning Herald on 3 July 2017, online and in print. The article contained information that went beyond this offending, including an allegation that you further owe more than $2.5m to the ATO and stated that you are closely linked to an individual who was implicated in a multi-million dollar fraud in the United States … I accept that you would have endured some embarrassment as a result of the publication of this article, particularly in circumstances where the article reports on matters *beyond allegations of this offending*') (emphasis added); *R v Maguire* (Unreported, New South Wales District Court, Whitford J, 20 March 2015), [31] ('Publicity generally, concerning outcomes, whether they be acquittals or convictions, is right and proper and, provided it is balanced and accurate, is not reasonably regarded as punishment in my view. It is an inevitable consequence of the dictates of open justice … Where reporting is inflammatory, inaccurate or misleading and vitriolic, as is the case for some of the material which has been published concerning the offender, then there is some scope in my view for giving some, albeit limited, favourable recognition in the synthesis to the attendant opprobrium, public humiliation and vilification as a form of extra-curial punishment').
104. See, for example, *DPP v Cooper* [2013] VCC 1763, [54]–[57]; *R v Wilhelm* [2010] NSWSC 378, [16] ('there was a degree of hysteria which surrounded the allegations … which was brought about by rumours and mistakes or misunderstandings … The relevance … is the effect this has had upon the offender').
105. Brown argues that it is usually 'a particular type of coverage' that justifies mitigation, especially 'overblown (rhetorical, utilising hackneyed narrative frames, toxic); misleading (factually or legally incorrect); the product of improperly obtained police or prosecution material … or which does not accord with the media's own stated ethics and standards of practice': David Brown, 'The Sentencing of Harriet Wran: Tabloid Press Induced Extra Curial Punishment as Mitigation' (2016) 41(4) *Alternative Law Journal* 275, 278.
106. See, for example, *DPP v Mendieta-Blanco* [2020] VCC 1319, [40] ('The reporting of your case was extreme and in only the slightest of ways does the reportage reflect the criminality before me').
107. *R v Wran* [2016] NSWSC 1015, [27].

The court described the subsequent reporting as an 'ill-informed', 'disproportionate', 'sustained and unpleasant campaign'.[108] Brown summarises the coverage as follows:

> The 'campaign' by *The Daily Telegraph* and *The Sunday Telegraph* included what the judge described as 'distasteful and wholly misleading headlines'; private letters from Ms Wran to a friend; her distraught phone calls to her mother … which were transcribed and re-enacted for on-line listeners; details of what should have been confidential negotiations between Ms Wran's lawyers and the DPP; claims of a 'sex, drug binge after murder' which was not advanced by the Crown and 'vehemently denied by Ms Wran'; and a narrative framing that implied that Ms Wran had 'willingly taken part in a planned murder' when this was not part of the Crown case.[109]

The court concluded that:

> the publication of these egregious articles warrants the imposition of a sentence that takes account of Ms Wran's continuing exposure to the risk of custodial retribution, the unavoidable spectre of enduring damage to her reputation and an impeded recovery from her ongoing mental health and drug related problems.[110]

3. Evidence of adverse media coverage

Whatever the basis on which media coverage might be mitigating, there is also uncertainty about whether evidence is required and, if so, what evidence. In *Ryan v R*, Kirby J suggested that evidence would be a prerequisite to taking public opprobrium into account.[111] Whether he was referring to evidence of the media coverage itself, the consequences of the media coverage, or most likely a combination of both, is not immediately apparent. Some practitioners have presented sentencing courts with examples of media coverage about a case.[112] Others have presented evidence of the effect of media coverage on the offender.[113] Similarly, some courts have *refused* to acknowledge public opprobrium and humiliation in the absence of evidence.[114]

108. *R v Wran* [2016] NSWSC 1015, [27], [72], [77].

109. Brown (2016), above n 105, 275.

110. *R v Wran* [2016] NSWSC 1015, [79]. The court also later refused a request to access certain materials by *The Daily Telegraph*, in part because '[o]ne could be excused for forming the view that The Daily Telegraph has some form of vendetta against Ms Wran': *R v Wran* [2016] NSWSC 1026, [14].

111. *Ryan v R* [2001] HCA 21, [123].

112. See, for example, *R v Einfeld* [2009] NSWSC 119, [4]; *R v Hayne* [2021] NSWDC 242; *R v Obeid (No 12)* [2016] NSWSC 1815, [98]; *DPP v Ellerton* [2020] VCC 1639, [15]; *DPP v O'Reilly* [2010] VSC 138, [35].

113. See, for example, *Dickinson v The Queen* [2021] VSCA 50, [36].

114. See, for example, *Hine v Western Australia* [2010] WASCA 216, [72] ('Public opprobrium is not a matter which can be assumed without some factual basis for it'). Some courts, though, have inferred that even limited reporting had an effect on the offender, despite no apparent evidence of it: *R v Kisun (No 5)* [2018] ACTSC 311, [14] ('His conviction has been associated with some media coverage, which, I infer, gives rise to a degree of public opprobrium'); *The Queen v Gould* [2020] NSWDC 831, [194] ('There is … no evidence before me as to the effect that the limited reporting of these proceedings has had upon the [o]ffender. I nevertheless consider it reasonable to infer that it may have had some effect … albeit to a minimal degree'); *R v Curtis (No 3)* [2016] NSWSC 866, [44] ('although the degree of adverse media reporting has not reached the level of some cases, I accept that Mr Curtis is likely to have suffered to some degree'); *DPP v Sor* [2020] VCC 1947, [34] ('You have committed a serious crime which is a legitimate topic of public discussion, and which will inevitably attract some degree of public opprobrium. However, I accept the publicity in your case, although limited, has caused you and your girlfriend some unnecessary distress, and I will allow some modest mitigation of sentence in the exercise of my discretion to accommodate that fact').

For instance, in *R v Lane* Whealy JA of the New South Wales Supreme Court said that:

> I was able to make my own observations about the way in which Ms Lane was subjected to the most invasive media attention throughout the trial … [t]here [still] needs to be clear evidence that extra-curial punishment has significantly impacted on the offender before it can be taken into account … Consequently, this is not a matter for which I propose to make allowance in the imposition of sentence.[115]

The comments of Whealy JA raise a further issue about the extent to which a sentencing court can permissibly take 'judicial notice' of the media coverage about a case,[116] – especially a case that has dominated the 24-hour news cycle – and perhaps even whether the coverage was inaccurate or misleading given the judicial officer's first-hand experience with the case.

Whether evidence is required to prove adverse media coverage and its consequences, and if so what evidence, will no doubt turn on the basis on which the coverage is submitted as a factor in mitigation. If, for example, it is asserted that the psychological consequences on the offender have been especially severe, a mental health expert may be required. As the Queensland Court of Appeal said in *R v Galeano*, '[y]ou do not need the opinion of a medical expert' to know someone has suffered extensive burns or a bullet wound, '[b]ut the same confidence cannot always be expressed about a psychiatric condition'.[117] Alternatively, if it is the perceived or actual community backlash against the offender that is said to mitigate, the offender's own testimony may be necessary.

4. Dismissing the notion that adverse media coverage could be aggravating

A final point on how extensive media coverage might conceivably affect sentencing is that it has sometimes been treated as an *aggravating* factor in the United States. This is apparently on the basis that the case presents a rare opportunity to reach the masses and enhance the deterrent effect of the sentence (and, so the theory goes, the more severe the sentence, the more deterring its effect).[118]

115. *R v Lane* [2011] NSWSC 289, [87].

116. For instance, section 144 of the *Evidence Act 2008* (Vic) provides that:

    (1) Proof is not required about knowledge that is not reasonably open to question and is—
        (a) common knowledge in the locality in which the proceeding is being held or generally; or
        (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.
    (2) The judge may acquire knowledge of that kind in any way the judge thinks fit.
    (3) The court … is to take knowledge of that kind into account.
    (4) The judge is to give a party such opportunity to make submissions … as is necessary to ensure that the party is not unfairly prejudiced.

    See further, Peter McClellan and Amber Doyle, 'Legislative Facts and Section 144 – A Contemporary Problem?' (2016) 12(4) *Judical Review* 421, 449–454.

117. *R v Galeano* [2013] QCA 51, [118].

118. See, for example, *United States v Ulbricht*, no. 15-1815 1, 34–35 (2nd Cir, 2017) ('the sentence imposed on Ulbricht could have a powerful general deterrent effect because the case had attracted an unusually large amount of publicity'); Johannes Andenaes, 'The Morality of Deterrence' (1970) 37(4) *University of Chicago Law Review* 649, 656 ('If a case has for some reason attracted greater publicity, a severe sentence could be expected to have great deterrent effect').

A recent empirical study of over 43,000 sentencing decisions in three American states found that crime coverage did indeed increase sentencing harshness.[119] Such reasoning has not yet found much favour in Australia.[120] This could be partly because unlike judicial officers in the United States, judicial officers in Australia are not elected and therefore are less likely to be swayed by populist views.[121] It may also be due to judicial awareness[122] of research consistently showing that while the risk of being caught is known to have a deterrent effect,[123] the potential length of a sentence does not (or at least, not much).[124] Would-be offenders of unpremeditated crimes simply are not influenced by a slightly more severe sentence being imposed on another offender. That said, research shows that judicial officers tend to prioritise general deterrence as the most important purpose of sentencing at a significantly higher rate (35% of cases) than do jurors (9%), as a proxy for community views.[125] In addition to there being almost no evidential basis for the suggestion that a slightly longer sentence will deter other offenders, it would also arguably be unfair and contrary to the requirement of consistency in sentencing[126] to allow a factor outside both the offender's and the court's control to *increase* an offender's sentence.[127] Media coverage often has 'more to do with the whims of the press corps' than with 'the individual defendant's case'.[128]

119. Itay Ravid, 'Judging by the Cover: On the Relationship Between Media Coverage on Crime and Harshness in Sentencing' (2020) 93(6) *Southern California Law Review* 1121.

120. Contra *R v Wilhelm* [2010] NSWSC 378, [30], in which the court took public opprobrium into account as a mitigating factor, but *also* said 'when the sentence of the offender will probably receive a degree of media interest … he is a suitable case for general deterrence because so very frequently the Court imposes deterrent sentences upon people where that deterrence is of a theoretical nature rather than of a real effect'; *R v Mauger* [2012] NSWCCA 51, [39] ('this is also not one of those cases where general deterrence might be regarded as particularly important because of the notoriety of the respondent').

121. This was one of three reasons posited for the finding that media coverage enhances sentence severity in the United States: Ravid (2020), above n 119, 1175.

122. See, for example, *Munda v Western Australia* [2013] HCA 38, [54]; *DPP v Snow (A Pseudonym)* [2020] VSCA 67, [79] ('in relation to unpremeditated crimes … the theory on which general deterrence rests has little or no application').

123. This is known as the 'certainty of apprehension': Daniel S. Nagin, 'Deterrent Effects of the Certainty and Severity of Punishment', in Daniel S. Nagin et al. (eds), *Deterrence, Choice and Crime* (2018) 158. See also the various studies discussed in Sentencing Advisory Council, *Does Imprisonment Deter? A Review of the Evidence* (2011) 16.

124. Sentencing Advisory Council (2011), above n 123, 14–15; Peter J. Henning, 'Is Deterrence Relevant in Sentencing White-Collar Criminals?' (2015) 61(1) *Wayne Law Review* 27; Raymond Paternoster, 'How Much Do We Really Know About Criminal Deterrence?' (2010) 100(3) *Journal of Criminal Law & Criminology* 765.

125. Kate Warner et al., 'Why Sentence? Comparing the Views of Judges, Jurors and the Legislature on the Purposes of Sentencing in Victoria, Australia' (2019) 19(1) *Criminology & Criminal Justice* 26.

126. See, for example, Geraldine Mackenzie, 'Achieving Consistency in Sentencing: Moving to Best Practice' (2002) 22(1) *University of Queensland Law Journal* 74; Sarah Krasnostein and Arie Freiberg, 'Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?' (2013) 76(1) *Law and Contemporary Problems* 265.

127. Bagaric and Isham make a similar argument: Bagaric and Isham (2019), above 31, 242, 257, 288. See also *Wakim v The Queen* [2016] VSCA 301, [53] ('The coverage led to the complainant and his family being identified … The deleterious effect of such publicity is most unfortunate, but it is not a relevant sentencing consideration as it did not occur through any fault of the applicant').

128. Brian Jacobs, 'The Role of Publicity in Sentencing', *Forbes*, 23 October 2017 <https://www.forbes.com/sites/insider/2017/10/23/the-role-of-publicity-in-sentencing/?sh=19d018c23e5c> at 17 May 2022.

C. The weighting issue: How relevant is adverse media coverage?

For the moment, it is assumed that it is possible for adverse media coverage and public opprobrium to be mitigating, and that mitigation will usually only be in cases where there is an exceptional feature to the coverage or its consequences. The final issue, as alluded to by McHugh J in *Ryan v R*,[129] is how courts should assess the weight to give to such an amorphous factor. While adverse media coverage may be difficult to measure, 'it is certain and we all know it can be keenly felt'.[130] In some cases, it may even be weighty enough to justify a less severe sentence type altogether, not just less time in prison. For instance, one court seemed to suggest that it imposed a community sanction (as opposed, presumably, to imprisonment) because of the extensive publicity and its effect on the offender.[131] To date, there does not appear to have been a concerted attempt to distil the various factors that might be relevant to assessing the weight that adverse media coverage should be given in sentencing. In 2021, the Victorian Court of Appeal heard an application for leave to appeal a sentence, argued partly on the grounds that the adverse media coverage should have been given *more* than 'modest' weight in the sentencing exercise.[132] Kaye JA intimated that if the case had been a proper vehicle, he would have referred the issue to a full bench of the Court of Appeal but declined to do so 'in a case such as this'.[133] Some guidance can be found in *R v Jones*, though, in which the Queensland Court of Appeal proffered five factors that might be relevant, including:

> (a) the identity and position of the accused; (b) the nature and seriousness of the offences; (c) the circumstances of the offending conduct …; (d) the nature, content, duration and extent of the public communication which induces the opprobrium, and (e) the effect of the public shaming on the accused.[134]

In light of the conflicting case law and academic commentary, it is difficult to establish anything resembling a bright-line rule about when and to what extent adverse media coverage becomes relevant to sentencing.[135] Chong et al. argue, for example, that even the initial decision about whether to treat extra-curial punishment as mitigatory *at all* should be governed by a 'common sense' test.[136]

129. In particular, McHugh J said that '[t]he opprobrium attaching to offences varies greatly from one offender and one offence to another. How a judge could realistically take such a matter into account is not easy to see. Whether or not public opprobrium will attach to an offence and, if so, to what extent, will depend on the individual, his or her position and reputation in society, whether and when the offender will return to the community where the offence occurred and the nature of the publicity, if any, that the conviction receives': *Ryan v R* [2001] HCA 21, [53].
130. *R v Galeano* [2013] QCA 51, [118].
131. *DPP v Dhankar* [2015] VCC 189, [27] ('In my view in this case given the publicity that this case has attracted the effect on you, a Community Correction Order could appropriately meet the sentencing requirements').
132. *Dickinson v The Queen* [2021] VSCA 50, [47].
133. *Dickinson v The Queen* [2021] VSCA 50, [52].
134. *R v Jones* [2011] QCA 147, [17].
135. See, for example, *R v Daetz; R v Wilson* [2003] NSWCCA 216, [62] ('How much weight a sentencing judge should give any extra-curial punishment will, of course, depend on all the circumstances of the case').
136. Chong et al. (2016), above n 24, 384–386.

However, there are some features of media coverage that courts might consider in determining whether and how much to take adverse media coverage into account, building on the Queensland Court of Appeal's list in *R v Jones*, including:

- the duration of the coverage (was it a single day, as in *DKN v Western Australia*, or years, as in *Jackway*?[137]);
- the prolific nature of the coverage (was it front-page news in multiple newspapers?);
- the accuracy of the coverage (was it sensationalised or mischaracterised?);
- the locality of the coverage (such that media coverage in less populous areas will be more detrimental if the offender lives or works in that area, but this may be counterbalanced by the coverage being a natural and probable consequence of their offending);
- the extent to which the level of coverage was either disproportionate to the offending (as was the case in, for example, *Wilhelm*[138] and *Wran*) or a natural and probable consequence of the offending,[139] which will be affected by:
  - the nature of the offending (child sex offences and breaches of trust in public positions often provoke not just media coverage but also extreme moral outrage, and courts have shown less sympathy for consequent stigmatisation and humiliation); and
  - the public profile or position of the offender (such that people who assume a role in the public eye, or a position of public trust, should expect a certain level of media coverage when they commit crimes, especially when their role is related to the offending, as was the case in *Pell*, *Cooper*, *Rossi*, *Punchard* and *Einfeld*);
- the emotional and psychological effect of the media coverage on the offender (preferably with evidence from a mental health expert about the nature and cause of any psychological condition, to distinguish the anguish associated with being caught and facing the prospect of being punished);
- stigmatisation of the offender caused by the media coverage to such an extent that they have effectively become a recluse, that is, their *fear* of community backlash (preferably with oral or written testimony from the offender and their friends or family); and
- the actual community backlash against the offender (such as being approached in public, subjected to abuse on social media and being subjected to vandalising, threatening or assaultive vigilantism).

137. *Attorney-General (Qld) v Jackway* [2019] QSC 261. This is not a sentencing decision but rather a judgment about whether the offender should continue to be detained as a sexually dangerous offender. It does, though, show the potentially lengthy media interest in some offenders. Years after the case had ended, the offender indicated to a psychiatrist that he was 'scared of getting out' because whenever he 'went to court, there's a big burst of media': at [54].

138. *R v Wilhelm* [2010] NSWSC 378, [27], [33] ('The public humiliation that has gone on for so many years for Mr Wilhelm can now be seen against the actual charge for which he is being sentenced, that is supply of a drug to a consenting adult who asked him to give it to her. Such a matter would hardly rate any mention in any newspaper … There is in my view no need to impose any further punishment on Mr Wilhelm. No punishment that I could give would be anything like the punishment that he has suffered over the years as a result of the activity of this night').

139. *Eva v Southern Motors Box Hill Pty Ltd* [1977] FCA 2 ('Adverse publicity is often one of the most inevitable consequences of wrongdoing and in most cases is without influence in the assessment of the appropriate penalty').

There is also often an interrelatedness between the humiliation and shame that attend media scrutiny on the one hand, and loss of chosen career[140] or hardship to family[141] on the other. Some courts have indicated that these should be considered separately: one New South Wales court observed that '[t]he issue of public opprobrium needs to be distinguished from the loss of a job or similar personal financial loss'.[142] Others have suggested that separation is not always possible: 'the public opprobrium that you precipitated upon yourself … resulted as I understand it in Coles Supermarkets retracting their recent offer of employment to you, and it may interfere with future employment opportunities'.[143] In the context of loss of chosen career, the difference is perhaps in whether the employment lost is *current* or *future*. While there will be occasions where criminal offending will understandably cause someone to lose their current employment, particularly where the two are intertwined, it is infeasible to maintain the complete, life-long demonisation and unemployment of people who commit crimes. Research too consistently demonstrates the fundamental importance of employment in reducing reoffending.[144] In any event, it may simply be that there are cases where adverse media coverage and other forms of extra-curial punishment are capable of being considered separately, and cases where they are not.

140. See, for example, *DPP v Dhankar* [2015] VCC 189, [20].

141. See, for example, *DPP (Cth) v Kassan* [2021] VSC 439, [170], [188], [206] (the court accepted that the 'adverse media attention … had a deleterious effect on [the offender's] children … includ[ing] publication of [his] daughter's image', and therefore was 'prepared to accept that [he] ha[d] suffered, and will continue to suffer, a degree of extra-curial punishment *as a result of circumstances relating to your children*') (emphasis added); *R v Obeid (No 12)* [2016] NSWSC 1815, [103] (the evidence did not establish that the adverse media coverage affected the offender, 'Instead, it has had an effect on his family'); *DPP v Cooper* [2013] VCC 1763, [58]; *DPP v Spits & Anor* [2021] VCC 822, [86] ('the negative publicity has also had a direct impact on [your family]').

142. *R v Cox & Lucas* [2011] NSWDC 58, [93], citing *Kenny v R* [2010] NSWCCA 6.

143. *DPP v Rossi* [2020] VCC 1471, [84].

144. See, for example, Caroline Doyle et al., '"If I Don't Get a Job in Six Months' Time, I Can See Myself Being Back in There": Post-Prison Employment Experiences of People in Canberra' (2021) *Australian Journal of Social Issues* (advance).

Conclusion

This report aimed to review the literature and case law on the role of public opprobrium stemming from adverse media coverage as a factor that courts may take into consideration in sentencing. Its key findings include that:

- while courts, practitioners and advisory bodies all tend to acknowledge that the issue of media coverage as a mitigating factor is unsettled, the vast majority nevertheless show a tendency towards allowing media coverage to have some (even limited) role in the synthesis process in appropriate cases;
- most courts, however, also seem to suggest that adverse media coverage may not be relevant to sentencing if the coverage was a natural and probable consequence of the offending, an assessment informed by the nature of the crime and the profile of the offender;
- there are a number of bases on which adverse media coverage could be considered mitigating, including the experience of stigmatisation, community backlash, sensational or inaccurate reporting and/or psychological sequelae; and
- in assessing the weight to be given to adverse media coverage and its consequences, there are a number of factors (above) that may be helpful for courts while the issue remains unresolved.

With the exception of discounting adverse media coverage as an aggravating factor, no view is offered on the appropriateness or otherwise of the current state of the law. It does, however, seem that there is considerable inconsistency in whether adverse media coverage is taken into account at all, the basis on which it is taken into account and how much weight is given to it in sentencing. Whether through legislation or, more likely, appellate guidance, Australian courts would benefit from clearer guidance about whether, when and how adverse media coverage and public opprobrium should affect sentencing.

Sentencing Advisory Council

Level 3
333 Queen Street
Melbourne VIC 3000

Telephone 1300 363 196
Facsimile 03 9908 8777
contact@sentencingcouncil.vic.gov.au

www.sentencingcouncil.vic.gov.au

Follow us on Twitter @SACvic