THE IMPACT OF MEDIA ON THE CHOICE OF SENTENCE

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Introduction

When you watch the news on television or read the daily newspaper, how often have you passed comment on the severity or leniency of a sentence handed down to an offender?

How many of you have listened to talk back radio or watched current affair programs and thought that the judiciary in Australia appear to be out of touch with community values and beliefs?

In Australia, the workings of the criminal justice system are under daily scrutiny within the public arena. And such scrutiny should be encouraged. The public has a fundamental right to critique the decisions handed down by the courts and to enter into debate about the appropriateness or otherwise of a particular sentence. To maintain public confidence, the court system must be transparent and open and be able to withstand such scrutiny.[1]

The media play an important role in this process. People should know what happens in the courtroom and how justice is dispensed, but for most attending a court hearing is impractical. Court is generally held during business hours and not on the weekend. For this reason the newspaper, the television and the radio become a link to the courtroom and provide the means by which the public gain an understanding of how the judiciary apply the criminal law. In this way, there exists a public dependence on the news media.

Society is saturated with media coverage of courtroom trials, of high profile offences and of prominent offenders. In some countries, entire trials are televised on public television. The general public expects to be informed of why a person has been convicted of an offence and more particularly, what sentence the court has determined to be appropriate.

[1] *Courts, Transparency and Public Confidence – To the Better Administration of Justice* B McLachlin Deakin Law Review

In Australia, public thinking about the operation of the criminal justice system is clearly conditioned by media output through newspapers, television and radio.[2] Once formed, such thinking is then reflected by and expressed though the media coverage as valid and legitimate community concerns and values.

This paper is about media coverage and the sentencing process. Sentencing is an important part of the courtroom proceedings. It is a public denunciation that what the offender has done is contrary to the rules of an otherwise harmonious society and that he or she deserves to be punished.[3]

There are three main players in the sentencing process: defence counsel, the prosecutor and the Judge. Defence counsel represents the interests of the offender. The prosecutor represents the public interest[4] and must ensure that the community is protected and that the offender is adequately punished. The task of sentencing falls to the Judge who is required to select a sentence within the confines of public expectation.

The sentencing process does not happen in a vacuum. Judges and lawyers live with others in the community and are well acquainted with public views on justice as expressed in the media. Judges and lawyers are part of the community that criminal laws serve to protect and it would be fanciful to suggest that they are not aware of public expectation as to how laws should be applied and how offenders should be punished. The central issue is whether those involved in the sentencing process take note of such media coverage, and further whether or not they are influenced by public opinion.

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[2] *Are the Courts Too Soft? How Media Reports Distort the Realties of Sentencing* JM Robertson Proctor October 2005 pg 15

[3] Williscroft [1975] VR 292

[4] The concept of public interest is central to international prosecutorial guidelines. See the International Association of Prosecutors: Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors 1999. See also Western Australian DPP prosecutorial guidelines which states that : A prosecutor is not entitled to act as if representing private interests in litigation. A prosecutor represents the community and not any private or sectional interest. A prosecutor does not have a "client" in the conventional sense and acts independently, yet in the public interest.

The aim of this paper is to move beyond the academic literature and take a practical approach to the issue of media, public perception and choice of sentence. By reference to actual cases, this paper examines the role of the prosecutor and Judge during the sentencing process and examines how public opinion as expressed by the media impacts on the imposition of sentence.

The Prosecutor

The prosecutor has an active role in the sentencing process. As previously stated, the prosecutor represents the public interest and has a duty on behalf of the public to ensure that a person is properly punished for the crime that they have committed.[5] However, it is not for the prosecutor to choose the ultimate sentence. That task falls to the Judge.[6]

In all Australian courts, prosecutors are called upon to provide the facts pertinent to the sentencing decision. The requirement to provide facts has long been recognised by the courts[7].

Where there has been a plea of guilty, the prosecutor must put before the court the facts surrounding the commission of the offence. This is not necessary where there has been a verdict of guilty following a trial and where the sentencing Judge has had the benefit of listening to the evidence.

The prosecutor is also required to provide the Judge with antecedents including the offender's prior convictions.

In recent years, the prosecutor's role in the court room has expanded beyond the provision of factual material.

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[5] *The Role of the Crown Prosecutor on Sentence* IG Campbell (1985)9 Crim LJ 202; *Traditional and Modern Prosecutions* delivered at the AACP 2005 Conference Richard Refshauge SC; *The Role of the Prosecutor in Sentencing Process* I Temby (1986)10 Crim LJ 199; *Some Aspects of the Prosecutors Role at Sentencing* J Willis Journal of Judicial Admin (1996) 6 at 38.
[6] GAS v R (2004) 206 ALR 116
[7] R v Gamble [1983]3 NSWLR 356; Regina v Glass (1994) 73 A Crim R 299.

It is now well established that during the sentencing process the prosecutor is required to assist the court not to fall into appellable error.[8] This means that if the sentencing judge is mistaken as to the law or has been misled as to the facts, the prosecutor should to the extent that it is reasonable correct the error.

The prosecutor is also given the opportunity to the make sentencing submissions.[9]

Given the vast range of sentencing laws, the courts are increasingly reliant on the prosecution to bring to their attention laws which affect the case.[10] In the context of the matter before the court, the prosecutor should refer to legislative provisions that the court should consider when determining the appropriate sentence. This is particularly relevant in Commonwealth sentencing.

Commonwealth legislation creates a separate sentencing regime to that of the State. As Commonwealth offences are dealt with in State courts it is important that the Commonwealth prosecutor assists the Judge with the relevant legislation. Except to the extent permitted by the Crimes Act 1914, a Commonwealth offender can not be punished under State legislation.[11]

The court also expects the prosecutor to make submissions on general sentencing principles that are relevant to the offence and to inform the court of any aggravating circumstances which are likely to require a strong punitive sentencing response. Such submissions are made by the prosecutor as representative of the public interest.

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[8] R v Tait (1979)24 ALR 473 at pg 476-77 "When a crown right of appeal against sentence is conferred, the prosecutor is under a duty to assist the court to avoid appellable error. The Court is not likely to intervene on appeal against sentence if the Crown had not done what was reasonably required to assist the sentencing judge to avoid the error".

[9] See Western Australian DPP Prosecution Policy – The Role of the Prosecutor. It is the duty of the prosecutor to make submissions on sentence to a) assist in the attainment of an appropriate disposition; b) prevent the judge from falling into appellable error; c) put before the court such information as may be necessary to decide an appropriate disposition.

[10] R v Rumpf [1988] VR 466

[11] The exception is pursuant to section 20AB of the Crimes Act 1914 which permits State community based orders to be imposed for Commonwealth offences.

In Australia, the prosecutor is often invited by the court to indicate what type of sentencing disposition is appropriate. To such an invitation, the prosecutor must respond with caution.

It is acceptable for the prosecutor to submit to the court that a custodial or non-custodial sentence is appropriate.[12] This is particularly important in matters where the nature of the offence is of the severity to warrant a term of imprisonment. If at sentencing, the prosecutor does not object to a non-custodial ground, it is probable that an appeal court will dismiss a prosecution appeal on the basis that the prosecutor had not done what was reasonably required to assist the Judge to avoid error. It is also appropriate for a prosecutor to provide the sentencing Judge with authority pointing towards a particular range of sentence. Comparative sentencing submissions are permitted to ensure that there is consistency in the length of custodial sentences for certain offences.

It is not appropriate however for a prosecutor to suggest the precise quantum of a custodial term. This is because the roles of the prosecutor and Judge must be clearly delineated. The Judge must be seen to impose a sentence independent of the suggestion of either the prosecutor or the defence lawyer. More importantly, the prosecutor's duty of fairness precludes such an approach because it is inconsistent with the prosecutor's role as a non-partial participant in the sentencing process.[13]

Despite media coverage and public pressure for severe punishment in particular matters, it is important that the prosecutor approach the task in an even handed and fair manner. The prosecutor must not be swayed by public demands for a custodial sentence if such a disposition is not warranted. It is never appropriate for a prosecutor to make submissions in terms of quantum although in serious matters where a custodial term is appropriate, the prosecutor may call for a term of imprisonment at the lower, middle or upper end of the

[12] R v Wilton (1981)28 SASR 362; R v Acerbi (1983)11 A Crim R 90; R v Economedes (1990)58 A Crim R 466; R v Allpass (1993)72 A Crim R 561;Everett v R (1994) 181 CLR 295.
[13] *Some Aspects of the Prosecutors Role at Sentencing* J Willis Journal of Judicial Administration(1996) 6

scale.[14] Such submission should be supported with comparable cases to ensure consistency in sentence.

The temptation to seek a vindictive sentence and appease public sentiment must be avoided. Some matters before the courts strike at the core of human decency and are so abhorrent that the public calls for the most severe penalty available. With respect to offences that the media portray as being commonplace in Australian courts, the public may call for hash penalties in order to stop such offences from happening in the future. The danger of an offender being sentenced on the basis of public fears, rather than for what he or she has done is contrary to established sentencing practice.

The Sentencer

The task of sentencing falls to the judicial officer who is presiding in the court room. In Australia this is either a Magistrate or if the matter is to be dealt with in a superior court, a Judge.

Sentencing an offender is not an easy task. In determining the appropriate sentence, the Judge is bound by the rule of law but must balance the needs of the community with the needs of the offender.

In Australia, the sentencing Judge is required to act within boundaries set by Parliament.

Parliament ascribes each offence a maximum penalty which is given in terms of imprisonment and fines. The maximum penalty is reserved for the worst cases but gives an indication of the gravity of the offence.[15] It is well established that the maximum

[14] The WA State DPP Prosecutorial Guidelines state that although a prosecutor is responsible for ensuring that the sentencing tribunal has all appropriate material before it, it is not the role of the prosecutor to push for a particular length or type of sentence.
[15] Veen v R (No20 (1988)164 CLR

penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed.[16]

The sentencing options are also set out in legislation.

In practice, for any offence there is a range of sentencing options. For example under Commonwealth legislation, there are five categories of sentencing ranging from a conviction without sentence to immediate imprisonment.[17]

How the Judge is to approach the task of sentencing is also set out in legislation.

The Crimes Act 1914 provides that with respect to Commonwealth offences, the court must impose a penalty of severity appropriate in all the circumstances.[18] This provision reflects the principle of retribution and the principle that a person can not be punished to any greater extent than is proportionate to the gravity of the offence. In effect, the punishment must fit the crime.

Further, in relation to a Commonwealth offence a court is not to impose a sentence of imprisonment, unless there has been careful consideration of all sentencing options and it has been determined that no other sentence is appropriate.[19]

Section 16A(2) of the Crimes Act 1914 provides a non exhaustive list of matters to which the court must have regard when considering sentence. The factors must be taken into account where "relevant and known" to the court.[20] For example, the court is required to consider amongst other things the nature and circumstances of the offence[21], the effect of

[16] Ibbs v R (1987) 163 CLR 447
[17] Conviction without a sentence (section 19B Crimes Act 1914); Conviction and good behaviour bond (section 20(1)(a) Crimes Act 1914); Community based orders (section 20AB Crimes Act 1914); Fines (section 4D Crimes Act 1914); Immediate imprisonment (section 19AC – AB Crimes Act 1914) or suspended imprisonment (section 20(1)(b) Crimes Act 1914).
[18] Section 16A(1) Crimes Act 1914
[19] Section 17A Crimes Act 1914
[20] Ferrer-Esis (1991)55 A Crim R 237
[21] Section 16A(2)(a) Crimes Act 1914

a sentence on the offender's family[22] , a plea of guilty[23] and any co-operation afforded by the offender.[24]

In addition to legislative directives, the judiciary must have regard to the general principles of sentencing that underpin the criminal justice system. As stated by Lawton LF in *R v Sargeant*:[25]

> "…the classical principles of sentencing…are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind."

Accordingly, the common law sentencing principles, unless modified by the Crimes Act 1914 apply.

In Australian courts, it is accepted that general deterrence is an important sentencing consideration.[26] One of the purposes of sentencing is to deter potential offenders from committing the same offence. Judges will often refer to the prevalence of an offence in order to justify an increased penalty for the purposes of general deterrence.[27] For example, in Western Australia sentencing for social security fraud the courts have stated that offences of this type are both prevalent and difficult to detect. They must be viewed seriously because they threaten the basis of the social security system, which is designed to provide financial security for the needy in the community. Penalties must therefore reflect a concern for the protection of the revenue and serve the purposes of personal and general deterrence.[28]

When making comment on the prevalence of an offence, the Judge will often rely on personal observations or media reports as opposed to detailed statistics. This is a clear

[22] Section 16A(2)(p) Crimes Act 1914
[23] Section 16A(2)(g) Crimes Act 1914
[24] Section 16A(2)(h) Crimes Act 1914
[25] (1974) 60 Cr App R 74 at 77
[26] DPP v El Karhini (1990)97 ALR 373
[27] R v Cuthbert [1967] 2 NSWR 329 R v Malas (1978) 21 ALR 225
[28] Nunn v Kinnon (1988) 4 WAR 459; R v Rossi and Bowman (1988) 4 WAR 463

example of how Judges incorporate an understanding of the community into their decision making.

Within the parameters set by Parliament and in accordance with decided cases, the sentencing Judge is required to balance the objective factors with those factors personal to the offender. The Judge will consider issues such as ill health, drug addictions and family situations. Within this framework, the Judge exercises his or her discretion and will determine the appropriate sentence in all the circumstances. This is referred to as the sentencing discretion.

Generally speaking, the favoured approach in Australia is for the sentencing Judge to identify all relevant factors to sentencing, discuss their significance and then make a value judgment as to what the appropriate sentence should be.[29] The instinctive synthesis approach to sentencing can be compared to an approach that reduces the sentencing method into specified stages with specific indications of discount.

Sometimes pre-sentence media coverage will generate community outrage and the public will call for the Courts to impose severe sentences. Judges are regularly faced with the task of sentencing offenders who have committed crimes that are of such a level of depravity that it is beyond comprehension that a person would be capable of behaving in such a manner. Such crimes include murder and violent sexual offences.

Such matters are usually the subject of intense media coverage. Prior to sentencing, the media have reported on the charge, the succession of court appearances, details of the offence and any subsequent trial. It is usual in such matters for the public to call for the harshest penalty available. Media pressure for the re-introduction of capital punishment and the protection of the community commonly resound

Upon entering the courtroom, the Judge having read articles in the newspaper, watched television and listened radio coverage will be aware of the mainstream public sentiment

[29] Makarian (2005)215 ALR 213

towards the offender, and will be aware of what the public expect from him or her as a sentencing Judge.

How difficult it must be for a sentencing Judge not to be persuaded or influenced by pre-sentence media coverage! In many instances, the Judge approaches the task of sentencing in a climate of public anger and outrage. The Judge is aware that the ultimate sentence will be open to public debate, and that criticism will result if public expectations for a harsh penalty are not met

Sentencing Challenges – High Profile Offenders

On occasion, the Courts are required to sentence a person of celebrity status. Prominent offenders such as politicians, film and media personalities attract much media publicity resulting in the public becoming more involved in the process than they would with someone of lesser prominence. In such matters, the offender by virtue of their prominence and standing in the media can become the subject of criticism and this can result in a public view that punishment should be severe (whether or not such severity is warranted). The Australian public is renowned for succombing to the "tall poppy" syndrome, namely the view that the more prominent the offender, the harsher they should be treated.

The conviction and sentencing of Rene Rivkin resulted in claims that he had been the victim of a media campaign that had bought him public odium and disgrace and which had wrongly influenced the sentencing Judge in his choice of sentence.

Rivkin was a wealthy and flamboyant but somewhat eccentric stock broker. He was a prominent personality who was well known throughout Australia. In 2003, Rivkin was convicted after trial by jury of one count of insider trading in contravention of the Corporations Act 2001 (Cth).[30] The maximum penalty for the offence was a fine of $200,000 or imprisonment for 5 years or both.

[30] Section 1002G of the Corporations Act 2001

Media coverage of the 21 day trial had been unrelenting.[31] Details of the evidence and the bizarre behaviour shown by Rivkin were reported throughout Australia. For example, during his Counsel's final address to the jury, Rivkin proceed to use an inhaler in a very distracting manner. This behaviour prompted his Counsel to reprimand him in the face of the jury. Needless to say, the public were fascinated with the trial and the subsequent conviction.

After conviction, the media foreshadowed a sentence of imprisonment and public expectation followed.

At the sentencing hearing,[32] Counsel for Rivkin argued against a conviction being entered. He submitted that in the circumstances the charges should be dismissed, or at the very least a non-custodial sentence should be imposed.

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[31] The evidence at trial established that in March 2001 Impulse Airlines which operated as a domestic airline in Australia was operating at a loss. Around this time, Gerard McGowan the Executive Chairman of Impulse Airlines approached Qantas airlines and entered into confidential discussions involving funding and the leasing of Impulse planes to Qantas.

At the same time, Mr Rivkin had his residence at Rose Bay on the market. On 24 April 2001, McGowan spoke to Mr Dassakis the Group Operations Manager of the Rivkin Group about buying the Rose Bay property. McGowan said to Dassakis that as he was waiting for the sale of his business and that he would have to make a conditional offer.

Mr Dassakis immediately contacted Mr Rivkin. McGowan then spoke to Rivkin over the telephone and told him that he was interested in purchasing the property. He said that he was looking to merge Impulse with Qantas and that he was waiting for ACCC approval. He told Mr Rivkin that after several months of negotiation with ACCC he believed the approval would be forthcoming. McGowan told Mr Rivkin that the information was confidential and that as he had now been informed of the intended transaction, he was unable to trade in Qantas shares;

Mr Rivkin instructed Dassakis to go ahead with the preparation of a conditional contract for the sale of the house. On that same day, Rivkin also instructed the purchase of 50,000 shares in Qantas on behalf of Rivkin Investments Pty Ltd.

A short time later, the Qantas Board gave approval for the proposed transaction with Impulse Airlines and the Australian Stock Exchange was informed.

On 1 May 2001, the share price in Qantas increased and Mr Rivkin instructed that the shares be sold. The Qantas shares for a profit of $2,664.94.

[32] R v Rivkin (2003) 198 ALR 400

The prosecution sought an immediate term of imprisonment.

The sentencing Judge after consideration of the relevant law and sentencing principles applicable to white collar crime[33] determined that imprisonment was the appropriate penalty in all the circumstances and imposed a sentence of 9 months imprisonment together with a fine of $30,000. The Judge declined to set a minimum period of detention and ordered that the imprisonment be served by way of periodic detention. [34]

The media delighted in the custodial sentence handed down to Rivkin and reported it in a sensational manner. The media focus was on the celebrity rather than the offence. Rivkin was portrayed as someone who being used to the luxuries in life would have to adjust to the sordidness of a State prison.

Rivkin appealed the sentence on the grounds that a custodial sentence was manifestly excessive. His media status and public prominence were an important aspect to his appeal grounds.

Rivkin argued that the sentencing Judge had been pre-occupied by his public persona and portrayal by the media and sentenced him on the basis of who he was, rather than what he had done. It was also argued that the sentencing judge had allowed himself to be distracted by "what appeared to be a personal dislike" of Mr Rivkin. Counsel for Mr Rivkin submitted that the sentencing judge was "jaundiced by extraneous considerations" that "he failed to approach the sentence with the dispassion required of a sentencing judge".

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[33] Ibid: The general principles relating to sentencing in white collar crimes are that the element of general deterrence is especially important as the nature of insider trading is that it is particularly hard to detect but where it occurs it has the capacity to undermine to a serious degree the integrity of the market in public securities and it is especially important that the sentencing process provide a firm disincentive to the carrying out of illegal activities especially by those who are engaged in the securities industry : at para 44

[34] Ibid: The sentencing Judge found that a sentence of periodic detention in the circumstances of the present offence would reflect overall the objective seriousness of the offence and fulfill the manifold purposes of punishment including personal deterrence while at the same time attenuating the punishment so as to take account of the offender's strong subjective case especially in relation to his physical and mental health: at para 64

Such argument was not entertained by the New South Wales Court of Criminal Appeal who stated that the sentencing Judge had fallen into any such error.[35] It was accepted that the sentencing Judge had made adverse findings but that he had not "abandoned the neutrality expected of the sentencing Judge".[36]

In the course of its reasoning, the Court felt compelled to comment on the influence of the media in the sentencing process.

The Court stated that neither the sentencing Judge, nor an appellate court can permit themselves to be swayed by popular expressions of opinion, whether in the media or otherwise, as to whether a particular offender should or should not receive a custodial sentence. Rather, it is the responsibility of the sentencing judge to determine the appropriate sentence after a consideration of the subjective and objective factors relevant to the offence[37].

The Court was satisfied that in this matter the sentencing discretion had not miscarried and that a term of imprisonment was appropriate.

By way of final comment, the Court stated that:

> "A sentencing court must strive to avoid being influenced by a sense of outrage stemming from foreign sources. The outraged

[35] Regina v Rivkin [2004] NSWCCA 7: Mason P, Wood CJ and Sully J

[36] Supra 34: The adverse findings related to the finding that Rivkin had not shown any remorse or contrition for the offence. The sentencing Judge also referred to Rivkin as an "arrogant man" and had "displayed an attitude of contempt and disdain for the jury's verdict" at para 54. However, the sentencing Judge correctly stated that this did not warrant the imposition of any greater penalty than was otherwise appropriate and could not play a role in increasing the penalty to be imposed.

[37] Ibid: Objective factors included relevant considerations under section 16A(2) of the Crimes Act 1914 including the nature and circumstances of the offence. The sentencing Judge found that there were some serious aspects to the circumstances of the offence, namely that Rivkin was an experienced stockbroker and that he had deliberately arranged the purchase of the shares notwithstanding an express caution from McGowan that he should not trade in Qantas shares. Subjective factors taken into account included: no prior convictions, Rivkins physical and mental health, the disgrace and humiliation for Rivkin, the impact on his wife and family, the loss of his previous good standing in the community and in his profession as a stockbroker, the good character references and his extensive philanthropy, the unquantifiable but real economic impact the conviction may have on his livelihood, the disqualification from managing a corporation and the fact that he might loose his security dealers license.

> sense of innocence expressed by a person who has been duly convicted cannot reduce an otherwise appropriate sentence. Nor, on the other hand, can the "community's" sense of outrage expressed through the media lead to a harsher sentence that is otherwise appropriate according to the law.
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> Since his conviction, the appellant has been the object of sustained media attention. Much of that coverage has been openly critical of him: or overtly hostile towards him: or merely derisory of him. It would be disingenuous to say the very least, to close one's eyes to the tendency of that type of coverage to spawn an outrage which is informed by matters going beyond legal principle.
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> In those circumstances, the best that any sentencing court can do is to apply the law fairly according to the particular circumstances of the particular case, and influenced only by the evidence in the particular case. If that is done with a proper clarity; and if what has been thus done is reported truthfully; and commented upon fairly, then there should be no need for concern about the reaction of reasonable members of the general community. Principled justice is not likely to be advanced by any attempt, necessarily futile, to identify whether the community generally has, or might have, or might be influenced by the media to have, this or that opinion: let alone to evaluate reliably any such supposed opinion."

The Court of Criminal Appeal was clear in stating that an offender who occupies a significant position in the community cannot escape a custodial sentence simply because it is "humiliating or embarrassing". Further, a court cannot impose a custodial sentence if it is not warranted. However, in this matter the sentencing Judge got it right. Rivkin was not the victim of the "tall poppy syndrome". The sentence was not imposed due to media or public pressure but because it was the appropriate sentence in all the circumstances.

Prosecution Appeals

In Australia, if the prosecution believes that the sentencing Judge has made an error and that the sentence is inadequate, then the prosecution has the right to seek the review of a sentence by a higher court.

In Western Australia, as in all jurisdictions within Australia, the right of the prosecution to appeal against a lenient sentence is wholly statutory.[38] There is no inherent power in appellate courts to entertain such appeals.[39]

To be successful in such an appeal, the prosecution must show that that the sentencing Judge has erred in fact or in law, or that the sentencing discretion has miscarried and the sentence imposed was inadequate[40].

The High Court has made it clear that prosecution appeals should only be mounted in very special cases because prosecution appeals against sentence cut "across the time-honored concepts of criminal administration by putting in jeopardy for the second time the freedom beyond the sentence imposed". [41] Clearly an offender who has received a non-custodial sentence in the first instance is faced with the prospect of losing his or her liberty if an appeal is upheld. This is challenges concepts of justice and fairness which underpin the legal system.

Prosecutors must therefore carefully consider whether or not an appeal should be commenced. The Commonwealth DPP Prosecution Policy refers to *The Queen v Osenkowski* [42] and the judgment of King CJ who made the following observations concerning the role of prosecution appeals against sentence:

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[38] Section 24 Criminal Appeals Act (WA) 2004;
[39] Griffiths v The Queen (1977) CLR 293 at 299
[40] Lowndes v R (1999) 195 CLR 665
[41] Everett v the Queen (1994) 181 CLR 295 at 299; Leucus (1995) 78 A Crim R 40 at 50; R v Disun (2003) 27 WAR 146
[42] (1982) 30 SASR 212

> "It is important that prosecution appeals should not be allowed to circumscribe unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform. The proper role for prosecution appeals in my view is to enable idiosyncratic views of individual judges as to particular crimes or types of crimes to be corrected, and occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience."

The Commonwealth DPP Prosecution Policy requires that the prosecution's right to appeal against sentence should be exercised sparingly. Accordingly, a prosecution appeal against sentence should only be commenced where the sentence is disproportionate to the seriousness of the crime or it is so out of line with other sentences imposed for same and similar offences without reasonable cause for that disparity. [43] The purpose of prosecution appeals against sentence is to ensure that there are established and maintained adequate and proportionate standards of punishment for crime.

Mere public dissatisfaction with a particular sentence should never drive a prosecution appeal. In *R v EPR*, the prosecution appealed a suspended sentence of imprisonment imposed for serious sexual offences.[44] Counsel for the State DPP informed the court that

[43] See Commonwealth DPP Prosecution Policy pg 22; Western Australian DPP Prosecution Policy (151 State Appeals Against Sentence)

[44] [2001] WASCA 214 WA Court of Criminal Appeal. In this case the offender was charged with various counts of sexual offences against his daughter including penile penetration. He received a 5 year custodial term suspended for 2 years.

the appeal was brought "following community concern" as to the appropriateness of a non-custodial sentence in matters of serious sexual assault. The Court stated:

> "It is not generally helpful to tell the court that an appeal has been brought because of public disquiet about the sentence. The sentence is either within the right parameters or it is not. That question must be answered by reference to all of the various considerations that go to make up the purposes of punishment".[45]

On a prosecution appeal, the issue is not whether the public considers a sentence too lenient but whether the sentence manifests error.

Sometimes Judges do make mistakes and Judges can impose sentences that are too lenient. It then becomes the duty of the prosecutor, in the public interest to seek a review of such sentences in a higher court. The appellate court system exists to correct poor sentencing decisions and to maintain standards of punishment. However, commencing an appeal because it is in the public interest must be distinguished from acting on the basis of public discontent as expressed by the media.

Political Action and Mandatory Sentences

If a sentence of perceived leniency is upheld on appeal, the media will often turn attention to the political arena.

Mandatory sentencing is a political response to public concern and media pressure about courtroom sentencing. Mandatory sentences remove judicial sentencing choice. In the absence of sentencing choice, the Judge is unable to exercise his or her discretion and is required to impose the penalty as ascribed by Parliament.

[45] Ibid page 4

Mandatory Sentencing and People Smuggling

At the beginning of 2001 and again in 2003, new laws were introduced into Australia in an effort to curb an influx of asylum seekers. The arrival of illegal immigrants by boat was well documented by the media, and the general public became obsessed about a perceived threat to Australia's sovereignty. The public looked to Parliament to strengthen existing laws in order to deter such illegal entry. The media was instrumental in putting this issue on the political agenda, and made a significant contribution to political thinking at the time.

Parliament acted to allay public concern and the new laws significantly increased the maximum penalty for offenders who entered Australia without a properly obtained visa. The laws set a mandatory minimum period of imprisonment for a person convicted of organizing or facilitating "people smuggling".[46] A first time offender was to be sentenced to a minimum of 5 years imprisonment with a non parole period of 3 years and a repeat offender was to be sentenced for a minimum of 8 years with a non parole period of 4 years.[47]

The effect of these changes meant that if someone was convicted for people smuggling, the sentencing Judge was required to impose imprisonment for 5 years or more (to a maximum of 20 years). Imprisonment was the only sentencing disposition available.

In the Western Australian people smuggling case of *R v Nyguyen and Tran*[48] the sentencing Judge was required to impose a mandatory custodial term in circumstances where she was of the opinion that immediate imprisonment was too severe in all the circumstances.

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[46] Section 233C and s232A of the Migration Act 1958. The Migration Act 1958 was amended by the Migration Legislation Amendment Act (No.1) 1999.
[47] Section 232A was amended by the Border Protection Legislation Amendment Act (No.1) 1999.
[48] District Court of Western Australia No. 1927 of 2003 R v Van Hoa Nguyen, Hoang Tranh Lai and Van Tol Tran before her Honour Judge Yeats 5 May 2004

Nguyen was a Vietnamese born Australian citizen. He was convicted after trial in the District Court of Western Australia of people smuggling.[49]

Nguyen was an Australian citizen who had come to Australia from Vietnam in 1994. It was accepted by the Court that Nguyen had been a political dissident in Vietnam and that he had been a political prisoner sentenced to 20 years imprisonment. Nguyen had escaped custody, entered a Thai refugee camp before entering Australia as a political refugee.

In April 2003, Nguyen had traveled to Vietnam where he arranged for and participated in an anti-Vietnam government leaflet distribution over a period of days. After distributing the leaflets, members of the group feared that the authorities had found out the identity of the source of the leaflets and believed that they would be arrested and goaled for their activities. Nguyen subsequently arranged the departure of a group of 53 people from Vietnam to Australia.

Nguyen, his co-accused Tran and the 53 people traveled by boat towards Indonesia and Australia. Due to bad weather, the group stopped in Indonesia. In Indonesia they stocked up with provisions and continued their journey to Australia. The boat was apprehended in Australian waters near the north of Western Australia. None of the passengers on the boat possessed a visa to lawfully enter Australia.

The matter came before the Judge for sentence. The Judge was bound by the legislation and was required to impose the mandatory minimum sentence of 5 years imprisonment with a non parole period of 3 years. In her sentencing comments, the Judge made reference to the second reading speech for the Migration Amendment (Excision from Migration Zone) Bill 2001[50] and stated that it was clear that the introduction of mandatory sentences was aimed at "organised criminal gangs of people smugglers who

[49] Section 232A of the Migration Act 1958
[50] Second Reading Speech read by Minister for Immigration and Multicultural Affairs Philip Ruddock on 18 September 2001

were motivated not by any desire to help others but by base motives of greed" and not genuine asylum seekers. She stated:

> "I raise these matters because of my belief that this case may be one where the Commonwealth executive will need to intervene, relying on the prerogative of mercy, to alleviate the harshness of the mandatory sentencing regime that I am required to apply"[51]

In sentencing the Judge said that but for the mandatory minimum she would have imposed a lesser sentence and that she would have contemplated suspending any such sentence.

The introduction of mandatory sentencing has little to do with the administration of justice and everything to do with politics. It is a political response to public dissatisfaction with the operation of the criminal justice system and media pressure to turn political promises into a reality.

Conclusion

Clearly, what is reported in the media shapes public opinion about the operation of the criminal justice system. Although most reporters act with integrity and report accurately, the prevalence of opinion based journalism can not be ignored. Talk back radio and current affair programs concerned more with ratings that responsible journalism has the potential to generate much public debate about the state of the criminal justice system in Australia and more particularly, criticism of those that make the laws and those that administer them. Accordingly media not only informs the public, but also conditions mainstream community attitudes. Indeed, the interrelationship between media and public perception is a reality that can not, and should not be ignored.

[51] District Court of Western Australia No. 622 of 2003 The Queen v Jack Roche before Healy DCJ on 1 June 2004 at pg 845

The media purports to reflect community standards and the concerns of the community as to the adequacy of punishment administered by the courts. In certain circumstances, these are relevant considerations in the sentencing process. For example public expectation for a harsh penalty may be appropriate when the prevalence of the crime is such that a deterrent penalty is required, or when the offence has been committed in aggravating circumstances. Sometimes however, expressions of community concern in the media can be based on a misunderstanding of the true facts, or on a view of the facts which is markedly different from the facts which the Judge must accept because of the way the case is presented in Court.

Those involved in the sentencing process are aware of public expectation and opinion. Lawyers and Judges read newspapers, watch television and listen to the radio. However, public opinion should never drive a prosecutor to seek a vindictive sentence and must not influence a Judge to impose a sentence more severe than that which is warranted by the circumstances. Furthermore, public dissatisfaction with a sentence that has been imposed should never be the driving force behind a prosecution appeal. The sentencing process must occur in accordance with the law and established sentencing principles in order to maintain consistency and fairness in sentencing.

In those instances where there is public outcry as to the leniency of a sentence the media often turns its attention from the judiciary to the legislature, to those who make the laws that the judges must impose.

When it comes to public demand for an increase in custodial sentences for particular offences, those in the political arena do not exercise the same restraint as the judiciary. It would take a brave politician to ignore media coverage of what is presented as the mainstream community view. Politicians will address the public fear of certain offences and offenders by changing the law which the Judge must impose upon conviction. In many instances, the change is the introduction of mandatory sentencing. For the politician this may bode well at election time, but for the Judge the removal of sentencing choice can disrupt the fair administration of justice.

So where does the media fit in to all of this? It can be said with confidence that in Australia the media does not adversely impact on the approach of either the prosecutor or the Judge during the sentencing process. The media does however have significant influence in the political arena and on legislative activity, and it is this impact that reverberates in the courtroom and impacts on choice of sentence.

A CASE STUDY
IMPACT OF MEDIA ON CHOICE OF SENTENCE

Jack Roche – A Convicted Terrorist

Introduction

It was the events of 11 September 2001 that pushed terrorism into the forefront of public concern. The bombings in Bali which occurred in 2002 and in which 80 Australians lost their lives changed the shape of national thinking. No longer could Australians believe that they were isolated from such atrocities. The fear of terrorist activity had infiltrated into the lives of each and every Australian.

In 2004 the public were made aware that an Australian citizen Mr Jack Roche had been charged with terrorist offences. He had been charged with entering into a conspiracy to bomb the Israeli embassy in Australia with intent to endanger the lives of Israeli diplomats who worked there.[52]

Media coverage of the charges, the subsequent trial of Roche and the unexpected plea of guilty made for front page headlines. The public became aware that Roche had traveled to Malaysia where he met with Hambali who was then the leader of Jemaah Islamiya in Malaysia. He had traveled to Pakistan and on to Afghanistan where he met with senior members of al-Qaeda including Mukhtar, Abu Hafs and Osama Bin Laden. In Afghanistan, Roche had participated in explosives training at an al-Qaeda camp. The public were informed that Roche accepted money from both Mukhtar and Hambali and that he had been told to establish a terrorist cell in Australia. Roche had been given instructions to conduct surveillance of the Israeli Consulate in Sydney and the Israeli

[52] Section 86 of the Crimes Act 1914 that between 15 February 2000 and 13 September 2000 in Malaysia, Pakistan and Afghanistan he conspired with Mukhtar, Abu Hafs and Saif and divers others to commit an offence contrary to section 8(3C)(a) of the Crimes (Internationally protected Persons) Act 1976. Section 86 of the Crimes Act has since been replaced by the conspiracy provision in section 11.5 of the Criminal Code (Cth).

Embassy in Canberra, and he had undertaken such surveillance. The public were also aware that he had sourced two igniters which could be used to ignite bombs.

Media coverage portrayed Roche as an "evil minded" and "cunning" individual who was deeply involved in terrorist activity and was an imminent threat to the Australian people.

Needless to say the public were alarmed that such activity could occur in Australia and furthermore that an Australian citizen could have involvement with known terrorists such as Hambali and Osama Bin Laden. The public called for a harsh penalty to be imposed on the basis that terrorism was heinous crime which threatened innocent people and that Australia needed to be protected from a person such as Roche. There were calls for the death penalty to be re-introduced, or for life imprisonment.

Sentencing Submissions

The matter came before the trial Judge for sentencing. The offence for which Roche was convicted carried a maximum term of 25 years imprisonment.[53]

During the sentencing hearing, the prosecutor stated:

> "In the Crown's submission this offence is unique. All sentencing principles will tell your Honour that the need for dramatic deterrent sentencing takes over from almost all other considerations…the nature of this plan in this country to do this…is so serious and such an affront to the values of this community that the legislation clearly directs that your Honour be looking at a term which is directed almost exclusively to general deterrence"[54]

[53] Conspiracies under Commonwealth law are punishable by the same penalty as if the offence had been committed
[54] Supra 47 at pg 615

When making submissions on the appropriate penalty, the prosecutor submitted imprisonment was the only appropriate sentence and he sought a term approaching the maximum term available. He did not specify a quantum.

In making his sentencing submissions, the prosecutor discharged his responsibilities appropriately. He sought a substantial term of imprisonment, but he did so after presenting the facts in an even handed manner and after alerting the Judge to relevant sentencing principles. He focused on the seriousness of the offence and the need for general deterrence. In his submissions, the prosecutor recognised public concern for this type of behaviour without becoming embroiled in the emotiveness that was evidenced in the media.

The Sentence

It was common ground between the prosecution and the defence lawyer that imprisonment was the appropriate penalty, and the only matter in issue was one of quantum.

The defence lawyer submitted that as Roche had been in custody for some 18 months awaiting trial and that he should not be required to serve a term much longer than what he had already served. The prosecution called for a custodial sentence close to the maximum term of 25 years.

As part of fact finding by the sentencing Judge, it was accepted that Roche did not initiate the conspiracy and that his role was to carry out the surveillance on the Israeli embassy in Canberra and to send the material to Afghanistan for further planning. It was accepted that Roche was not meant to be one of the persons who was to destroy or damage to the embassy by means of explosives. The conspiracy did not reach its end. It did not go any further than its initial planning stages and surveillance of the premises, the material was not sent to Afghanistan, nobody was injured and no property was damaged.

In the exercise of his discretion, the sentencing Judge adopted the two stage method of sentencing and stated:

> "In fixing your term of imprisonment I have given credit for your cooperation and your eventual plea of guilty. But for that, your sentence would have been 12 years. However, taking those matters into account I now sentence you to a period – I would have sentenced you to a period of 10 years. However, taking into account the letter that has been provided, that sentence is reduced to nine years. Therefore you are sentenced to nine years imprisonment. I fix a non parole period of four and a half years."

After starting at twelve years, the sentencing Judge provided a two year discount for past co-operation and a plea of guilty. These are matters that must be considered pursuant to section 16(2) of the Crimes Act 1914. He also discounted the head sentence by a further one year for future co-operation. The authorities had provided the Judge with a letter stating that Roche had agreed to provide additional information with respect to terrorist activity. By law, the Judge was required to consider the contents of this letter in sentencing.[55]

The sentence of nine years imprisonment was backdated to 18 November 2002 when Roche was first taken into custody. Accordingly, his eligible date of release was 18 May 2007, approximately three years from the date of sentence.

This sentence resulted in a public outcry which was intensified by media coverage. The media claimed that the judiciary was too soft on terror and that the penalty imposed was too lenient.

Public outrage and disquiet about the sentence was widespread. In an opinion poll conducted by the West Australian newspaper the day after the sentence was handed

[55] Section 21E Crimes Act 1914

down, only 7% stated that the sentence imposed was appropriate. Of those surveyed 40% said that the death penalty was the most appropriate punishment, and 34% called for life imprisonment. In another opinion poll on Channel nine's website http://ninemsn.com.au over 75% of voters though that the sentence was too lenient.

The sentencing Judge would have been well aware of public expectation that Roche would be given a harsh penalty towards the maximum available. He would have been aware that by imposing the sentence that he did, he would come under public criticism both in a personal capacity and as a member of the judiciary. In sentencing, the Judge was clearly not swayed by public opinion as expressed by the media, and imposed a sentence that he determined was appropriate in the circumstances.

The Prosecution Appeal

Did the sentencing Judge err in imposing the sentence of nine years with a non-parole period of four and a half years? The public certainly thought so. Newspaper headings, talk back radio and television coverage criticised the Judge for not taking the threat of terrorism seriously. There was intense pressure for the sentence to be reviewed in the appeal courts.

The Commonwealth DPP considered the merits of an appeal and formed the opinion that an appeal was warranted. The appeal was not driven by public dissatisfaction with the sentence or because of media pressure. The decision was made in accordance with the prosecution policy.

The appeal was argued on the basis that the sentencing discretion had miscarried and the sentence was inadequate in that it did not properly reflect the need for general deterrence. The prosecution formed the opinion that the sentence was so disproportionate compared to the seriousness of the offence that it was a shock to the public conscience and that it was in the public interest to appeal the sentence. This is a very different concept to mere public discontent or dissatisfaction.

The Court of Criminal Appeal (WA)[56]

All three members of the Court of Criminal Appeal held that in order to determine the appropriate sentence in relation to the offence it was necessary to consider what Roche had actually done and what harm had actually occurred. In accordance with sentencing principles, the Court held that Roche was not to be punished for what he might have done, or at some stage intended to do or what he may have thought about doing but did not do.[57] The rule of law required that Roche be sentenced for the crime for which he was convicted and not the fear that terrorists create. The Court by way of judicial comment made it clear that public opinion on how courts should sentence convicted terrorists was not a sentencing consideration.

Miller ACJ and Templeman J turned to the evidence and concluded that the acts performed by Roche did not amount to the worst case of terrorism. The conspiracy went no further than its initial planning stages, nobody was injured and no property damaged. Roche had been given money and purchased a vehicle. He had driven from Perth to Canberra and then to Sydney. He had taken photographs and made a video film. He also took some preliminary steps towards the acquisition of two igniters from which an explosive device might ultimately be constructed. However, Roche did not provide the results of his work to any other person in furtherance of the conspiracy. He lost enthusiasm and ceased his activities and did nothing further until his premises were raided by police two years later. When arrested, he co-operated fully with the authorities.[58]

Miller ACJ and Templeman J acknowledged that the difficulty for the prosecution was that this was the first conviction of its type in Australia and accordingly there were no comparable cases to determine whether or not the sentence imposed was disproportionate or inadequate. Both of their Honours dismissed the appeal on the basis that the sentencing

[56] Unreported R v Jack Roche [2005] WASC 4; Murray ACJ, Templeman and McKechnie JJ
[57] Ibid Templeman J para 32
[58] Ibid Miller ACJ para 20

Judge did not overlook any relevant material fact and that the sentence fell within the sentencing discretion.

Justice McKechnie provided the dissenting judgment. His Honour did not take issue with the facts, or with the law as applied by the sentencing Judge. He did however turn to decided cases on terrorism from other jurisdictions and after careful consideration of sentencing principles applicable in cases of terrorist activity determined that the sentence imposed on Roche was inadequate.[59] He found that the sentencing discretion had miscarried because the sentencing Judge had failed to take "sufficient account of the abnormal nature of the crime, the intention with which the conspiracy was entered into and the threat to the State of such a conspiracy. The sentence was insufficiently grave to mark denunciation of the conduct and insufficient to be a general deterrent."[60] His Honour stated that he would have allowed the appeal and would have substituted a sentence of 15 years with a non-parole period of 9 years.

The fact that the Court handed down a majority decision with a dissenting judgement demonstrates that there was an arguable case and a proper basis for the prosecution to appeal sentence. Although the appeal was unsuccessful, the appeal grounds had merit and the Commonwealth DPP had acted in the public interest by taking the matter to the appeal courts.

Political Reaction

The public anger generated by the sentencing of Roche and amplified by the media put mandatory sentencing on the political agenda. As stated by the Commonwealth Attorney General during question time in Parliament on 3 June 2004:

> "…the issue of Mr Roche has to be dealt with under the law as it now is, but let me say that it has been suggested- and I

[59] Ibid McKechnie J para 119; After considering case law and sentencing principles, his Honour set out 13 principles which he would apply to cases of international terrorism.
[60] Ibid McKechnie J at para 121

> acknowledge that there is a very wide degree of interest in this matter- that the government would consider options for amending terrorist legislation to set non parole periods for terrorism offences. I might say that I would not consider such amendments to be out of order. We have used this type of mechanism before, particularly in the context of smuggling offences. While the measure, if it were to be pursued, would be considered as an extraordinary circumstance, I think terrorism offences demand consideration of those matters. I will be looking at it with a view to bringing forward further amending legislation to set a non parole period in relation to terrorist offences."[61]

Mr Ruddock turned political comment into political promises. During a radio interview the following day, he stated:

> "What I did flag in Parliament yesterday and something that I'm going to consider, is the introduction of minimum parole periods, to reduce the discretion that the court might have in specifying a non-parole period".[62]

And political promises turned into a reality. On 1 July 2004 the Anti-terrorism Act 2004 introduced new provisions into the Crimes Act 1914 to fix minimum non-parole periods for persons convicted of, and sentenced to imprisonment, for specified terrorism offences.

These new provisions require that where a head sentence of imprisonment is fixed, the court must set a single non parole period of at least three quarters of the aggregate head sentence.[63]

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[61] Attorney General Philip Ruddock; 3 June 2004; Question without Notice: National Security: Terrorism Hansard pg 29677
[62] 2GB Ray Hadley Morning Show 4 June 2004
[63] Section 19AG of the Crimes Act 1914. Inserted by the Anti-terrorism Act 2004.

The introduction of the new terrorism laws was a political response to public concern about how the courts dealt with convicted terrorists. At the time that the laws were introduced, there was only one person who had been convicted for modern day terrorist activity in Australia. That person was Roche. To the public the sentence imposed on Roche indicated that the judiciary could not be trusted to adequately deal with terrorists in an age where violent terrorist activity was a reality. The media was instrumental in shaping public opinion and in putting this matter in the political arena. The outcome was the introduction of new laws which took away some judicial discretion and put in place a degree of legislative control on choice of sentence.