

OPINION

We can't escape the trial by media that preceded the Maxwell guilty verdict

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The trial of Ghislaine Maxwell in New York has been one of the most watched in recent years. Maxwell, a former partner of the deceased child sex offender Jeffrey Epstein, is now facing “decades” in jail after being found guilty last week of five offences including recruiting and trafficking of young girls to Epstein who sexually abused them.

While the jury verdicts have been acclaimed by victims’ groups and commentators as a welcome development in the hunting down of sexual assault perpetrators, this case shows the deep flaws in the US justice system that fails to protect against adverse pre-trial publicity and which imposes sentences that are disproportionate to the point of cruelty.



Ghislaine Maxwell, the world's highest profile sex trafficker. *CREDIT: AP*

To be clear, this is not an analysis of whether Maxwell has been wrongly or rightly convicted, but is about justice not only being done, but being seen to be done.

We can assess the integrity of the concept of justice in the Maxwell case by looking at how it might have been dealt with in Australia. While this country is a long way from perfect in how it ensures an accused person is treated in the criminal trial and sentencing process, it does seek to prevent potential juries being tainted by trial by media and sentencing is driven generally by the need for proportionality.

Maxwell’s case is a prize example of trial by media. In the past few years there has been an avalanche of media dealing in detail with Maxwell, Epstein and the allegations of sexual abuse. The alleged victims of Maxwell and Epstein have provided, in graphic detail, their version of what they say happened to them when, as teenage girls, Maxwell introduced them to Epstein’s sordid world. This pre-trial publicity was, without exception, hostile to Maxwell’s character and actions, and she has been portrayed as the enabler of Epstein’s depravity.

Given this unrelenting hostile publicity how could it be said the jurors selected for the trial would be able to put out of their mind any views they might have had about Maxwell and Epstein? While there was an arduous pre-trial jury selection process, including questionnaires and directions from the judge about ignoring media, the failure of the US justice system, generally and particularly in this case, to allow for widespread suppression orders of the type used in Australia to curtail prejudicial media means the reality of their being some prejudice on the part of some jurors about Maxwell was highly likely.

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As a senior US judge, Alex Kozinski, observed with refreshing realism, in 2015, "we have no convincing reason to believe that jury instructions in fact constrain jury behaviour in all or even most cases".

We know from the case of Cardinal George Pell, acquitted by the High Court in 2020 after being found guilty by a jury in Melbourne, that relentless publicity casting him in a poor light before his trial was problematic.

One cure for Maxwell to remedy injustice might have been trial by judge alone but while that is available in Australia for cases where serious adverse media is an issue for an accused, it is very rare in the US.

What the Maxwell case also shows is there is likely to be no justice when it comes to sentencing. The US sentencing regime is notoriously unjust because it does not sentence according to the gravity of the offending and taking full account of the circumstances of the defendant. High maximum penalties and mandatory sentencing make for cruel outcomes.

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In Maxwell's case, she is said to be facing decades behind bars. A former US prosecutor, Mitchell Epner, has told the ABC that Maxwell is likely to receive a jail term of 20 to 25 years, meaning she will likely die in jail given she is 60. While the offending is serious, a jail term of that magnitude in Australia is generally reserved for murder or serious multiple sexual assaults where a person has prior criminal history for the same sort of offences. Do we really think Maxwell should be equated with a person who has killed another? She should be sentenced to a term commensurate with others' convicted of similar crimes. In Australia, that might be about 10 or 15 years.

Ghislaine Maxwell's demise is a symbolic victory for many who abhor the powerful and their abuses of that power. But her case – from the perspective of the insidious influence of trial by media eroding the right to a fair trial, and punishment built of irrational vengeance and cruelty – is troubling.