

LAW AND CHANGE

In order to expand and improve its coverage of law reform issues, the editors of the Melbourne University Law Review have decided to introduce a new section entitled 'Law and Change' from this issue onwards. 'Law and Change' is intended to provide scope for the publication of a number of shorter comments which critically assess contemporary law reform issues.

The Law Review encourages students in particular to make contributions to the new section. Student work is seen as an important part of the journal, in providing a forum for students to develop their research and writing skills, and to have the opportunity to be published. Naturally, academics and legal practitioners are also encouraged to make submissions.

The approximate length of the comments is negotiable, but should be no longer than 3000 words. Where appropriate, a particular comment may be lengthened to explore the complexities of a topic in greater detail. If there are any further inquiries, please do not hesitate to contact the editors, or the law reform editors. All contributions are greatly appreciated.

SENTENCING OF SEXUAL OFFENDERS WHEN THEIR VICTIMS ARE PROSTITUTES AND OTHER ISSUES ARISING OUT OF HAKOPIAN

SENTENCING PRINCIPLES APPLIED IN THE QUEEN v. HEROS HAKOPIAN¹

In August 1991, Judge Jones of the Victorian County Court sentenced Heros Hakopian to a total of three years and four months imprisonment, with a minimum term of sixteen months.² Hakopian had been found guilty of rape with aggravating circumstances, indecent assault with aggravating circumstances and kidnapping. Judge Jones had taken a number of factors into account to justify the leniency of this sentence. One of these considerations was the fact that the victim/survivor³ was a prostitute and it was, His Honour supposed, reasonable to assume that she suffered less psychological harm than would have been suffered by other classes of victim/survivors of sexual offences.

Judge Jones was not the first sentencer to view a rape victim/survivor's occupation as a sex worker as a relevant consideration in determining the

¹ Unreported, County Court of Victoria, 8 August 1991.

² On appeal, this sentence was increased to a total of four and a half years imprisonment, with a minimum term of two and a half years: *The Queen v. Heros Hakopian*, Unreported, Supreme Court of Victoria, Court of Criminal Appeal, 11 December 1991.

³ 'Victim' refers to those who have suffered the impact of crime. 'Survivor', especially in relation to crimes of violence, is used as an empowering term to reinforce a victim's ability to cope with the effects of the assault. This redefinition assists in providing a foundation for survivors to regain control and power in their lives.

seriousness of the offence and the duration of the sentence. His Honour followed the earlier decision of *The Attorney-General v. Leonard Richard Harris*.⁴ In that case, Starke J. stated that rape 'when committed against prostitutes . . . is not as heinous as when committed, say, on a happily married woman living in a flat in the absence of her husband when the miscreant breaks in and commits rape on her.'⁵

Judge Jones would also have found guidance in the *Victorian Sentencing Manual*. This manual sets out the principles and considerations which may be taken into account in imposing sentences, supported by either cases where these factors were taken into account or quotes from judicial decisions illustrating the approach which should be adopted. Under the section concerning sentencing for 'Offences Against the Person — Sexual', a number of 'Victim Details' are listed as relevant in determining the gravity of the offence. These include whether the offence was committed in the presence of others, the age of the victim, the relationship between the offender and the victim, the vulnerability of the victim, the harm to the victim (physical or psychological, short-term or long-term), prostitution and the conduct of the victim prior to the offence.⁶

Under 'Prostitution', it is noted that although victim/survivors who are prostitutes (or are 'of dubious moral standards'⁷) are entitled to the full protection of 'their right to determine for themselves when and in what circumstances they will permit access to their bodies by men',⁸ the psychological trauma suffered by a prostitute may be less than it would be for other victim/survivors. This assertion is supported by a quote from *Harris*.⁹ The approach adopted by Howse J. in *Henry*¹⁰ was referred to as a guide to sentencers when victim/survivors are prostitutes:

[I]n assessing the heinousness of crimes of this kind, it is quite proper to take into account the likely and actual effect of the crime on the victim, psychiatrically, psychologically and otherwise. In this connection the previous and then current sexual experience of the victim is significant.¹¹

It is apparent that the approach set out in the *Victorian Sentencing Manual* and in *Harris* was adopted by Judge Jones in sentencing *Hakopian*. Judge Jones found that since the victim/survivor was a prostitute, it could be presumed that she suffered less serious psychological harm as a result of being raped because she had been 'involved in sexual activities on many occasions with men she had not met before, in a wide range of situations'.¹²

On appeal to the Victorian Supreme Court, the question of whether *Harris* was applied correctly at trial was not decided as this ground of appeal was abandoned by the Director of Public Prosecutions during argument; the Director of Public Prosecutions conceded that Judge Jones did not breach any sentencing principle

⁴ Unreported, Supreme Court of Victoria, Court of Criminal Appeal, 11 August 1981.

⁵ *Ibid.* 7.

⁶ Mullally, P. (ed.), *Victorian Sentencing Manual* (1991) 485-8.

⁷ *Ibid.* 487.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Unreported, County Court of Victoria, 6 October 1988; as cited in Mullally, *op. cit.* n. 6, 487.

¹¹ Mullally, *op. cit.* n. 6, 487.

¹² *The Queen v. Heros Hakopian*, Unreported, County Court of Victoria, 8 August 1991, 8.

by taking into account the victim/survivor's occupation as a sex worker in the way that he did.¹³ Consequently, it was not necessary for the Supreme Court to rule on whether the occupation of the victim/survivor (in this case a prostitute) is a relevant consideration in sentencing. In the absence of a clear decision by the Supreme Court in this regard, the principles applied in *Harris*, and followed in *Hakopian*, still apply in Victoria.

VICTORIAN LAW REFORM COMMISSIONS INQUIRY INTO ISSUES ARISING FROM HAKOPIAN

Judge Jones' comments and sentencing in *Hakopian* provoked public outrage and debate in the media. As a result of this attention, and in the absence of any finding by the Supreme Court on appeal regarding sentencing principles relating to the status of a rape victim/survivor as a sex worker, the Victorian Law Reform Commission received an oral reference in January 1992 from the Attorney-General to inquire into issues arising out of the County Court and Supreme Court decisions in *Hakopian*. The Law Reform Commission sought and received submissions from a number of groups and individuals in the community and expects to report back to the Attorney-General by the end of June. Their recommendations will be included in a supplementary report on rape law and procedure. Other issues to be addressed in the report will include the following as they relate to rape: crimes compensation, perjury, tape recording of statements, cross-examination and committal hearings.¹⁴

ISSUES AND RECOMMENDATIONS REFERRED TO BY THE SUBMISSIONS SENT TO THE LAW REFORM COMMISSION OF VICTORIA

The Law Reform Commission invited groups and individuals to make submissions in relation to the issues arising out of *Hakopian*. They were also asked to consider four specific questions concerning how judges should go about fixing sentences in sexual assault cases.¹⁵

Of the many issues and recommendations raised in the submissions, the following points will be discussed in this paper: firstly, the concern over sentencers assessing the gravity of the offence by judging victim/survivors as 'good' or 'bad' women (the 'virgin/whore continuum'); secondly, suggested

¹³ *The Queen v. Heros Hakopian*, Unreported, Supreme Court of Victoria, Court of Criminal Appeal, 11 December 1991, 11-2 per Crockett J.

¹⁴ This report follows on two 1991 reports, also dealing with issues concerning rape: *Rape: Reform of Rape Law and Procedure: Interim Report*, Report No. 42, July 1991, Law Reform Commission, Victoria; and *Reform of Rape: Law and Procedure*, Report No. 43, September 1991, Law Reform Commission, Victoria.

¹⁵ These questions were as follows: (1) Should a judge, when sentencing an offender in a sexual assault case, take into account the psychological impact of the assault on the victim? (2) Should it be assumed that any class of sexual assault victim suffers more or less psychological harm than other victims? (3) If psychological impact on the victim is to be a relevant consideration in fixing sentence, how should it be assessed? (4) If a change to current sentencing practices is desirable, how can it best be achieved? Is legislative action required and, if so, what form should it take? See Women's Electoral Lobby Victoria, *Submission to Law Reform Commission Victoria Re: Victim Impact and Sentencing in Rape Cases* (1992) 1-4, regarding issues arising from *Hakopian*.

changes to the Sentencing Act 1991 (Vic.) and the *Victorian Sentencing Manual* to reflect the harm of rape and the experiences of women; and thirdly, whether Victim Impact Statements should be used in determining sentences.

Classification of Women along the Virgin/Whore Continuum

As noted above, Starke J. remarked in *Harris* that rape, when committed against prostitutes, is not as heinous as when committed against 'happily married women'.¹⁶ His Honour also approved of the trial judge taking into account the fact that the victim/survivors were 'to say the least, very sexually experienced'.¹⁷ In *Hakopian*, Judge Jones commented in a similar vein that prostitutes suffered less psychological harm than 'chaste women' since a prostitute 'would have been involved in sexual activities on many occasions with men she had not met before, in a wide range of situations'.¹⁸

Hakopian and *Harris* illustrate how the court's attention is diverted from judging the offender's culpability and the inherent harmfulness of the offence of rape to judging victim/survivors by explicitly categorising them along a continuum of 'good' and 'bad' women, with virgins at one end and whores at the other. The crime of rape is deemed by the court to be more or less serious according to where the victim/survivor lies in the continuum. Hence, it is presumed to be more abhorrent to rape a virgin or a married woman than it is to rape an unmarried sexually active woman or a prostitute. In the submission made by the Women's Legal Resource Group, which was endorsed by many other groups,¹⁹ the effect of this classification of women along a hierarchy of victim/survivors was discussed:

The division of sexual assault victim/survivors into classes inevitably fosters the reproduction of stereotypical notions of 'real' rape victims — the married woman attacked in her home by a stranger — and 'appropriate' female responses — 'revulsion' at the idea of having sex [*sic*] with a stranger. This creates a hierarchy of victim/survivors in which the majority of rape experiences are systematically disqualified through the legal process.²⁰

To classify women according to their marital status, sexual experience, or occupation as a sex worker is to presume that some classes are more 'rapeable' than others. The assumption that sexually experienced women are less affected by rape than 'chaste women' is 'premised on a conflation of rape with sexual intercourse which can only raise the gravest of doubts regarding judicial understanding of the nature of rape and the reasons for its criminal status.'²¹

¹⁶ *Supra* n. 5 and accompanying text.

¹⁷ *The Attorney-General v. Leonard Richard Harris*, Unreported, Supreme Court of Victoria, Court of Criminal Appeal, 11 August 1981, 7.

¹⁸ *The Queen v. Heros Hakopian*, Unreported, County Court of Victoria, 8 August 1991, 8.

¹⁹ See the endorsements noted in The Prostitutes Collective of Victoria Inc., *Submission to the Law Reform Commission Victoria Regarding Sentencing Practices in Rape Cases* (1992) 11-2; Domestic Violence and Incest Resource Centre Inc., Untitled leaflet (1992) 1; Women's Information and Referral Exchange, *Submission to Law Reform Commission Victoria Regarding Sentencing Practices in Rape Cases* (1992) 3; Geelong Rape Crisis Centre, Untitled (1992) 1.

²⁰ Women's Legal Resource Group, *Don't Judge the Woman, Judge the Crime, Submission to the Law Reform Commission of Victoria* (1992) 2, regarding issues arising from *Hakopian*.

²¹ *Ibid.*

Legislative Changes to Sentencing Practices

The most comprehensive recommendations for legislative amendments to the Sentencing Act 1991 (Vic.) came from the Women's Legal Resource Group. Firstly, they suggested that the legislation should expressly recognise that it is often not the general community which is at risk but specific groups or individuals. This is particularly so in the case of gendered crimes (such as rape) where nearly all perpetrators are male and nearly all victim/survivors are female. Accordingly, sub-s. 5(1)(e)²² should be amended to read 'to protect the community, a social group, or an individual at continuing risk from the offender'.²³

Secondly, a new paragraph should be included in sub-s. 5(2)²⁴ 'to enshrine a widely accepted proposition'²⁵ that generally, 'offences involving violence or significant personal dangers to members of the community or a social group should be considered to be more serious than offences involving loss of money or property'.²⁶

Thirdly, the legislation should 'reflect women's experiences of sexual assault more accurately; remedy current judicial misconceptions regarding the nature and gravity of sexual offences; [and] ensure that the offender's culpability is assessed rather than the victim's character or response'.²⁷ Consequently, in addition to the general principles outlined in sub-ss 5(1) and (2),²⁸ the following considerations should also be taken into account in sentencing a sexual offender:

- (a) as rape constitutes a fundamental violation of a person's physical, social and emotional integrity, it is a serious offence against the person of significant inherent harm;
- (b) the gendered nature of sexual offences and the social harm consequent on the subjugation of women and children;
- (c) sexual assault is an abuse of a power and/or trust relationship. The offender's culpability is directly proportional to the disparity of power and/or extent of trust operating between the offender and victim.²⁹

With respect to (c), the Women's Legal Resource Group argued that the offender's abuse of a relationship of power or trust should be reflected in the harshness of

²² Section 5(1): The only purposes for which sentences may be imposed are —

- (a) to punish the offender to an extent and in a manner which is just in all of the circumstances; or
- (b) to deter the offender or other persons from committing offences of the same or a similar character; or
- (c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or
- (d) to manifest the denunciation by the court of the type of conduct in which the offender engaged; or
- (e) to protect the community from the offender; or
- (f) a combination of two or more of those purposes.

²³ Women's Legal Resource Group, *op. cit.* n. 20, 15.

²⁴ Section 5(2): In sentencing an offender a court must have regard to —

- (a) the maximum penalty prescribed for the offence; and
- (b) current sentencing practices; and
- (c) the nature and gravity of the offence; and
- (d) the offender's culpability and degree of responsibility for the offence; and
- (e) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so; and
- (f) the offender's previous character; and
- (g) the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances.

²⁵ Women's Legal Resource Group, *op. cit.* n. 20, 15.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Supra* n. 22 and 24.

²⁹ Women's Legal Resource Group, *op. cit.* n. 20, 15.

the sentence.³⁰ The Women's Legal Resource Group provided the following illustrations of relationships of power and trust between the offender and the victim/survivor: parent/child, husband/wife, doctor/patient, teacher/student and employer/employee.³¹ Circumstances which increase the disparity of power include 'the use of a weapon, disparity in ages or physical ability of the perpetrator and the victim, economic dependence, or the presence of more than one perpetrator'.³² The Women's Legal Resource Group applied this analysis to *Hakopian*:

Through agreeing to provide oral and vaginal sex and accepting a negotiated fee, a trust relationship similar to a contract of employment was established. This relationship also placed the sexworker [*sic*] in a subordinate position, as she was providing Hakopian with a service in return for payment. Both the trust relationship and the her [*sic*] subordinate position were subsequently exploited when the perpetrator forced her to have further oral intercourse with him at knife point. Further, sexworkers are not highly regarded in the general community, thus the victim/survivors credibility [*sic*] and ability to go to the police and be taken seriously on reporting the sexual assault was circumscribed by the very nature of her profession. This factor, his possession of a weapon, in addition to the aforementioned power imbalance inherent in his position as a client and the resulting trust relationship; rendered the sexual assault a far more grave exploitation of trust and unequal power relations than the court recognised in its sentencing and judgment.³³

Such a framework was proffered as a means by which the Court's attention could be re-focused on the nature of the relationship between the offender and the victim/survivor, rather than on the particular characteristics of the victim/survivor.³⁴ While the courts do not seem to have great difficulty in understanding the fear of victim/survivors when they are faced with aggravated violence by a stranger, judges lack insight into the devastation caused by an offender who abuses a relationship of trust. This is evidenced by the Court's incapacity to deal with rape in the context of marriage, medical treatment and employment (such as here in *Hakopian*).

Finally, a new section should be included directing judges to make specific reference to the guidelines set out in the Sentencing Act 1991 (Vic.) when making sentencing decisions. This would ensure that judges are made more accountable, are restricted in their ability to rely on sexist assumptions in sentencing, and increase victim/survivors' (and the general public's) confidence in the criminal justice system.³⁵

In regard to the *Victorian Sentencing Manual*, the Women's Electoral Lobby objected to the inclusion of the victim/survivor's conduct prior to the offence as a mitigating factor in sentencing.³⁶ This section of the manual³⁷ clearly contemplates conduct which immediately precedes the assault (in the way of 'encouragement' or 'provocative behaviour') and prior sexual history.³⁸ The Women's Electoral Lobby emphasised that it

does not accept the myths that women provoke men to rape or say 'no' when they mean 'yes', or that men cannot control their urge to sexual penetration past some hypothetical point. Put crudely,

³⁰ *Ibid.* 12-4.

³¹ *Ibid.* 12-3.

³² *Ibid.* 13.

³³ *Ibid.* 14.

³⁴ *Ibid.* 12.

³⁵ *Ibid.* 16.

³⁶ Women's Electoral Lobby Victoria, *op. cit.* n. 15, 4-5.

³⁷ *Supra* n. 6 and accompanying text.

³⁸ Mullally, *op. cit.* n. 6, 488.

we know that sane adult men cannot always control the reactions of their penises, but they can control what they do with them. We believe that every person has the *right* to refuse sexual intimacy and a *duty* to accept a refusal no matter what the circumstances.³⁹

The inclusion of victim behaviour as a consideration in reducing a rapist's sentence only serves to reinforce such myths and to undermine legislative attempts to exclude sexual history from rape trials.⁴⁰ This preoccupation with the sexual history of the victim/survivor and her conduct immediately prior to the attack diverts attention away from the abhorrent behaviour of the offender and the heinous nature of the crime.

The Relevance of Victim Impact Statements

Victim Impact Statements have been proposed as a means of informing the court about the physical and psychological harm suffered by the victim/survivor of a crime. Its proposed usage would not be limited to sentencing for sexual offences. The rationale behind Victim Impact Statements is that judges make assessments of psychological trauma 'on the limited evidence available' to them.⁴¹ To enable better assessments, they should have access to more information, and this information should be provided by the victim/survivor. The Victims Of Crime Assistance League Incorporated adopted this argument in their submission:

The purpose of such evidence [as to the psychological impact of the crime], we believe, is for the Court to be made aware of the impact of the crime on the victim standing before the Court not on the class to which he/she belongs.⁴²

However, the use of Victim Impact Statements is problematic and has been criticised in a number of submissions. The Legal Aid Commission of Victoria expressed the concern that methods of assessing the psychological impact of crimes on victim/survivors 'could increase the trauma to the victim at a time when the legislature has taken great steps to protect victims in the court process.'⁴³ The Commission pointed out that it was 'quite conceivable a stage could be reached where the defendant disputes the validity of reports obtained by the prosecutor and seeks to arrange his or her own assessments, cross-examine the prosecutor's experts and even the victim.'⁴⁴

Another problem with Victim Impact Statements is that they create a stereotypical victim/survivor. Over time, Victim Impact Statements may crystallise into expectations of what *should* be experienced by a particular victim/survivor. If an actual victim/survivor in some way deviates from the psychological and physical harm suffered by this stereotype, then the resultant sentence is lessened. A victim/survivor may be stoically attempting to cope with the assault; it would be plainly unjust if this served as a mitigating factor in sentencing. The introduction of

³⁹ Women's Electoral Lobby Victoria, *op. cit.* n. 15, 5 (emphasis added).

⁴⁰ See Evidence Act 1958 (Vic.) s. 37A.

⁴¹ Victims Of Crime Assistance League Incorporated, Untitled, *Submission to the Law Reform Commission of Victoria* (1992) 1, regarding issues arising from *Hakopian*.

⁴² *Ibid.* 2.

⁴³ Legal Aid Commission of Victoria, *Sentencing and Sexual Abuse Cases*, *Submission to the Law Reform Commission of Victoria* (1992) 3, regarding issues arising from *Hakopian*.

⁴⁴ *Ibid.*

Victim Impact Statements into sentencing only serves to reinforce the existing practice of sentencers to judge the victim/survivor rather than the crime and the offender.

CONCLUSION

It could be argued that these cases do accord equal protection to sex workers, given that the offenders (Hakopian and Harris) were indeed convicted. The sentences, however lenient, do not amount to a licence to rape prostitutes. Nevertheless, when a sentence is shortened because of sexist presumptions based on sexual activity, occupation and marital status, the undeniable implication is that the victim/survivor is valued less than some 'ideal' standard of women and femininity (the 'chaste woman standard'!). Furthermore, when a rapist receives a much lighter sentence for raping a prostitute than he would for raping a virgin or a married woman, he is effectively being sentenced for a different (and less serious) crime.

While the harm caused by offenders like Hakopian and Harris to individual women and to the wider community of women is readily apparent, the damage caused by judges like Judge Jones and Starke J. may be less obvious but just as real: their comments will live on as legal precedent and as a distorted reflection of 'male-stream standards'.

We endorse the view taken by the Women's Legal Resource Group that the four questions posed by the Law Reform Commission⁴⁵ when asking for submissions 'actually limit and inhibit, rather than facilitate, productive debate regarding reform.'⁴⁶ The Women's Legal Resource Group stated that 'the main issue arising from the *Hakopian* case is the fact that women are being judged rather than the crimes against them.'⁴⁷ This occurs through judicial presumptions about the psychological impact of rape and the classification of women according to their sexual history, marital status, or occupation as a sex worker.

We believe, moreover, that the introduction of Victim Impact Statements will only further disadvantage victim/survivors by systematically excluding those who do not conform to stereotypical notions of how women should respond to sexual assault.

While we think that the Women's Legal Resource Group's suggestions for legislative change would undoubtedly relieve some of the problems and should be adopted, it is our view that these are symptoms of a much larger problem. Clearly, tinkering with rape legislation or any sentencing manual fails to deal with the broader substantial gender issues permeating the law and its application.

The Women's Legal Resource Group did not limit their proposals to the amendment of sentencing practices but also made recommendations directed at the underlying problems in the law's treatment of sexual assault. Of particular interest is their suggestion that a centre be established in the community whose function would include monitoring, reporting and researching into 'the instance

⁴⁵ *Supra* n. 15.

⁴⁶ Women's Legal Resource Group, *op. cit.* n. 20, 3.

⁴⁷ *Ibid.*

and consequences of sexual assault'.⁴⁸ It was also suggested that compulsory education and training about the nature and harm of sexual assault be introduced.⁴⁹ This would extend to 'all members of the judiciary and the DPP, participants in the Bar Readers' Course and the Leo Cussen Institute program, students in tertiary law courses and VCE legal studies.'⁵⁰ We support these recommendations and suggest that their scope be widened beyond the realm of sexual assault to other areas of law where women's voices are not heard.

Until some mechanism is in place to identify and respond to problems in law that continue to disadvantage, discriminate against, and persecute women as participants in the legal system in every sense (as judge, lawyer, prosecutor, accused, witness and victim/survivor), no significant change will be effected.

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⁴⁸ *Ibid.* 18.

⁴⁹ *Ibid.* 19.

⁵⁰ *Ibid.*

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