

RAPE AND THE SEX INDUSTRY¹

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RAPE IS A CRIME OF VIOLENCE. WOMEN FORM THE OVERWHELMING majority of targets of rape and indecent assault while men form the overwhelming majority of perpetrators of these crimes. Rape not only subjugates individual victims/survivors to the power of the attacker, but also impacts upon the whole community.

Rape, and the criminal justice system's treatment thereof (as evidenced by the sentencing in *R v. Hakopian*) are direct outcomes of legal, administrative and cultural frameworks which attempt to control the sexualities of women, transsexuals and men who sleep with men (in particular, sex workers) and which accept the denial of women's choices, in favour of men's freedom to exercise power and force.

The Prostitutes' Collective of Victoria (PCV) receives an average of twenty reports of violence against sex workers (women, men and transsexuals) each week. This is an under-representation of the level and incidence of violence against sex workers.

Moreover, sex workers have unequal access to the criminal justice system. Consequently, and appallingly, such incidences of violence are not regarded as seriously as violence against other members of the community.

All people deserve the unconditional right to safety from rape and from the threat of rape. All survivors of rape and indecent assault should have equal access to the criminal justice system—including reporting, court and sentencing procedures. The gravity or implications of rape cannot be measured by the 'class' of the victim. Nor can they be measured by the 'class' of the perpetrator. The effects of rape are experienced differently by each victim/survivor regardless of gender, age, class, cultural background, occupation and/or sexual history. Further, there is no 'appropriate' victim/survivor response to this crime which can provide a basis for the sentencing of rapists.

Sentencing guidelines and procedures in rape trials play an important role in that they inform the community of the court's attitude to the crime and act as a deterrent to potential offenders. Sentencing in *R v. Hakopian* relied heavily on misinformed attitudes towards sex industry workers and has compounded stress levels for those workers (through increased risk) and restricted legal access for many rape victims/survivors.

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The Difference Between Sex, Sex Work and Rape

Prevailing myths about prostitution are the basis of misconceptions that sex industry workers are victimised by virtue of their work, and that they are disempowered to make decisions and choices regarding their sexualities and sexual behaviour. In fact, sexual acts within commercial sexual transactions are, commonly, more clearly negotiated than other sexual acts. Evidence given in *R v. Hakopian*, for example, showed that the two parties involved agreed to both the payment for the acts which were to take place and the nature of those acts. Given that agreement, the individual parties maintain the right, as within all commercial transactions, to re-negotiate the terms of the service to an agreed and mutually satisfactory resolution. In *R v. Hakopian*, this right was exercised when the venue where the activities were to occur changed.

It is implied, however, that this right is not held by a sex worker if he/she wishes to cease engagement in, or change the nature of, sexual activity. William Keough (1991) cites a number of rape cases in which the 'court regarded the fact that the victim offered himself to the defendant for money as a significant mitigating factor' (*R v. Tutchell*; *R v. Butler*; *R v. Stewart*) as well as in *R v. Hakopian*. Not only does someone's occupation and/or sexual history come to be regarded as a mitigating factor in rape crimes, but the victim/survivor 'is in some way deemed to be inviting the commission of such an offence upon their person' (Keough 1991).

The role of a client of a sex worker is clear within commercial sexual transactions. It is unacceptable to conclude that a sex worker should expect aggression or assault if he/she wishes to re-negotiate the terms of a transaction.

Further, it cannot be expected that his/her reaction would be less or greater than that of any other individual under assault. Violations of power/trust relations, acts of aggression and violence (including rape), or degradation are *not* a matter of course within commercial sexual transactions. They occur in a broad range of contexts and inter-relationships in our community, and all should be considered by the criminal justice system as factors in rape, not in sex or sex industry work. That is, rape is violent, not sexual.

Any person is betrayed, violated and abused by an act of rape. The type or nature of his/her work, sexuality or sexual history do nothing to 'prepare' him/her for rape *or* inform us of his/her likely response. Equally, the class or social circumstances of the individual rapist do not inform us of the malevolence of the attack. It is the nature of the crime that must be assessed, not the context or the victim.

The Trauma of Rape for the Sex Worker Community

The current prostitution and related legislation ignores the realities of sex industry work, creates few legal options for sex workers, and forces most sex workers 'underground' where they must operate illegally and/or with no occupational health and safety measures in place. Apart from severely limiting those workers' access to the legal and criminal justice systems within a community that acknowledges widespread violence and rape of women, it creates an opportunity for men to attack certain classes of women with little or no fear of retribution. Rather than challenge some men's assertions that prostitutes are 'asking for it' or 'flaunting it and what do they expect?', the legal system forces many sex workers into 'high-risk' work environments—for example, street work—where those same men can easily target them.

Sex workers frequently do not report acts of violence to the police owing to the likely response. For example, a number of rape survivors have advised the PCV that they may be turned away instantly on the grounds that 'it's part of the job', they are suspected of fraud, or they may be charged with a prostitution-related offence as a result of making a statement.

The PCV believes that these factors have made rape and indecent assault 'occupational hazards' for sex workers. If rape is to be treated fairly by the justice system, it must be recognised that all women are targets of rapists, and that current legislation is what makes sex workers easier targets for rapists and not the sex industry or its workers themselves.

The World Health Organization (WHO Press/42) has identified stress as the major health issue for sex workers. One of the main contributing factors to that stress is discriminatory sex legislation coupled with unequal access to the criminal justice system. While current laws and regulations continue to provide no health and safety measures for the majority of Victoria's 15,000 sex workers, fear of rape and violence contributes to high levels of stress for sex industry workers. This fear is compounded by the knowledge that crimes of violence against sex industry workers are often more brutal than crimes of violence and rape against other people in our community:

Sex workers tend to be raped in a more violent manner involving more weapons, subsequently suffering more (physical) injury than non-sex workers. Their attackers tend to have a record of sexual offences and other violent crimes (Harrington and Bourke 1991).

The criminal justice system has sent alarming messages to all people in our community, and, in particular sex workers, through its inadequate response to rape crimes. Not only has it been shown that reporting and trial procedures in rape cases are distressing for victims/survivors (Law Reform Commission of Victoria 1991), but it has been made clear by judges' sentencing practices that the rape of sex workers is tolerated by the courts as a means of preventing violence and rape against so-called 'chaste' women.

The attackers of sex workers received universally lower sentences than other men convicted of rape. The lowest sentences in 1990 for rape and aggravated rape were received by men who attacked sex workers (Harrington & Bourke 1991).

The community would, rightly, be outraged were the harm inflicted by a shooting in a bank robbery considered relevant to the acknowledged 'high-risk' nature of work in the banking industry and that such incidents prevent aggressive behaviour towards 'innocent' community members; that is, those not employed in banking. Indeed, the courts would not take this into account. Rather, the inadequacy of safety measures for employees (such as bank tellers) in the banking industry is assessed independently of the criminal justice system.

Similarly, the community of Victoria sex industry workers and their peers condemns the judiciary's sentencing practices in both *R v. Harris* (Supreme Court, 11 August 1981) and *R v. Hakopian*.

The Prostitutes' Collective of Victoria has been witness to the outrage and fear caused by rape in the sex worker community. In April 1989, Amanda Byrnes (a street worker) was assaulted and murdered in St Kilda. The sex worker community suffered extreme grief and shock following this attack, and the resultant fear in this community was heightened by the knowledge that sex workers have: severely limited options with regards to work and the

law; few or no occupational safety measures and standards; and are viewed by the criminal justice system as being a more 'rapeable' class of people than other community members.

More recently, the sex worker community has responded to the *R v. Hakopian* case and vocalised its distress at the sentencing decision in which Judge Crockett said:

the likely effect on the victim of the forced oral intercourse and indecent assault is much less a factor in this case and lessens the gravity of the offences' (*R v. Hakopian*, Victorian Government Reporting Service 1991).

The Victorian Government Reporting Service clarifies the judge's comments thus:

That statement . . . can be seen in the context in which it occurs to be a reference to the fact that the victim of the assault was a prostitute (*R v. Hakopian*, Victorian Government Reporting Service 1991, p. 10).

and that further:

He was not in breach of any sentencing principle when he dealt with the matter as he did on the basis that the complainant was a prostitute (*R v. Hakopian*, Victorian Government Reporting Service 1991, p. 11).

The judge's statements were, however, in breach of ethical principles and community standards. They extended the harm inflicted and, understandably, both the sex worker community and the Victorian community reacted strongly.

The *R v. Hakopian* ruling provided a forum for the community to come out in support of sex workers and condemn discriminatory practices within the criminal justice system. The PCV received approximately fifty calls from individuals and community groups after the announcement of the Supreme Court judgment. Non-sex workers demanded that a second protest be held. The public protest attracted widespread community and official support for sex workers. Letters to the editors in all major newspapers also confirmed that the community was outraged at this discriminatory treatment.

The Trauma of Rape for Individual Sex Workers

While it is evidently the view of the courts that sex workers would experience less harm than other victims/survivors of rape, there are in fact circumstances specific to the sex industry and its workers which indicate that there are measurable harms which result from the rape of a sex worker. These have been exacerbated in light of recent judiciary decisions in *R v. Hakopian*.

The PCV had contact with the defendant in the *R v. Hakopian* case. She has reported to us several real harms which resulted from the incident, which are measurable but which the *Victorian Sentencing Manual* (Mullaly & Duncan 1991) does not identify.

One of the main issues pertaining to the trauma she has experienced is the breach of her confidentiality and the subsequent fear of incidents of assault upon her. She has been publicly identified as a prostitute, and the court has ruled that she is more 'rapeable' than other women.

Sex workers have been threatened and assaulted by male family members upon learning of their occupation through media reports. Others who have been raped and go to

court have received abusive phone calls and mail, including death threats. There have also been incidents of harassment by the media seeking to sensationalise aspects of the experience of sex workers who have been raped. All of these occurrences are ongoing causes of trauma.

Apart from confidentiality issues (which *all* sex workers report to the PCV as having an impact upon their fears both of subsequent attacks and of reporting and court procedures), many sex workers who have been raped become unable to continue working and earn an income.

They can become frightened of men—in particular, violent men who may pose as clients. Not only are a sex worker's personal relationships potentially damaged through this fear and mistrust, but so are his/her relationships with those men who provide the source of his/her income, the clients. In the instance of a sex worker being unable to return to work because of an attack which occurred in the workplace, he/she would not benefit from the industrial rights and financial support of workers in other industries who were similarly assaulted.

The issue of loss of income for a sex worker who has been raped has been ignored by the courts, yet, disturbingly, in sentencing *R v. Hakopian*, Judge Jones placed weight on the offender's potential loss of income.

Sex workers are widely recognised as the main educators of men with regards to safe sex and sexual health. Surveillance reports from the Melbourne Sexually Transmitted Disease Centre support this, revealing again and again that sex industry workers, as a group, have lower incidences of sexually-transmitted diseases than other community members. The impact of contracting a sexually transmitted disease through rape (whether or not a condom was used or used properly) can be highly traumatic for a worker who takes great pride in being involved in safe sex education and the minimalisation of the transmission of HIV and other sexually transmitted diseases.

The fear of acquiring AIDS/HIV from a rapist is a common concern expressed to the PCV by individual victims/survivors. Again, loss of income can be the outcome, as workers in the sex industry do not have access to sick leave and Workcare compensation and cannot work while infected with a sexually transmitted disease (*see further* Women's Legal Resource Group 1992). In the case of HIV—a potentially life-threatening organism—concerns are exacerbated by the asymptomatic and unpredictable nature of the virus itself and by the fact that an accurate HIV-antibody test result is not possible until three months after transmission-risk activity.

Loss of employment options, and often blackbanning from working in the sex industry, are experiences of sex workers who have been raped. Many workers who inform their employers and managers of incidents of sexual assault are warned not to 'make a fuss'; that is, not to take legal action. (Employers' main concerns are about media sensationalism and potential threat to future renewal of licences.) Sex workers who have taken action are unable to find work again and, in many cases, are forced to move interstate.

Occupation and sexuality of rape victims/survivors bear no relevance to the crime. Individual sex workers, and sex workers as a group, experience severe trauma arising from rape and other violent attacks upon them, and it is unacceptable to assume that sex industry work predisposes someone to any level of 'rapeability' or that there is an appropriate response to violent attack.

The stress of sex industry work brought about by inadequate, outdated legislation and occupational health and safety standards has been compounded by court decisions such as that in *R v. Hakopian*.

Psychological Harm and Victim Impact Statements

There is no 'appropriate victim/survivor response' to the crime of rape. There are, however, other factors related to harm—and to the culpability of the offender—which can inform the sentencing guidelines in rape trials.

Sex workers do not possess inherent psychological traits which determine their response to violent attack and distinguish that response from other survivors. In light of the recent decision in *R v. Hakopian*, however, it has been argued that if a sex worker is the rape victim, then this bears relevance to the culpability of the offender.

However, the PCV does not support the introduction of Victim Impact Statements (VIS)² in rape trials. Victim Impact Statements are problematic for many reasons:

- rather than assessing the crime, they assess the victim and serve to trivialise the intent of the offender;
- psychological harm is not easily measurable—the extent of it cannot be assessed through a VIS nor by the courts (given that long-term social and psychological effects and delayed trauma are reported by many individuals as part of their experience of rape);
- offering a VIS as evidence in court provides the defence with the opportunity to question and/or cross-examine the victim yet again and to submit contradictory evidence. This situation forces the complainant to defend his/her response to the crime as 'appropriate' and sets up a situation whereby the class, occupation or sexuality of the victim/survivor are accepted as relevant to that response; and
- addressing the individuals' psychological harm is the role and responsibility of counsellors, mental health workers and, in the case of rape, Centres Against Sexual Assault (CASA). It is not the domain of the justice system to address the issue of individual psychological harm.

It needs only to be acknowledged by the court that rape results in extensive short- and long-term serious trauma for individuals and that offenders are aware of this.

Sentencing Practices and the Court's Responsibility

Current guidelines for sentencing, as outlined in Section 5 of the *Crimes Act 1958* (Vic.), have provided for inadequate responses to rape offenders and rely too heavily on judicial discretion. For example, Section 5(1)(b) states that sentences may be imposed 'to deter the offender or other persons from committing similar offences'. The sentencing in *R v. Hakopian*, however, has revealed judiciary attitudes that encourages deterrence of rape

² A Victim Impact Statement is a statement made by the victim and addressed to the judge for consideration in sentencing.

against certain classes of women only. The effect in the real world is a 'regionalisation' of crime, whereby a judge may accept evidence that anyone raped in the St Kilda area, for example, is aligned with a class of women that the judge may believe to be more 'rapeable'.

Similarly, with regard to Section 5(2)(c), the judiciary has historically revealed its misunderstanding of the 'nature and gravity of the offence', particularly in its view that the victim/survivor's sexuality, occupation, psychological response, and/or legal status is of relevance.

Section 5(1)(e) does nothing to direct the judiciary to acknowledge the fact that certain communities of people are at greater risk than others due to circumstances such as inadequate legislation and/or industrial safety standards, economic dependence, sexuality or perceived sexuality, and disability or perceived disability. All of the preceding can also change over time for individuals and communities.

The culpability of the offender must be of primary concern to sentencers in rape trials. There is a danger, as with the judiciary's historical view that the class of victim/survivor impacts upon harm, that the class of the offender is seen to bear relevance to the malevolence of the crime. In *R v. Hakopian*, for example, the facts that Hakopian had only a relatively minor criminal record and did not appear to be a violent man were relevant to sentencing indicates that certain classes of offenders are protected on the grounds of social status and appearance despite conviction and despite the malevolence of the attack.

Conclusion

All rape is violent and unacceptable whatever the background of the victim. To work in the Victorian sex industry is legal; to rape is not. *R v. Hakopian* has revealed serious problems with the criminal justice system's response to the crime of rape, particularly where the victim/survivor is a sex worker.

Traditionally, the courts have judged the victim/survivor and not the offence or the offender. This core issue must be addressed with regards to reporting and trial procedures, legal restrictions on the victim/survivor, and attitudinal changes within the judiciary and those enshrined in sentencing guidelines and practices.

The community expects and demands that all victims/survivors of sexual assault receive equal access to and fair treatment by the criminal justice system, regardless of sexuality, occupation, sexual history, legal status, economic status, cultural background, age, class, race, or gender. It is time to address the current imbalances and injustices which have been made obvious in the misunderstanding and mistreatment of sex workers who survive rape.

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