WHO IS VULNERABLE? THE SENTENCING OF ELDER ABUSE OFFENCES
AND THE CASE OF KATSIS v THE QUEEN

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INTRODUCTION

When sentencing an offender, courts in New South Wales are to take into account a range of aggravating factors that are ‘relevant and known to the court’.¹ One of these considerations is the vulnerability of the victim of the offence.² Over the past 20 years, NSW legislative and judicial decision-making has indicated that the courts may be moving towards an increased recognition of victim vulnerability. Despite this, recognising the vulnerability of victims in cases of elder abuse has, until the case of Katsis v The Queen,³ appeared to extend only to the ‘very old’.⁴ The decision of the NSW Court of Criminal Appeal in Katsis v The Queen⁵ appears to represent a shift in judicial thinking well aligned with the findings of the Australian Law Reform Commission (ALRC) in their 2017 Report on Elder Abuse.⁶ Both the Court and the ALRC appear to recognise that the vulnerability that allows for the abuse of older people is often made up of a number of different factors working together, rather than the age of the victim alone.⁷ However, the applicability of this decision may be limited by the forms of elder abuse to which it will be relevant and its potential to be overruled by the High Court.

FACTS

The accused, Alexis Katsis, was found guilty in 2015, some 37 years after the offence, of the rape and murder of 66 year old Doris Fenbow.⁸ Ms Fenbow’s body was found in her apartment on 3 September 1988 after smoke was seen coming from her unit.⁹ She had died as a result of asphyxiation, both manually and through smoke inhalation, and she had been sexually abused.¹⁰ Multiple fires were started in Ms Fenbow’s unit in what appeared to be an attempt to dispose of the evidence of the crime.¹¹ Ms Fenbow lived alone in a Housing Commission block and was described as someone who did not care for herself well, did not have visitors and was noticeably thin.¹² The police investigation stalled not long after the crime.¹³ However, vaginal swabs that had been taken from the victim were retained, and in 2014 sperm found in the swabs were matched with Katsis’ DNA.¹⁴ As a result of this forensic evidence, he was arrested in May 2014 and charged with these offences.¹⁵

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¹ Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A(1).
² Ibid s 21A(2)(l).
⁷ Ibid 18 [1.6]; Katsis v The Queen [2018] NSWCCA 9, [61]–[64].
⁹ Ibid [7].
¹⁰ Ibid [14].
¹¹ Ibid [9].
¹² Ibid [6].
¹³ Ibid [20].
¹⁴ Ibid [20]–[21].
¹⁵ Ibid [21].
III  Litigation History

Katsis was found guilty of murder and sexual intercourse without consent on 21 October 2015. He was sentenced by Fagan J in the Supreme Court of NSW on 11 December 2015 to 26 years’ imprisonment with a non-parole period of 15 years. Justice Fagan described the attack on a ‘vulnerable, inoffensive, lonely old lady’ as ‘savage, inhuman and despicable’. Despite having clearly considered the vulnerability of the victim to be a relevant factor, Fagan J did not refer to s 21A (2)(l) of the Crimes (Sentencing Procedure) Act in his sentencing judgment. Also taken into account was evidence of physical and sexual abuse to the offender in his early years, substance abuse issues, the absence of contrition or remorse and the sentences imposed in comparable cases of murder at the time of the 1988 offence.

On 1 November 2017, the applicant sought leave to appeal the sentences on five separate grounds. The only relevant ground to this discussion is the first, in which Katsis argued that the sentencing judge had erred in taking into account the victim’s vulnerability as an aggravating factor. The additional grounds of appeal involved the application of principles for sentencing historical offences, the downward adjustment of the ratio set out in s 44, failure to assess the moral culpability of the applicant as a result of his deprived upbringing and failure to take into account the applicant’s otherwise good character. These grounds of appeal fall outside the scope of this discussion given its focus on the recognition of vulnerability in sentencing elder abuse cases. The Court gave leave to appeal, and made a decision on 14 February 2018.

IV  The Decision in Katsis v The Queen

The applicant submitted that the age of the victim could not on its own provide grounds for vulnerability as she was not ‘very old’ and did not have a disability. Thus, despite accepting the marginalised position in society that the victim occupied, the applicant argued that this was not enough for her to fall into a particular ‘class of victim’ that was required according to R v Tadrosse. The Crown argued that s 21A(2)(l) was not to be interpreted strictly, but instead as providing illustrative examples of characteristics that might make a person vulnerable. The Crown drew on the decision in Longworth v The Queen in making this argument, in which security guards working late at night were considered to be vulnerable people, despite their occupation not being listed in s 21A(2)(l).

In a unanimous judgment, Hoeben CJ, Schmidt J and Campbell J agreed with the Crown’s submission. It was held that s 21A(2)(l) should be interpreted as illustrative of some of the classes of people who might fall into the category of ‘vulnerable’. Further, the Court believed that the victim in this case fell into a class of vulnerable people in our society — the elderly who are living alone without support and who exhibit poor self-care. Thus, it was held that

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16 Ibid [27].
17 Ibid.
18 Crimes (Sentencing Procedure) Act 1999 (NSW).
20 Ibid.
21 Ibid [57].
22 Ibid.
24 Katsis v The Queen [2018] NSWCCA 9, [58].
26 Ibid [20].
28 Katsis v The Queen [2018] NSWCCA 9, [61]–[64].
29 Ibid.
30 Ibid.
in determining whether a victim was vulnerable under s 21A(2)(l), a variety of factors may be taken into account that might contribute towards placing the individual into a category or class of persons, rather than viewing the age or capacity of that person in isolation. All five grounds of appeal were dismissed.

V CRITIQUE AND COMMENTARY

A Evidence of Recognition and Progression

This decision appears to contribute towards the growing recognition of elder abuse as an imperative issue in Australian society. The 2017 ALRC Report into elder abuse suggested that ‘older people should not be considered vulnerable merely because of their age’, as ‘vulnerability does not only extend from intrinsic factors such as health, but also from social or structural factors, like isolation and community attitudes’. Similarly, the decision in Katsis v The Queen attempts to separate the vulnerability of certain older people from their age in years or the presence of a disability, and instead place them into a wider context in which older members of society are often ostracised or mistreated. The decision in Katsis v The Queen, alongside the 2017 ALRC Report into elder abuse, has the potential to ensure that any form of abuse towards or neglect of an older person is condemned in an appropriate manner through harsher sentencing penalties. The decision may also assist in identifying classes of older people who are susceptible to mistreatment in situations in which they may not have traditionally been considered to be vulnerable, such as financial manipulation in the planning of wills, superannuation and family agreements.

The decision in Katsis v The Queen also appears to fall into a general progression in judicial and legislative thinking towards stricter sentencing principles for crimes committed against vulnerable victims. The original provision in the Crimes (Sentencing Procedure) Act 1999 that dealt with the judicial power to increase or decrease penalties had no reference to vulnerable victims and provided no specific guidance in regard to this matter. In fact, no guidance was provided at all to judges in relation to the types of matters that should be seen as aggravating or mitigating an offence. This provision was modified in 2002 to include the consideration of ‘any vulnerability of the victim arising because of the nature of the victim’s occupation’, but did not cover any other areas of vulnerability. In 2003, the provision was again changed to include the vast majority of the examples that are now a part of the provision.

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32 Katsis v The Queen [2018] NSWCCA 9, [61]–[64].
33 Ibid.
34 Australian Law Reform Commission, above n 6, 18 [1.4].
35 Ibid 18 [1.6].
37 Ibid.
38 Ibid. 
40 Ibid 203–90.
42 Ibid.
When analysing the development in judicial thought surrounding s 21A(2)(l), it becomes apparent that the courts have progressively worked towards viewing the examples included as merely guiding terms, as was held in *Katsis v The Queen*. In *Tregeagle v The Queen*, the NSW Court of Criminal Appeal held that a shopkeeper fell into the category of a vulnerable victim despite not being an example of a vulnerable person included in s 21A(2)(l). In the following year, the NSW Court of Criminal Appeal held in *R v Longworth* that a security guard could be considered to be a vulnerable person as the ‘examples given ... are not exhaustive. They are concerned with classes of persons’. *R v Longworth* also limited the relevance of cases such as *R v Tadrosse* to circumstances in which the vulnerability of the victim had not been raised at trial. Thus, there appeared to be a progression in judicial thinking towards s 21A(2)(l) being merely illustrative, and not exhaustive, prior to the decision in this case. When placed in a social, political and judicial context, it is evident that *Katsis v The Queen* may be part of a broader recognition of the seriousness of crimes against vulnerable victims, particularly in cases of elder abuse.

**B  Limitations**

Despite the significance of the decision in recognising the seriousness of elder abuse, it could be somewhat limited in its applicability. One of the most significant areas of elder abuse highlighted in the 2017 ALRC report was institutional elder abuse occurring in aged care facilities. The decision in *Katsis v The Queen* would likely not affect the consideration of sentencing principles for crimes committed in these institutions, or in many care relationships, as those individuals would likely be considered ‘very old’, or would be suffering from a cognitive or physical disability. Thus, the decision in *Katsis v The Queen* would only affect cases of elder abuse that have occurred to individuals outside the scope of the examples provided in s 21A(2)(l). Further, the consideration of s 21A(2)(l) in *Katsis v The Queen* is not extensive – there is little to no extrapolation to other ‘classes’ of vulnerable people outside of the very specific class of victim in this case, that is, an elderly woman who ‘lives alone, does not associate with other persons, has no community support and does not look after herself’. Thus, it is unclear as to how this decision would apply to future cases in which, for reasons not analogous to the victim in *Katsis v The Queen*, an elderly person could be considered vulnerable. Finally, the longevity and significance of the decision remains uncertain, as it could be appealed or reversed by the High Court in similar circumstances.

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46 Ibid.
50 *Longworth v The Queen* [2017] NSWCCA 119, [17].
51 Ibid.
53 *Longworth v The Queen* [2017] NSWCCA 119.
55 Ibid.
56 Ibid.
62 [2018] NSWCCA 9, [61]–[64].
63 Ibid.
64 Ibid.
65 Ibid.
VI CONCLUSION

Despite being prima facie limited in its applicability, the decision in *Katsis v The Queen*\(^{66}\) is indicative of a broader shift in the fabric of Australia’s social, political and judicial thinking surrounding the abuse of older people in our society. Further, it has the potential to increase the sentences imposed on offenders who mistreat those who, through a variety of interdependent factors, are victims of what we now understand to be elder abuse. In order to determine the significance of *Katsis v The Queen*\(^{67}\) in relation to s 21A(2)(l)\(^{68}\), the progression of this area of law will need to be continually monitored as the recognition of elder abuse becomes further entrenched within Australian society.

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\(^{66}\) Ibid.

\(^{67}\) Ibid.

\(^{68}\) Crimes (Sentencing Procedure) Act 1999 (NSW).