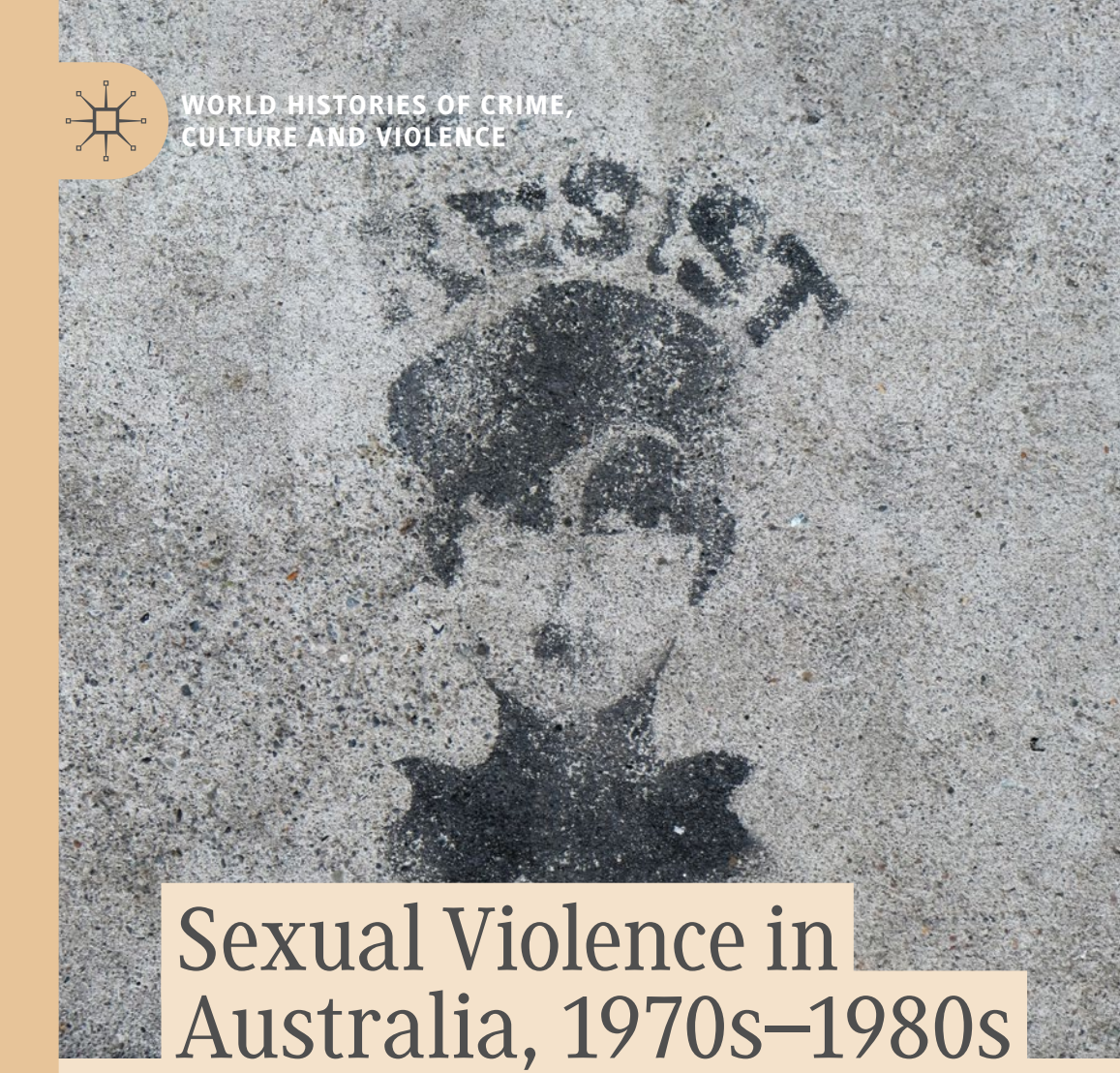

WORLD HISTORIES OF CRIME, CULTURE AND VIOLENCE

Sexual Violence in Australia, 1970s–1980s
Rape and Child Sexual Abuse

Lisa Featherstone

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For friends and strangers who are survivors.

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Contents

CHAPTER 1

Introduction: Sexual Violence

In 2013, an eighteen-year-old woman and her friend from the Central Coast of New South Wales (NSW) travelled two hours on the train to Sydney, for a night on the town. She had planned to hit the clubs: it was the first time she had been to Kings Cross, one of city's main nightclub precincts.[1] A little after eleven o'clock that night, the two young women met with other friends at McDonalds at the Cross, where they finished their premixed drinks. For the next five hours, the two friends moved between the World Bar and Soho Nightclub.

It was on the dance floor at the Soho that the young woman met Luke Lazarus. He told her he was a part-owner of the nightclub, and asked if she had met the DJ. In fact, it was his father who was a part-owner of the club, where Lazarus worked part-time. He introduced her very briefly to the DJ: according to CCTV footage, this took only two minutes or so. Lazarus would later give evidence in court that while they talked to the DJ, he had kissed her and touched her, including grabbing her on her bottom. This intimacy, he argued, encouraged him to think she would have sex with him. In contrast, the young woman gave evidence that they had held hands.

[1] Details of this case are taken from *Lazarus v R* [2016] NSWCCA 52; *R v Lazarus* (Unreported, District Court of NSW, Tupman DCJ, 4 May 2017); *R v Lazarus* [2017] NSWCCA 279.

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Minutes later, Lazarus guided her to what he had told her was the VIP area. He led her from the dance floor down a flight of stairs to a cloakroom, and then outside to a dead-end alley behind the nightclub. They walked approximately 50 metres up the road and began to kiss. The young woman gave testimony that she repeatedly told Lazarus she wanted to return to her friends. She told the court that when she had turned to go, he pulled down her stockings a few inches. Her evidence continued:

> A. I turned back to him and I pulled them back up and I said 'I really have to go'.
>
> Q. And did he reply to that?
>
> A. He—that's when he said 'Put your fucking hands on the wall'.
>
> Q. What was the tone of his voice like when he said that?
>
> A. He—he was getting frustrated and impatient I guess frustrated and impatient would be the tone, more aggressive than [the] previous conversation.
>
> Q. And what did you do then?
>
> A. Put both my hands on the—on the fence.
>
> Q. Are you able to tell the Court why you did that?
>
> A. I was just scared I guess, I didn't know what to do so I just did what he said.

The interpretation of *her* actions in these moments—and the moments that follow—were central to *his* trial.

After some courtroom discussion about the location, the young woman's evidence continued. She recorded that he told her, 'Just get on your hands and knees and arch your back.' When asked about the tone of his voice, she replied, 'Like authoritarian like do, not—not aggressive but not nice I guess, just do that if you know what I mean.' And so she gave testimony that she complied: 'I—I was scared, I can't—I was just doing what he asked.' At this point, the defendant had anal sex with the complainant. The complainant gave testimony that she asked him to stop: 'I asked him to—I said "Stop" at the start like at the beginning after—after he said "Oh shit, really" and then I just kept saying "I need to go back to my friend".'

The complainant gave evidence of immediate complaint of sexual assault to the friend she had gone to the club with, then shortly afterwards to her sister and other friends. This can be important in a trial, as it goes towards her credibility as a witness. There was evidence from multiple people that she had been seen crying and in shock. The complainant went to the Chatswood Police Station the following morning and made a report. She was taken to Royal North Shore Hospital, and the medical

examination revealed grazes on her knees, and small tears around her anus. She gave a statement to police at Kings Cross Station on the same day (defence would later suggest that there were some inconsistencies in the various reports provided). Luke Lazarus was charged with one count of sexual intercourse without consent.

At trial, the young woman came under considerable scrutiny, particularly on the issue of her consent. Under cross-examination, the defence attempted to challenge her credibility. By questioning her on highly specific details, defence aimed to show that she was lying about what had happened in the alleyway and to show that the complainant was a willing participant in sex. It was claimed that she had changed her mind only when she saw she was part of a 'trophy' list of girls in the defendant's phone.

Much of the evidence presented at the original trial was around the young woman's drinking. The complainant told the court she had consumed around sixteen standard drinks; her friend recorded they had drunk around ten. Under Section 61HA(6)(a) of the Crimes Act, a person could not be said to have consented to sex if 'the person has sexual intercourse while substantially intoxicated by alcohol or any drug'. At trial, neither side denied that anal sex had taken place: instead, the trial swung on whether or not it was consensual, and on whether or not the complainant was capable of consent. In this trial, the prosecution argued that the complainant was too drunk to consent to sex. The complainant gave evidence that 'I was drunk but yeah, and I was pretty out of it I guess and just very, I don't know, drunk is the only way I can really think to describe it'. There was CCTV evidence of her steadying herself as she left the club. In contrast, the defence argued that the complainant had exaggerated her drinking, and claimed that she had not been steadying herself as they left the building. Witnesses reported that the complainant had been 'moderately' drunk that evening.

Other evidence was given, on the defendant's behaviour on the night and afterwards. It was suggested that Lazarus took the complainant to the laneway, as he knew the CCTV would not cover that area. Revealing text messages between Lazarus and his friends and father had also been obtained by the police, and these suggested a certain unease about the encounter. However, Lazarus strenuously denied force had been used, and claimed that the sex was consensual throughout. Under NSW law, to be found guilty, the defendant had to perform the guilty act (*actus reus*) but also do so with a guilty mind (*mens rea*). The prosecution had to show that the defendant actually knew the complainant did not consent, was reckless over whether the complainant consented, or had no reasonable

grounds for believing the complainant consented.[2] Thus, in this trial, the prosecution had to prove that Luke Lazarus knew that the woman had not consented to sex, or that he was reckless in his assumptions, or that there were no reasonable grounds for believing she had consented.

In the District Court in 2015, Luke Lazarus was found guilty by a jury of one count of sexual intercourse without consent. He was sentenced to imprisonment for five years, with a non-parole period of three years. He was to serve ten months of this sentence. The verdict was appealed on three grounds, with two grounds going forward. First, there was a challenge that 'the verdict of the jury was unreasonable and contrary to the evidence'. The second ground for appeal was even more complicated. During the trial, the judge had given directions to the jury, that the defendant had no reasonable grounds for believing the young woman was consenting to sex. This, the appeal argued, imposed an objective test of 'reasonableness of belief in consent where no such test existed', and misstated the onus of proof. The appeal hearing reserved a decision on the first ground of appeal, but on the second ground found that the judge had indeed given erroneous directions regarding consent. A retrial was ordered.

The case was retried before a judge alone, with no jury, in 2017. Judge Robyn Tupman addressed the first part of the appeal, and found that the Crown had proven lack of consent beyond a reasonable doubt. However, Judge Tupman ultimately found Lazarus not guilty, stating that the defendant *believed* the complainant was consenting. Judge Tupman stated that the complainant 'did not take any physical action to move away from the intercourse or attempted intercourse'. The judge stated:

> I accept that this series of circumstances on the early morning of 12 May 2013 amounts to reasonable grounds in the circumstances for the accused to have formed the belief, which I accept was a genuine belief, that in fact the complainant was consenting to what was occurring even though it was quick, unromantic, they had both been drinking and in the case of both of them [it] may not [have] occurred if each had been sober.[3]

* * *

[2] *Crimes Act 1900* (NSW) s 61HA(3) (a)–(c).

[3] Georgina Mitchell, 'Court of Criminal Appeal Upholds Luke Lazarus Rape Acquittal', *Sydney Morning Herald (SMH)*, 27 November 2017, https://www.smh.com.au/national/nsw/court-of-criminal-appeal-upholds-luke-lazarus-rape-acquittal-20171127-gzteon.html.

Tupman J's judgement reverberated through Australian communities. There was an almost visceral reaction to what must have been a physically and emotionally painful sexual experience for the young woman—the speed of the encounter, the ugliness, the lack of basic care by a young man to a young woman. For many reading the news, it highlighted the ruthless way a young woman might be simply a receptacle, a vessel, for a young man's sexual needs. Reading the reports, I myself felt a sinking horror at just how little *her* needs and desires were considered, in this sexual encounter. Further, there were legal questions. Using the standard of 'reasonable grounds', how would someone in Lazarus' position think that a young, sexually and socially inexperienced girl would consent to anal sex in a back alley, with a man she had just met?[4] While legally the Crown had to prove that Lazarus himself had 'no reasonable grounds for believing' that there was consent (as Fullerton J suggested), public opinion was not focused on this. Instead, there was much critique in the media of an affluent and privileged young man who appeared to have been distinctly disinterested in issues of a woman's pleasure or her desire.

The NSW Court of Criminal Appeal upheld the rape acquittal of Luke Lazarus, finding that he should not face another retrial because it would 'give rise to oppression and unfairness'. The narrative during and around the Lazarus trials was often about *him*: about Luke's potential. As he stated at his sentencing hearing, 'I could have been a CEO.'[5] The victim was originally absent and her trauma was silenced, though, as we will see, this would change over time.

The Lazarus case (the trial, the retrial and the two appeals) brought to mind a number of recent trials in other Western nations, including the controversial criminal trial of American student Brock Turner, in 2016.[6] Turner had been apprehended by two international students on Stanford Campus, after they had seen him sexually assaulting 'Emily Doe' while she was unconscious. She would later state clearly that she had not consented to any sexual activity that night. At trial, Turner was found guilty of three

[4] For discussion on 'reasonable' in this case, see Andrew Dyer, 'Sexual Assault Law Reform in New South Wales: Why the Lazarus Litigation Demonstrates No Need for Section 61HE of the Crimes Act to Be Changed (Except in One Minor Respect)', *Criminal Law Journal* 43:2 (2019): 91–3.

[5] Louise Hall, 'Convicted Rapist Luke Lazarus Jailed for at Least Three Years', *SMH*, 27 March 2015.

[6] *People of the State of California v. Brock Allen Turner*. Turner was originally indicted on five counts, but two were withdrawn before the trial began.

counts of felony sexual assault. The charges held a minimum penalty of two years and a maximum of fourteen years. In a conviction that made headlines across the world, Judge Aaron Persky sentenced Turner to just six months in county jail, of which he served only three months.

Feminists and others read the judgement as prioritising the future of a young affluent white man, a 'promising' swimmer, over the trauma he had caused to a young woman.[7] The judge (himself a former athlete at Stanford) had suggested that the imprisonment would have a 'severe impact' on Turner.[8] Turner's father had written to the court to say any prison sentence 'is a steep price to pay for 20 minutes of action out of 20 plus years of his life'.[9] But as Emily Doe herself would state:

> The probation officer weighed the fact that he has surrendered a hard-earned swimming scholarship. How fast Brock swims does not lessen the severity of what happened to me, and should not lessen the severity of his punishment. If a first-time offender from an underprivileged background was accused of three felonies and displayed no accountability for his actions other than drinking, what would his sentence be? The fact that Brock was an athlete at a private university should not be seen as an entitlement to leniency, but as an opportunity to send a message that sexual assault is against the law regardless of social class.
>
> The Probation Officer has stated that this case, when compared to other crimes of similar nature, may be considered less serious due to the defendant's level of intoxication. It felt serious. That's all I'm going to say.[10]

There was a significant political backlash against the sentence, and Judge Persky was recalled from the bench in 2018, the first time this had happened in over eighty years. Nonetheless, the sentence remained. These

[7] On the issue of swimming, see, amongst others, Michael E. Miller, 'All American Swimmer Found Guilty of Sexually Assaulting Unconscious Woman on Stanford Campus', *Washington Post*, 31 March 2016, downloaded 12 September 2019; Alice Phillips, 'Freshman Swimmer Brock Turner Faces Five Felony Counts After Alleged Rape', *The Stanford Daily*, 27 January 2015, downloaded 12 September 2019.

[8] Elle Hunt, '"20 Minutes of Action": Father Defends Stanford Student Son Convicted of Sexual Assault', *The Guardian*, 6 June 2016, downloaded 21 September, 2019.

[9] Elle Hunt, '20 minutes of Action'.

[10] Katie J. M. Baker, 'Here's the Powerful Letter the Stanford Victim Read to Her Attacker', *Buzzfeed News*, 3 June 2016, https://www.buzzfeednews.com/article/katiejm-baker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra.

cases—and many others like them—begged a serious question. After fifty years of feminism, were young women becoming expendable?

As I read the press around the Lazarus case (and the Brock case, and the Federal Government's Royal Commission into Institutional Reponses into Child Sexual Abuse, and so many other press releases, official reports, social media posts, blogs and public commentaries on sexual violence), one thing became terribly clear. Not so very much had changed. As a historian, I had co-written a book on sexual assault in the 1950s. I was currently working on sexual offences in court cases from the 1970s and 1980s. Here, with Lazarus in 2017, I was reading a story that was all too familiar. How had there been so much change, and yet so little?

This book explores the conundrum at the heart of sexual violence: Why does it continue? This book asks difficult questions of our recent past. Using Australia as an important case study, it asks why we do not act more decisively to eradicate sexual and gender violence? What prevented our culture from looking seriously at abuse? How did we fail to protect victims, both inside institutions and beyond? *Why, after several decades of agitation around sexual violence, does the problem remain?* At the core of this book is the question that resonates deeply right now: Why does sexual violence appear seemingly insurmountable, despite significant change?

To answer these questions, I focus on Australia in the 1970s and 1980s, a period of intense social and legal change. Impelled by the sexual revolutions, second-wave feminism, and ideas of the rights of the child, this was a period of substantial public interest in the sexual assault of women and children. Australia was a world leader in many aspects of rape law reform. The rape of adult women was studied, surveyed and discussed more than ever before in Australian society. Yet, despite this, there remained substantial inaction by government, from community and on the part of individuals, across the final decades of the twentieth century. It was, and is, survivors who have literally demanded change.

Speaking Out

As I wrote this book, the #MeToo movement had garnered strength, becoming a global phenomenon. The #MeToo movement was started by Tarana Burke, a black American civil rights activist in 2006, to raise awareness of sexual assault, in particular amongst women of colour. The hashtag was not popularised until 2017, when the actor Alyssa Milano encouraged women to take to social media, particular Twitter, and voice their own

experiences. In the wake of the Harvey Weinstein exposé, the hashtag would be used over twelve million times in twenty-four hours. It was adopted by women in diverse countries the world over, spawning local variations too.[11] Australian women joined in, with journalist Tracey Spicer leading the NOW campaign, while other corresponding campaigns grew in size and prominence.[12]

At its best, #MeToo movement has revealed the commonality, even the banality, of sexual abuse and harassment of women in the workplace, in the home and in the street. It highlighted the shared experiences of many women, and revealed the multiple ways that institutions, including workplaces, covered up gendered abuse. Nonetheless, the #MeToo movement has been rightly controversial.[13] As criminologist Michael Salter has suggested, 'online justice' lacks the specificity of more nuanced discussions about sexual assault.[14] Critics have also highlighted the potential for the commodification of sexual violence, with the hashtag driving media clicks and potentially revenue, while not truly challenging industries that profit from gender violence.[15] In Australia, there have been controversies about

[11] Bianca Fileborn and Rachel Loney-Howes, 'Introduction: Mapping the Emergence of #MeToo', in *#MeToo and the Politics of Social Change*, eds. Biance Fileborn and Rachel Loney-Howes (London: Palgrave Macmillan, 2019), 3–4; Sarah Wildman, '#MeToo Goes Global', *Foreign Policy*, Winter 2019, https://foreignpolicy.com/gt-essay/metoo-goes-global-feminism-activism/; '#MeToo Movement's Second Anniversary', *Human Rights Watch*, 14 October 2019, https://www.hrw.org/news/2019/10/14/metoo-movements-second-anniversary.

[12] www.now.org.au. See also Destroy The Joint's social media on #Counting Dead Women and Sherele Moody's Red Heart Campaign, theredheartcampaign.org. On social media and gender violence, see Ana Stevenson and Bridget Lewis, 'From Page to Meme: The Print and Digital Revolutions Against Gender Violence', in *Gender Violence in Australia: Historical Perspectives*, eds. Alana Piper and Ana Stevenson (Melbourne: Monash University Publishing, 2019), 184–190.

[13] See Bianca Fileborn and Nickie Phillips, 'From "Me Too" to "Too Far"? Contesting the Boundaries of Sexual Violence in Contemporary Activism', in *#MeToo and the Politics of Social Change*, eds. Bianca Fileborn and Rachel Loney-Howes (London: Palgrave Macmillan, 2019), 99–115.

[14] Michael Salter, 'Want #MeToo to Serve Justice? Use it Responsibly', *The Ethics Centre*, 31 January 2019, https://ethics.org.au/want-metoo-to-serve-justice-use-it-responsibly.

[15] Rosalind Gill and Shani Orgad, 'The Shifting Terrains of Sex and Power', *Sexualities* 21:8 (2018): 1320; Michael Salter, 'Online Justice in the Circuit of Capital: #MeToo, Marketization and the Deformation of Sexual Ethics', in *#MeToo and the Politics of Social Change*, eds. Bianca Fileborn and Rachel Loney-Howes (London: Palgrave Macmillan, 2019), 317–334.

the use of women's private information in the media without their consent.[16]

Most damningly, #MeToo has been strongly critiqued for being a movement for white women, especially elite white women.[17] As Bianca Fileborn and Rachel Loney-Howes suggest, we must ask '*who* is able to speak and be heard… *whose* experiences are included and perceived as worthy of redress'.[18] Neha Kagal, Leah Cowan and Huda Jawad and others have argued that the campaign centres the 'experiences of white, affluent and educated women with access to a significant social media following and offline clout'.[19] The movement tends towards the 'erasure of poor, informally educated, low-paid, disabled, LGBT and non-urban women', as well as women of colour, migrant women and sex workers.[20] The exclusiveness of #MeToo is a very real limitation to its effectiveness. Nonetheless, #MeToo has driven an impetus to disclosure of sexual assault which has been powerful, far beyond Twitter.

A Voice

Speaking out—whether inspired by #MeToo or not—has offered (some) survivors a chance to take control of their own narrative, and to potentially navigate and negotiate change. In 2018, Saxon Mullins, the survivor of the Lazarus case, spoke out. It was a formidable moment. The young woman gave a powerful and moving interview with the current affair

[16] Nina Funnell, '"Unprofessional, unethical, unsafe": ABC breaches rape victim's privacy in new Tracey Spicer documentary', news.com.au November 13, 2019.

[17] Angela Onwuachi-Willig, 'What About #UsToo? The Invisibility of Race in the #MeToo Movement', *Yale Law Journal Forum* 128 (2018): 105–120.

[18] Fileborn and Loney-Howes, 'Introduction: Mapping the Emergence of #MeToo', 5 (italics in original).

[19] Neha Kagal, Leah Cowan, and Huda Jawad, 'Beyond the Bright Lights: Are Minoritized Women Outside the Spotlight Able to Say #MeToo?', in *#MeToo and the Politics of Social Change*, eds. Bianca Fileborn and Rachel Loney-Howes (London: Palgrave Macmillan, 2019): 134.

[20] Kagal, Cowan, and Jawad, 'Beyond the Bright Lights: Are Minoritized Women Outside the Spotlight Able to Say #MeToo?', 134; Jess Ison, 'It's Not Just Men and Women': LGBTQIA People and #MeToo', in *#MeToo and the Politics of Social Change*, eds. Bianca Fileborn and Rachel Loney-Howes (London: Palgrave Macmillan, 2019): 151–167; Tess Ryan, 'This Black Body is Not Yours for the Taking', in *#MeToo and the Politics of Social Change*, eds. Bianca Fileborn and Rachel Loney-Howes (London: Palgrave Macmillan, 2019): 117–132.

program *Four Corners*.[21] So, too, in the United States, 'Emily Doe' spoke out about her sexual assault by Brock Turner, sharing an extraordinary statement she read at her sentencing hearing publicly on *Palo Alto Online* and *BuzzFeed*, where it went viral.[22] The statement was so moving, so commanding, that it was even read in the US House of Representatives, to raise awareness of sexual assaults on campus.[23] In 2019, revealing her identity, Chanel Miller released a powerful memoir, *Know My Name*, on her experiences of the assault and its terrible aftermath.[24]

Here, in the bravery of these survivors, perhaps we see a moment of hope, though it cannot be the only answer to the problem of sexual violence. There are significant costs in speaking out: loss of anonymity, the likelihood for personal attacks, threats to mental health and the potential for media misrepresentation. As criminologist Tanya Seisner has shown, even the so-called feminist media has often co-opted or sensationalised survivors' stories.[25] Speaking out has had impact, both personal and political.[26] Survivors who speak out inhabit a peculiar space that crosses the individual and the collective: they are now are understood by the public as both individuals (victims of a specific crime) and yet somehow representative of all survivors (victims of all sexual crime). This leaves survivors both as vulnerable to vicious personal and online attack and as powerful voices for systemic, structural change. On an individual level, survivors have noted the somewhat 'ephemeral' changes in themselves and in their confidence in dealing with harassment and abuse, alongside improvements in local, workplace and community policies.[27]

[21] ABC, 'I Am That Girl', *Four Corner*s, 7 May 2018, http://www.abc.net.au/4corners/i-am-that-girl/9736126, downloaded 2 August, 2019.

[22] Baker, 'Here's the Powerful Letter'.

[23] Concepción de León, 'You Know Emily Doe's Story. Now Learn Her Name', *New York Times*, 4 September 2019, https://www.nytimes.com/2019/09/04/books/chanel-miller-brock-turner-assault-stanford.html, downloaded 5 September 2019.

[24] Concepción de León, 'You Know Emily Doe's Story. Now Learn Her Name', *New York Times*, 4 September 2019, https://www.nytimes.com/2019/09/04/books/chanel-miller-brock-turner-assault-stanford.html, downloaded 5 September 2019.

[25] Tanya Serisier, 'Speaking Out, and Beginning to be Heard: Feminism, Survivor Narratives and Representations of Rape in the 1980s', *Continuum* 32:1 (2018): 52–61.

[26] Loney-Howes, 'The Politics of the Personal', 33.

[27] Kaitlynn Mendes and Jessica Ringrose, 'Digital Feminist Activism: #MeToo and the Everyday Experiences of Challenging Rape Culture', in *#MeToo and the Politics of Social Change*, eds. Bianca Fileborn and Rachel Loney-Howes (London: Palgrave Macmillan, 2019), 46.

On a macro level, too, there have been tangible moves towards change. Not long after Saxon Mullins spoke on *Four Corners*, the state of NSW announced that the Law Reform Commission would review the provisions of consent, and in May 2021 the NSW government poposed the adoption of an affirmative consent model, to go through parliament in late 2021.[28] In Queensland, there have been calls to reform the defence of 'mistaken belief', which allows a defendant—often successfully—to argue that he believed his victim had consented to sex, even if she had not.[29] The author and survivor Bri Lee drove a campaign that successfully had consent laws and mistake of fact laws referred to the Law Reform Commission in Queensland for review.[30] In late 2019 in Tasmania, the #LetHerSpeak campaign convinced the Attorney General Elise Archer to amend section 194K of the *Evidence Act 2001* (Tas), which had effectively gagged survivors from talking about their own experiences of, and responses to, sexual assault.[31]

This recent activism was not, of course, the first time women had spoken out about sexual violence.[32] In this book, I chart the previous moment, during second-wave feminism in Australia, when women as a collective began to speak out about both rape and the sexual assault of children. The 1970s and 1980s were a critical turning point in the politics and culture of

[28] Mark Speakman and Pru Goward, 'Sexual Consent Laws to Be Reviewed', NSW Government Media Release, 8 May 2018, https://www.justice.nsw.gov.au/Documents/Media%20Releases/2018/sexual-assault-consent-laws-to-be-reviewed.pdf.

[29] Under the Queensland Criminal Code 1899, section 24(1) states: 'A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission.' For feminist interpretations of the law, see Kate McKenna, 'Queensland Consent Laws Confuse Juries and Need Reform, Women's Advocate Argues', *ABC News*, 13 August 2019, downloaded 13 August 2019.

[30] See consentlawqld.com. Bri Lee is the author of *Eggshell Skull* (Sydney: Allen and Unwin, 2018).

[31] Nina Funnell, '#LetHerSpeak', conference paper Sex and Consent in the Age of #MeToo Workshop, Macquarie University, 6–7 November 2019; Lisa Martin, 'Tasmania Sex Assault Gag Law to Face Overhaul Early Next Year', *The Guardian*, 19 August 2019; Lauren Roberts, "Gag Laws' Stopping Sexual Assault Survivors in the NT from Speaking Out', *ABC News*, 22 October 2019, https://www.abc.net.au/news/2019-10-22/nt-sexual-assault-victims-stopped-from-speaking-out/11622468. Similar legislation still exists in the Northern Territory at the end of 2019, meaning survivors are denied agency in telling their own stories, and journalists risk jail time in reporting on survivor's experiences.

[32] For studies historicising responses to sexual assault in the United States, see Tanya Serisier, 'Speaking Out Against Rape: Feminist (Her)stories and Anti-Rape Politics', *Lilith* 16 (2007): 84–95; Maria Bevacqua, *Rape on the Public Agenda: Feminism and the Politics of Sexual Assault* (Boston: Northeastern University Press, 2000).

sexual violence, requiring further, detailed investigation. Australia makes an important case study. The Australian situation is read here as one shaped by international networks of knowledge and practice: Australians have engaged with aspects of the law, feminism and violence as a settler colonial state, and the flow of information from other developed nations. In particular, Australia has been informed by the United Kingdom and the United States. Yet, Australia also led the way in many developments, including the involvement of feminists in the government and bureaucracy, and the criminalising of some offences including rape in marriage. Throughout this book, I trace these shifts and transformations—influenced by feminism—in thinking about sexual assault and child sexual abuse in Australia. These changes were social, cultural, political and legal, all intertwined. Social change drove legal reform; at the same time, legal change influenced the wider culture. So how did this coalescence operate in Australia, and what did it mean? How was sexual violence imagined in law and in society? Understanding Australia—in this period of rapid transition—helps us to understand our own contemporary attitudes towards gendered violence and to consider the options for further change.

Sexual Assault in the Law

As historians including Joanna Bourke have shown, rape has been defined in multiple ways, changing over time and place.[33] In some jurisdictions, rape might only include penile-vaginal penetration; at other moments, it might include penetration of a number of orifices by a range of body parts or objects. The twentieth century saw substantial shifts in how rape and other forms of sexual violence were imagined, understood, defined and treated in the criminal justice system. For instance, in Australian jurisdictions during the colonial period and for much of the twentieth century, homosexual sex between consenting men was a crime. From 1975 to 1997, consenting gay sex was decriminalised across Australian states, though there remained provisions for the sexual assault of boys, and for non-consensual sexual assault on men.[34]

[33] Joanna Bourke, *Rape: A History from 1860 to the Present Day* (London: Virago, 2007), 8–10.

[34] Claire Parker and Paul Sendziuk, 'It's Time: The Duncan Case and the Decriminalisation of Homosexual Acts in South Australia, 1972', in *Out Here: Gay and Lesbian Perspectives VI*, eds. Yorick Smaal and Graham Willett (Melbourne: Monash University Publishing, 2011), 17–35.

Australian laws around rape itself originated from seventeenth-century British common law, though the states had no one single definition of rape, either before Federation or after. Rape was commonly understood as 'unlawful sexual intercourse with a woman without her consent, by force, fear or fraud'.[35] Consent here was understood to mean physical resistance: to prove her non-consent, a woman needed to physically resist sexual intercourse.[36] By the late 1960s, the authoritative Jowitt's *Dictionary of English Law* defined rape as 'carnal knowledge of a woman against her will or without her conscious permission, or where her permission has been extorted by force or fear of immediate bodily harm', whereas carnal knowledge was defined as 'the penetration to the slightest degree of the male organ of generation'.[37]

Australian states took up these basic ideas in various ways. Australia is, on the whole, a common law nation: this means that judgements made in courts must be followed by later judges, due to the doctrine of precedent. Some states and territories codified criminal law in the late nineteenth century, including Queensland, Tasmania, Western Australia, the ACT and the Northern Territory. Nonetheless, if there was an ambiguity in the law, or the legislation did not adequately define a problem, judges might still form common law decisions, which then become part of the broader law for the state. In contrast, New South Wales, Victoria and South Australia were common law jurisdictions, guided by the relevant *Crimes Acts*, but where the crimes themselves were defined by common law. Thus, in NSW, for instance, under the *Crimes Act* 1900, rape itself was not defined, but the statute guided that 'the consent of the woman, if obtained by threats or terror, shall be no defence to a charge'.[38] As legal experts would suggest, this ensured 'the onus is upon the prosecution to prove that the woman did not consent'.[39]

[35] NSW Parliament, *Report of the Criminal Law Review Division of the Department of the Attorney-General and of Justice into Rape and Other Sexual Offences* (Sydney: Government Printer, 1977), 11.

[36] See Carol Backhouse, 'A Comparative Study of Canadian and American Rape Law', *Canada-United States Law Journal* 7 (1984): 182–3.

[37] NSW Government, *Report from the Select Committee on Violence Sex Crimes in New South Wales* (Sydney: Government Printer, 1969), viii.

[38] *Crimes Act 1900* (NSW) s 62.

[39] Montgomerie H. Hamilton and G. C. Addison, *Criminal Law and Procedure, New South Wales: Containing the Crimes Act, 1900, the Criminal Appeal Act of 1912 and Other Statues, vol. 2*, 5th edition, ed. C. E. Weigall (Sydney: Law Book Co., 1947), 80.

What all Australian states had in common was that rape was understood as sexual penetration of a woman by a man, without her consent. This definition of the crime of rape led, however, to a number of problems. In 1970, at the start of this study, rape was defined narrowly as penetrative sexual intercourse between a man and woman: it did not include non-consensual anal sex, non-consensual oral penetration or penetration by an object.[40] Further, the definition meant that rape could only be committed on a woman by a man,[41] yet men and boys were clearly suffering from sexual assaults that were similar to rape, but could not be named as such.

Other males could not be held criminally responsible under the law for rape. A boy under the age of fourteen could not be convicted of rape, though he could be convicted of indecent assault, or aiding and abetting rape.[42] Even more notably, a married man could not be charged with raping his wife: he was not liable under law, no matter how vicious or violent the assault. At marriage, his wife was considered to have granted ongoing consent for any penile-vaginal sexual encounter at any time in the marriage.[43] As we will see, this was one of the most controversial of all aspects of rape law reform, and remained an urgent but difficult issue, resistant to both social and legal change.

The problem of sexual violence against adult women was not a simple lack of legal capacity to define sexual assault, which was codified in law, albeit imperfectly. There were manifest, systemic problems in negotiating and utilising the law, in the reporting of crime, in the policing of sexual assaults, in the prosecution of offenders (and the safeguards they were offered) and, of course, with the protection of victims. These problems, along with a series of rape myths that were heightened by gendered and racial denigrations, permeated the social and legal landscape of the late twentieth century.

[40] For example, NSW Parliament, *Report of the Criminal Law Review Division*, 12.

[41] Royal Commission on Human Relationships (hereafter RCHR), *Final Report vol. 5* (Canberra: Government Printer, 1977), 196.

[42] NSW Parliament, *Report of the Criminal Law Review Division*, 21.

[43] Lisa Featherstone, '"That's What Being a Woman is For": Opposition to Marital Rape Law Reform in Late Twentieth-Century Australia', *Gender & History* 29:1 (2017): 87–103.

Child Sexual Assault

If public interventions focused imperfectly on adult women as victims, it slowly became clear that children, too, were vulnerable to sexual abuse. Gradually, across the 1970s and 1980s, sexual abuse emerged as a public problem, alongside increased attention to 'baby battering' and neglect, and a growing awareness about the 'Rights of the Child'. We might now think that the protracted 'discovery' of child sexual abuse is strange: after all, assault on children had long been a core business of the court, as studies in criminal records across the nineteenth and twentieth centuries show.[44] Further, across the twentieth century, crimes were reported in the press, often with surprisingly graphic details.[45] Offenders were routinely policed and prosecuted, with more success if the victim was a child than an adult.[46] And as Shurlee Swain has shown, the nineteenth and twentieth centuries saw numerous national and state inquiries into the physical and sexual abuse of children both inside and outside of institutions.[47]

Yet before feminist interventions, sexual abuse of children was understood as the unusual, grisly crime of pathological men. Child sexual assault continued to be imagined as the work of the deviant, aberrant man, and was thus to be dealt with as individual crimes, rather than as something requiring structural or community change.[48] It took activism from

[44] See, for example, Louise A. Jackson, *Child Sexual Abuse in Victorian England* (London: Routledge, 2000); Stephen Robertson, *Crimes Against Children: Sexual Violence and Legal Culture in New York City, 1880–1960* (Chapel Hill: UNC Press, 2005). In Australia, see Judith Allen, *Sex and Secrets: Crimes Involving Australian Women Since 1880* (Melbourne: OUP, 1990; Jill Bavin-Mizzi, *Ravished: Sexual Violence in Victoria Australia* (Sydney: UNSW Press, 1995); Yorick Smaal, '"Keeping it in the family": Prosecuting Incest in Colonial Queensland', *Journal of Australian Studies* 37:3 (2013): 316–32; Juliet Peers, 'The Tribe of Mary Jane Hicks: Imagining Women Through the Mount Rennie Rape Case 1886', *Australian Cultural History* 12 (1993): 127–144; Lisa Featherstone and Andy Kaladelfos, *Sex Crimes in the Fifties* (Carlton: Melbourne University Press, 2016).

[45] Andy Kaladelfos, 'Crime and Outrage: Sexual Villains and Sexual Violence in New South Wales, 1870–1939', PhD thesis, University of Sydney, 2010.

[46] Featherstone and Kaladelfos, *Sex Crimes in the Fifties*, 76–80.

[47] Johanna Sköld and Shurlee Swain, eds., *Apologies and the Legacy of Abuse of Children in "Care"* (London: Palgrave Macmillan, 2015); Shurlee Swain, *History of Australian Inquiries: Reviewing Institutions Providing Care for Children*, 2014, https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Research%20Report%20-%20History%20of%20Australian%20inquiries%20reviewing%20institutions%20providing%20care%20for%20children%20-%20Institutional%20responses.pdf.

[48] See Conclusion for comments on the Northern Territory Intervention, this volume.

feminists, especially women working in domestic violence shelters and rape crisis centres, to draw attention to the structural components of child suffering. Still, it took significant time, and some resistance, for child sexual abuse to emerge as a community problem, as this book will trace.

It was not until relatively recently that child sexual assault has come into the spotlight in the mainstream, and major studies in Canada, Ireland, Australia and the United States have proven the proliferation of sexual assaults against children within institutions, with cultures of secrecy that failed to protect victims.[49] When I began this book, the Australian Federal Government's Royal Commission into Institutional Responses to Child Sexual Abuse was already underway, and in 2017 it reported. In total, the Royal Commission held over 8000 private sessions, took over 42,000 phone calls and almost 26,000 emails and letters, and investigated 57 in-depth case studies. The final report ran to seventeen volumes, plus an executive summary. Taking a victim-centred approach, the Royal Commission was a vast yet intricate body of work documenting and critiquing the handling of child sexual assault in institutions in Australia's past. It made far-reaching recommendations for making institutions safer for children, but also recommending ways forward to support survivors, including redress and civil litigation.[50] The Royal Commission, alongside other state-based investigations, garnered widespread media coverage: never before had sexual violence against children received so much public scrutiny.[51]

[49] Karen Terry et al., 'The Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States, 1950–2010: A Report Presented to the United States Conference of Catholic Bishops by the John Jay College Research Team', United States Conference of Catholic Bishops, Washington, DC, 2011; *The Report of the Archdiocesan Commission of Enquiry into the Sexual Abuse of Children by Members of the Clergy*, 3 volumes (Archdiocese of St John's, Newfoundland, Canada, 1990); Francis D. Murphy, Helen Buckley, and Larain Joyce, *The Ferns Report: Presented to the Minister for Health and Children* (Dublin: Government Publications, 2005).

[50] www.childabuseroyalcommission.gov.au. See also the Special Issue 'The Royal Commission into Institutional Responses to Child Sexual Abuse', *Journal of Australian Studies* 42:2 (2018), especially Katie Wright and Shurlee Swain, 'Introduction: Speaking the Unspeakable, Naming the Unnameable: The Royal Commission into Institutional Responses to Child Sexual Abuse', 139–152.

[51] For other important works, see Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Canberra: Government Printer, 1997); E. P. Mullighan, *Children on Anangu Pitjantjatjara Yankunytjatjara (APY) Lands Commission of Inquiry: Report into Sexual Abuse* (Adelaide: Office of the Commissioner,

We cannot yet know the full and final impact of the Royal Commission into Institutional Reponses to Child Sexual Abuse. Running parallel to and beyond the Royal Commission, the courts were and are addressing a number of criminal and civil trials for historical child sexual assault. Most notorious is the trial and subsequent appeals of Archbishop George Pell, the highest-ranking Catholic to have been found guilty of child sexual abuse, convictions that have since been quashed. In December 2018, Pell was convicted by a jury of five counts of historic child sexual abuse, including four charges of an indecent act with or in the presence of a child under sixteen and one charge of sexual penetration of a child under sixteen. Pell was sentenced to six years imprisonment, with a non-parole period of three years and eight months.[52] His initial appeal, on the grounds that the jury might have had reasonable doubt, was overturned by two of three judges. The High Court of Australia allowed special leave to appeal, on the grounds that the Court of Appeal had misapplied the legal test, leading to a miscarriage of justice. Finally, the High Court ruled that the two judges at the Court of Appeal should have found that there could have been sufficient doubt by the jury. This does not mean that the High Court ruled him not guilty of the original crimes as charged, but rather that legal process was not correctly followed.[53] Civil action in the courts is ongoing as this book goes to press.

Whatever the outcome, it has truly been a series of trials and appeals that divided the nation. Many Australians have condemned his actions (in respect to both this individual case and his wider involvement with paedophile priests).[54] Other Australians remained convinced of his innocence, and eagerly awaited the overturning of his guilty verdict. Indeed, a string of high-profile community leaders wrote letters of character reference for

2008); Family and Community Development Committee, Victorian Government, *Betrayal of Trust—Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Institutions* (Victoria: Government Printer, 2013); Victorian Government, *Royal Commission into Family Violence Report* (Victoria: Government Printer, 2016).

[52] *DPP v Pell* (sentence) [2019] VCC 260 (13 March 2019), www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCC/2019/260.html.

[53] At the time of press, full legal analysis of the High Court decision has not yet occurred. A good summary appeared at Ben Mathews and Mark Thomas, 'How George Pell won in the High Court on a legal technicality', *The Conversation* April 7, 2020, https://theconversation.com/how-george-pell-won-in-the-high-court-on-a-legal-technicality-133156.

[54] On Pell's relationships with other priests, see Louise Milligan, *Cardinal: The Rise and Fall of George Pell* (Melbourne: Melbourne University Press, 2017); David Marr, 'The Prince: Faith, Abuse and George Pell', *Quarterly Essay* 51 (2013): 1–98.

the convicted Pell, including the former prime minister John Howard.[55] Yet what was perhaps most remarkable was the courage of the two young men who came forward, to press charges, in what they knew would be a volatile political, social and religious environment.[56]

Vulnerabilities

It is clear that women and children and some men were (and are) routinely subject to sexual violence. The 2016 *Personal Safety Survey of Australians* reports that one in five women and one in twenty men have experienced sexual violence.[57] But it is also clear that some groups are more vulnerable than others. Problems (including cultural attitudes towards consent, the policing of sexual crime, the prosecution of cases, and racial, class and gendered bias within the courtroom) were and are heightened for marginalised groups. Notions of an ideal or worthy victim have profound implications for seeking justice: as Linda Alcoff has suggested, some victims are more 'palatable' than others.[58] And as intersectional feminism has shown, this burden is intensified for survivors who suffer discrimination or marginalisation on multiple fronts.

In Australia, Indigenous women and children were and are a group vulnerable to sexual assault: one recent study suggests Aboriginal and Torres Strait Islander women are 3.1 times more likely to suffer from physical and sexual abuse.[59] This vulnerability is grounded in the racism and sexism of the coloniser, and the systemic oppression and intergenerational trauma experienced by many Indigenous Australians.[60] As Eugenia

[55] Scanned copies cited at theaustralianatnewscorpau.files.wordpress.com/2019/02/statements.pdf, downloaded 7 March 2019.

[56] One of the young men, known as R, died before trial.

[57] ABS, Personal Safety, Australia, 2016, https://www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0.

[58] Linda Alcoff, *Rape and Resistance* (Cambridge: Polity Press, 2018), 52.

[59] Our Watch, *Changing the Picture: A National Resource to Support the Prevention of Violence against Aboriginal and Torres Strait Islander Women and Their Children* (Melbourne: Our Watch, 2018), Executive Summary, np.

[60] Judy Atkinson, 'Violence in Aboriginal Australia: Colonisation and Gender', *Aboriginal and Islander Health Worker Journal* 14:2 (June 1990): 5–21.

Flynn has written, 'there is nowhere on this continent that has been untouched by white patriarchal violence.'[61]

One aspect of this appropriation of Indigenous bodies is that black women have been rendered always available for sex, as part of the colonial spoils.[62] Tess Ryan, a proud Biripi woman, has recently argued in her powerful piece on Indigenous women and gendered violence:

> Since colonization in Australia, Black Women have been viewed as lascivious and manipulative beasts, erotic curios, and domicile victims at the whims of men.[63]

Strong Indigenous women have (over and over) spoken out against multiple forms of violence. However, black women are still at a high risk of physical, verbal and sexual abuse, and as a recent study by Our Watch has suggested, this violence 'is often more severe and complex in its impacts'.[64] Reporting a crime—indeed any interactions with police—makes women further vulnerable in the criminal justice sector.[65] The mainstream media reports continue to report Aboriginal victims as promiscuous, addicts, and poor mothers.[66] Further, white attitudes towards Indigenous survivors have not necessarily improved. As Ryan and Flynn have both suggested, black women have once again been 'forgotten' in the #MeToo movement in Australia.[67]

In many ways, this book cannot overcome these omissions, not due to a lack of interest or a lack of care, but because of a resounding, even embarrassing, lack of sources. To build a picture of sexual violence in the

[61] Eugenia Flynn, 'This Place', in *#MeToo: Stories from the Australian Movement*, eds. Miriam Sved, Christie Nieman, Maggie Scott, Natalie Kon-yu (Sydney: Pan Macmillan, 2019), 17.

[62] Larissa Behrendt, 'Consent in a (Neo)Colonial Society: Aboriginal Women as Sexual and Legal 'Other', *Australian Feminist Studies* 15:33 (2000): 353.

[63] Ryan, 'This Black Body is Not Yours for the Taking', 120.

[64] Our Watch, *Changing the Picture: A National Resource to Support the Prevention of Violence against Aboriginal and Torres Strait Islander Women and Their Children*, Executive Summary, np.

[65] Amy McQuire, 'The More Things Change: Female Black Lives Don't Matter. If They Did, Ms Dhu Would Still Be Alive', *New Matilda*, 24 November 2015, https://newmatilda.com/2015/11/24/the-more-things-change-female-black-lives-dont-matter-if-they-did-ms-dhu-would-still-be-alive/.

[66] Flynn, 'This Place', 20.

[67] Ryan, 'This Black Body is Not Yours for the Taking', 117.

1970s and 1980s, I have drawn on four main forms of sources: feminist writings, government reports, media and court records. All of these groups—without exception—have not prioritised the voices of Indigenous women. White feminism has been widely critiqued by black women, for its exclusionary politics.[68] Indigenous women were rendered largely invisible in late twentieth-century mainstream media, and government reports might sometimes include statistics on Indigenous people, but gave no voice to women (or men). Court records tell us little about Indigenous women's experience of sexual violence, though I have utilised them when applicable. There were a small number of Indigenous women writing in this time period, including activists.[69] As a white woman living on unceded, colonised land, I have not attempted to tell—or take—the story of sexual assault on Indigenous women, but to acknowledge black voices when possible. This is done with a deep and saddening knowledge that sexual violence is at the core of the colonial process, and that so much more needs to be done by white Australia to address all forms of violence against First Nations people, in the past and in the present.

LGBTIQ+ people are also over-represented in sexual violence statistics, and under-represented in 1970s and 1980s material. We do not have good statistics on rates of assault and abuse against LGBTIQ+ communities, and there are significant differences between groups within queer communities, though much of the violence has at its core homophobic, transphobic and heterosexist values.[70] Gay men were notoriously subject to

[68] Pat O'Shane, 'Is There Any Relevance in the Women's Movement for Aboriginal Women?', *Refractory Girl* 12 (1976): 32–34; Melissa Lucashenko, 'No Other Truth?: Aboriginal Women and Australian Feminism', *Social Alternatives* 12:4 (1994): 21–24; Aileen Moreton-Robinson, *Talkin' Up to the White Woman: Aboriginal Women and Feminism* (St Lucia, Qld: University of Queensland Press, 2000); Larissa Behrendt, 'Aborignal Women and the White Lies of the Feminist Movement: Implication for AboriginalWomen in Rights Discourse', *The Australian Feminist Law Journal* 1 (1993): 27–44; A. Maguire, 'All Feminists Are Created Equal, But Some Are More Equal Than Others', *New Matilda*, 5 March 2015, https://newmatilda.com/2015/03/05/all-feminists-are-created-equal-some-aremore-equal-others/, downloaded December 2019.

[69] Edie Carter, *Aboriginal Women Speak Out About Rape and Child Sexual Abuse* (Adelaide: Adelaide Rape Crisis Centre, 1987). See also Vivian Bligh, 'A Study of the Needs of Aboriginal Women Who Have Been Raped or Sexually Assaulted', in *We Are Bosses Ourselves: The Status and Role of Aboriginal Women Today*, ed. Fay Gale (Canberra: Australian Institute of Aboriginal Studies, 1983).

[70] See Bianca Fileborn, 'Sexual Violence and Gay, Lesbian, Bisexual, Trans, Intersex, and Queer Communities', *Australian Institute of Family Studies* (March 2012): 3–7; Gail Mason and Stephen Tomsen, *Homophobic Violence* (Sydney: Hawkins Press, 1997); Alan Berman