

#MeToo under Colonialism: Conceptualising Responsibility for Sexual Violence in Australia

Honni van Rjiswijk

Michael Rothberg's *The Implicated Subject* interrogates the question of responsibility in complex cases where we need to expand the lexicon of players beyond victims, perpetrators and bystanders. Rothberg explores this complexity through adjudicating the historical questions of the Holocaust (Chapter 1), transatlantic slavery (Chapter 2), and apartheid (Chapter 3). The impact of historical trauma on the contemporary implication politics of Israel/Palestine is explored in Chapter 4, and post-Holocaust implication and Kurdish identity in Turkey are explored in Chapters 5 and 6, respectively. The #MeToo debate similarly requires a negotiation between past and present trauma – between, as Rothberg puts it, 'those who have inherited or who have been otherwise denigrated by histories of victimization' and 'those who have inherited or who have otherwise benefited from histories of perpetration.'¹ The many intersectional grey zones of responsibility within #MeToo are worth exploring, and in this piece, I want to pay particular attention to how the concept of the 'implicated subject' can help us think through our own situated responsibility, as, in my case, an Australian non-Indigenous feminist, academic and lawyer working through the questions raised by #MeToo in the context of the ongoing colonial violence of Australian legal and extra-legal life.

#MeToo needs to redefine its key terms, including 'sexual violence' and 'institution,' to foreground harm caused by the colonial state. This means considering sexual violence in a temporally flexible way, in the context of historical realities: the dispossession of Indigenous people and continuing refusal of Indigenous sovereignty; the Stolen Generations; and the sexual harms to Indigenous children recognised by the Royal Commission Into Institutional Responses to Child Sexual Abuse.² It also means understanding sexual violence beyond the 'pinpoint of harm' of sexuality: to consider sexual violence as part of a continuum

1 Michael Rothberg, *The Implicated Subject: Beyond Victims and Perpetrators* (Stanford, CA: Stanford University Press, 2019), p. 83.

2 'Terms of Reference', *Royal Commission into Institutional Responses to Child Sexual Abuse*, 13 November 2014, <<https://www.childabuseroyalcommission.gov.au/about-us/terms-of-reference>> [accessed 2 April 2020].



of contemporary colonial violence that comprises higher rates of sexual violence suffered by Indigenous women; Indigenous deaths in custody;³ higher rates of non-carceral death for Indigenous women in contrast to the general community; and the continuing ‘Northern Territory Intervention’.⁴

Thinking Through #MeToo Intersectionally

Beginning as a local movement focussing on the experiences of adolescent black girls, #MeToo has transformed into a global movement that highlights the endemic, ongoing problem of sexual violence worldwide. ‘MeToo’ founder Tarana Burke held ‘MeToo’ workshops in Alabama from 2007, but in October 2017, the hashtag #MeToo went viral, first in the US and then across the world.⁵ This was followed by allegations

- 3 The 1991 Royal Commission into Deaths in Custody made a number of recommendations, including removing incarceration as a consequence for fines, and promoting care for victims of domestic violence, (Ch 7). Still, the majority of the Royal Commission’s recommendations were not implemented in most Australian jurisdictions. Of course, the RCIADIC inquiry and report were themselves state-run processes which had a number of limitations. First, Commonwealth, State and Territory governments have failed to implement many of the recommendations. Second, Elena Marchetti has also shown the limits of the process itself, especially as it concerns Aboriginal women – of greatest significance is the fact that the report included no separate, substantial chapters on Aboriginal women, and ‘expressly referred to Indigenous women in only five of its 339 recommendations.’ See Marchetti, Elena, ‘Indigenous Women and the RCIADIC: Part I’, *Indigenous Law Bulletin*, 71 (2007), 6–9 (p. 8).
- 4 *Northern Territory National Emergency Response Act 2007* (Cth) No. 129 (NTNERA); *Family Community Services, Aboriginal Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) No. 128; *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) No. 130; *Families, Community Services and Aboriginal Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) No. 128; *Appropriation (Northern Territory National Emergency Response) Act (No. 1) 2007* (Cth) No. 126; and *Appropriation (Northern Territory National Emergency Response) Act (No. 2) 2007* (Cth) No. 127. When the Northern Territory Intervention came to the end of its five-year period in July 2012, it was immediately replaced by the *Stronger Futures in the Northern Territory Act 2012* (Cth) (No. 100) and related laws: *Stronger Futures in the Northern Territory Act 2013* (Cth) (No. 184); *Social Security Legislation Amendment Act 2012* (Cth) (No. 102). These laws will operate for a ten-year period: *Stronger Futures* s 118. *Stronger Futures* is broken up into a number of Parts that administer aspects of the lives of Aboriginal citizens in the Northern Territory. ‘Tackling alcohol abuse’ (Part 2) is aimed at ‘reducing alcohol-related harm to those Aboriginal people’; ‘Land reform’ (Part 3), is ‘aimed at facilitating the granting of rights and interests, and promoting economic development’; ‘Food security’ (Part 4), and some miscellaneous matters (Part 5) are also covered. The legislation includes income management schemes, and provisions for the suspension of parents’ welfare payments if children’s attendance rate at school is considered unacceptable (*Social Security Legislation Amendment Act 2012* (Cth) (No. 102) Sch 2). I use the term ‘Stronger Futures’ to refer to this regime.
- 5 Sandra Garcia, ‘The Woman Who Created #MeToo Long Before Hashtags,’ *The New York Times*, 20 October 2017, <<https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html>> [accessed 12 December 2019].

of sexual violence and sexual harassment against men in high-profile industries, including entertainment, politics, architecture and higher education: most infamously, Harvey Weinstein, the producer and co-founder of the Weinstein company, was accused by a number of women of behaviour ranging from harassment to rape, and was subsequently criminally charged as well as fired from his production company; other famous examples have included Mark Halperin (political journalist), Kevin Spacey (actor), Louis C. K. (Louis Székely, comedian), Matt Lauer (television news anchor), Lorin Stein (literary editor), Richard Meier (architect), and Jorge I. Domínguez (academic).⁶

These recent global iterations of #MeToo have been criticized for centring the experiences of white western women;⁷ and for reifying white western women's subjectivity by foregrounding self-disclosure as the primary means of discursive agency.⁸ Academics and activists have also been critical of parts of the #MeToo movement for its tendency to advocate for harsher carceral punishments for sexual violence, despite the disproportionate impact of this state violence on Black and colonized groups.⁹ Asked whether #MeToo is a white women's movement, Ashwini Tambe says the answer is 'both yes and no'.¹⁰ The subject matter of the movement – the injuries of sexual violence and harassment – clearly go beyond the scope of white women's problems; but in media coverage, Tambe argues, 'it is certainly white women's pain that is centered'.¹¹

One of the most provocative and productive applications of Rothberg's concept of the 'implicated subject' is to use it as a framework to think through #MeToo intersectionally. The 'implicated subject' provides

6 Audrey Carlsen, Maya Salam, Claire Cain Miller and others, 'Me Too Brought Down 201 Powerful Men: Nearly Half of Their Replacements Are Women', *The New York Times*, 23 October 2018, <<https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html>> [accessed 12 December 2019].

7 See Kimberlee Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics', *University of Chicago Legal Forum*, (1989), 139–168; Cristy Dougherty and Bernadette Calafell, 'Before and beyond #MeToo and #TimesUp: Rape as a Colonial and Racist Project', *Women and Language*, 42.1 (2019), 213–218; Sarah de la Garza, 'No More Magic Mirrors: Confronting Reflections of Privileged Feminisms in #MeToo', *Women and Language*, 42.1 (2019), 175–181; and Angela Onwuachi-Willig, 'What about #UsToo? The Invisibility of Race in the #MeToo Movement', *Yale Law Journal Forum*, 128, (2018) 105–120.

8 Tarana Burke, '#MeToo Was Started for Black and Brown Women and Girls: They Are still Being Ignored', *Washington Post*, 9 November 2017, <<https://www.washingtonpost.com/news/post-nation/wp/2017/11/09/the-waitress-who-works-in-the-diner-needs-to-know-that-the-issue-of-sexual-harassment-is-about-her-too/>> [accessed 28 January 2020].

9 Ashley Mack and Bryan McCann, 'Critiquing State and Gendered Violence in the Age of #MeToo', *Quarterly Journal of Speech*, 104.3 (2018) 329–344.

10 Ashwini Tambe, 'Reckoning with the Silences of #MeToo', *Feminist Studies*, 44.1 (2018), 197–203 (p. 199).

11 Ibid.

a way to think responsibility for sexual violence laterally – beyond the limited figures of victim, perpetrator and bystander – and also temporally, connecting the contemporary sexual harms with the legacies of colonialism and slavery. The concept of the ‘implicated subject’ opens up a field of nuanced responsibility:

it both draws attention to responsibilities for violence and injustice greater than most of us want to embrace and shifts questions of accountability from a discourse of guilt to a less legally and emotionally charged terrain of historical and political responsibility.¹²

This is a very rich concept to use as we develop schemas of responsibility in relation to #MeToo, especially for those who may be interpellated by #MeToo as survivors of sexual violence, but who may be implicated by other structural and historical processes – including colonialism, historical slavery, and other processes of structural racism.

Although acknowledging that the concepts are related, Rothberg distinguishes ‘implication’ from ‘complicity’ because he argues that complicity is responsibility akin to legal liability and direct causality,¹³ whereas implication is a relational responsibility that goes beyond causality and extends, too, to a temporal responsibility to the past that cannot be accounted for within ‘complicity’.¹⁴ ‘Implicated subjects,’ Rothberg writes, ‘are morally compromised and most definitely attached – often without their conscious knowledge and in the absence of evil intent – to consequential political and economic dynamics.’¹⁵ Complicity means ‘being an accomplice [...] in an evil action’.¹⁶ Implicated subjects occupy positions of privilege and relative power but are not direct agents of harm; neither do they intend evil. Of course, for many players within the institutional contexts of #MeToo, the stronger term *complicity*, with its causal, even legal, implications, will be appropriate – for example, for the many individuals within corporations and associated institutions, who either actively or passively facilitated

¹² Rothberg, p. 20.

¹³ Ibid.

¹⁴ Ibid., p. 11.

¹⁵ Ibid., p. 33.

¹⁶ ‘Complicity’, *Oxford English Dictionary (OED)*. <<https://www-oedcom.proxy.library.uu.nl/view/Entry/37715?redirectedFrom=complicity#eid>> [accessed 2 April 2020].

Weinstein's alleged violence.¹⁷ But for other contexts, the term *implicated subject* is much more helpful.¹⁸

Law is notoriously limited in its ways of thinking through and adjudicating sexual violence. Indeed, the #MeToo movement is in large part an extra-legal response to the inadequacies of liberal law in responding to sexual violence. #MeToo has shown that gendered harm, including but not limited to the harms of sexual violence and harassment, are a normalized part of the operation of liberal institutions. But more needs to be done to interrogate and historicise the concepts and institutions with which we are concerned. We need to bring to the foreground the fact that here, liberal law is not only state law, but colonising law. Approaching #MeToo as implicated subjects means re-thinking both the nature of the harm, and also the institutional settings that are at the focus of #MeToo. In this response to Rothberg's book, I draw widely from across a number of areas of law and politics, focusing on a specifically Australian context, to connect the ways in which historical and contemporary harms against Indigenous women are connected, and how these harms should in turn re-frame #MeToo. This method will be relevant to other colonial contexts.

We are implicated subjects vis-à-vis colonialism, which has shaped both sexual violence and the legal institutions and cultural practices that adjudicate that violence. The focus of #MeToo has tended to be on institutions such as schools, universities and corporations. As implicated subjects, we should expand this focus to include prisons, policing, healthcare, and 'family welfare' services, among other institutions, to dismantle the 'colonial patriarchy'.¹⁹ We need to do more work as part of #MeToo in explicating the role of state violence in shaping sexual violence against Indigenous women. State violence is defined broadly to include everything from obvious state harms such as direct police violence and genocide, to the provision or withdrawal of social services, and the covert use of new technologies of citizen surveillance.²⁰ There is a rich critical history which has proven that

17 See Megan Twohey, Jodi Kantor, Susan Dominus, Jimi Rutenberg and others, 'Weinstein's Complicity Machine', *New York Times*, 5 December 2017 [accessed 28 January 2020].

18 See also Chiara Lepora and Robert E. Goodin, *On Complicity and Compromise* (Oxford: Oxford University Press, 2013); Debarati Sanyal, *Memory and Complicity: Migrations of Holocaust Remembrance* (New York, Fordham University Press, 2015).

19 Eileen Baldry and Chris Cunneen, 'Imprisoned Indigenous Women and the Shadow of Colonial Patriarchy', *Australian and New Zealand Journal of Criminology*, 47.2 (2014), 1-23 (p. 1).

20 M. Gabriela Torres, 'State Violence', in *The Cambridge Handbook of Social Problems*, ed. by A. Javier Treviño (Cambridge: Cambridge University Press, 2018), pp. 381-391.

non-white women and girls are the most vulnerable groups in relation to state violence, due to the intersections of their gender, race, class, and sexuality, resulting in their experiences with physical, sexual, institutional and state violence.²¹ The institutional contexts of #MeToo – not only the legal institutions it seeks to side-step, but the wider corporate and cultural liberal institutions #MeToo invokes – carry specifically colonial legacies.

Sexual violence and sexual harassment are not epiphenomenal. Ultimately, the disproportionately high rates of sexual violence against Indigenous women in Australia are the direct effect of gendered, colonial violence against Indigenous women. Although it is reported that finding reliable data on the nature and extent of sexual violence against Indigenous Australians is difficult, it is estimated that Indigenous women are *twelve times more likely* to be victims or survivors of assault than non-Indigenous women.²² A number of factors have led to this appalling statistic, including systemic racism and poverty, and the understandable unwillingness of Indigenous women to access state services, including the police, because of the wider state violence towards Indigenous people. These colonial histories are not brought out by the individual call-and-response approach of much of #MeToo, but require attention to specific structures and histories of power in Australian political and legal life – to processes that have combined, at their limits, to criminalize, impoverish, and kill Aboriginal women. #MeToo asserts an extra-legal jurisdiction in adjudicating sexual violence. #MeToo also calls on processes of the state (for example, the legal cases that follow #MeToo call and response claims). In doing this, it is important to think through the consequences of this re-imagining for Indigenous women, and questions of Indigenous law and sovereignty – questions that challenge the authority of the common law and state at their core.

Non-Indigenous people must responsibly hold positions as implicated subjects within #MeToo by deconstructing the nature of ‘sexual violence,’ ‘sexual harassment,’ and ‘sexual harm,’ and re-conceptualizing the nature of ‘harm’ in colonized spaces. It simply does not make sense to separate out sexual acts as pinpoints of harm, as though these

21 See Patricia Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (New York: Routledge, 2000); Kimberlee Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’, *Stanford Law Review*, 43 (1991), 1241–1299; Beth Richie, *Arrested Justice: Black Women, Violence, and America's Prison Nation* (New York: New York University Press, 2012).

22 Janya McCalman and others, ‘Responding to Indigenous Australian Sexual Assault: A Systematic Review of the Literature’, *SAGE Open*, 4.1 (2014), 1–13 (p. 1).

could be separated from a network of harms. Per capita, Indigenous Australians are the most incarcerated people in the world.²³ According to research by Sisters Inside, an advocacy group for Australian women in prison, up to 90% of women in prison have been sexually abused and 98% have experienced violence.²⁴ Indigenous women are seventeen times more likely to die from homicide compared to non-Indigenous women.²⁵ #MeToo in Australia should be framed to foreground the significance of colonial violence to understanding sexual violence.

The State's Instrumentalization of Its Adjudication of Sexual Violence

It is also imperative that we keep in mind the recent history of state instrumentalization of sexual harm against Indigenous subjects, and how the state continues to use narratives of harm to justify violent assaults on Indigenous sovereignty, particularly the recent Northern Territory Intervention in 2007 ('the Intervention') and its subsequent updating through the Stronger Futures legislation in 2012. Given the legal and political overdetermination of the figure of the raped Indigenous child/woman, it is difficult for Indigenous women to disclose violence to the state, without that disclosure inviting further state violence. The interconnectedness of this colonial violence needs to be read as part of #MeToo.

I want to take as a case study the recent reckoning of historical harms caused by the state and other institutions to survivors of the Stolen Generations and how this should be understood within the framework of #MeToo via the lens of the implicated subject. Between 1995 and 1997, an Australian federal government agency, the Human Rights and Equal Opportunity Commission (HREOC), conducted an inquiry into the forcible removal of Aboriginal children from their parents – widespread practices that had been carried out by both state and private organisations under the auspices of state and federal legislative regimes. HREOC's final report, *Bringing Them Home*, published

23 Thalia Anthony, 'FactCheck Q&A: Are Indigenous Australians the Most Incarcerated People on Earth?', *The Conversation*, 6 June 2017, <<https://theconversation.com/factcheck-qanda-are-indigenous-australians-the-most-incarcerated-people-on-earth-78528>> [accessed 28 January 2020].

24 See Suzi Quixley and Debbie Kilroy, *Working with Criminalised and Marginalised Women: A Starting Point*, 2nd edn (Brisbane: Sisters Inside, 2011).

25 Hannah McGlad, 'Indigenous Femicide and the Killing State', *Deathscapes*, <<https://www.deathscapes.org/case-studies/indigenous-femicide-and-the-killing-state-in-progress>> [accessed 28 January 2020].

in 1997, found that from approximately 1910 to 1970, between one and three of every ten Indigenous children had been forcibly removed from their families, and that this had led to ongoing physical and psychological harms.²⁶ Sexual violence was noted as one of the many harms caused to survivors: in the course of its inquiry, the HREOC heard evidence from a number of witnesses who reported sexual abuse.²⁷ In *Bringing Them Home*, HREOC stated that ‘children in every placement were vulnerable to sexual abuse and exploitation’;²⁸ despite not being directly asked about experiences of sexual abuse during the extensive interviews, out of sensitivity to interviewees’ experiences, approximately 30% of girls volunteered that they had experienced sexual abuse in foster families and 11% volunteered that they had experienced sexual abuse in institutions.²⁹

Bringing Them Home concluded that the forcible removal of Indigenous children constituted cultural genocide under the United Nations Genocide Convention 1948 (ratified by Australia in 1949) and customary international law.³⁰ It recommended the use of the United Nations’ van Boven Principles for Victims of Gross Violations of Human Rights, including a full range of reparation measures, such as restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.³¹ *Bringing Them Home* also recommended that a reparations scheme be adopted to deal with compensation arising from harms suffered by the Stolen Generations, and that there be a national apology.³² But despite these important recommendations, no federal reparations scheme has been put in place. It is so important that this still be done, to compensate survivors for the racist removal policies of the past and also for the injuries of sexual, emotional and physical violence documented in *Bringing Them Home*.

Following the failure of the state to implement key recommendations of the *Bringing Them Home* report, survivors of the Stolen Generations brought claims at common law. The Federal Court denied claims for compensation in *Kruger v. Commonwealth* (1997), in *Williams v. The*

26 Meredith Wilkie, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sydney: Commonwealth of Australia, 1997), p. 308.

27 Wilkie, pp. 140–144.

28 *Ibid.*, p. 140.

29 *Ibid.*, p. 141.

30 *Ibid.*, pp. 308–9.

31 *Ibid.*

32 *Ibid.*

Minister (1999), and again in the *Cubillo* case (2000). *South Australia v. Lampard-Trevorrow* (2010), where the court dismissed the State's appeal against the decision of Gray J. in *Trevorrow v. South Australia (No. 5)* (2007), is the only successful Stolen Generations case, while Tasmania has been the sole state to create a compensation fund for members of the Stolen Generations.³³ The Western Australian Supreme Court recently denied a claim for compensation in *Collard v. The State of Western Australia (No. 4)* (2013). In February 2001, Valerie Linow, a survivor of the Stolen Generations and of sexual assault, tried to claim for her injuries through the New South Wales Victims Compensation Tribunal. Linow was unsuccessful initially, but successful on appeal, and her journey through the system is significant for the ways in which the state interpreted the intersection between her harms. The facts were as follows:

Valerie Linow was taken from her mother at the age of two and placed in the Bombaderry Children's home. In 1958, at age 16 she was placed by the Aborigines Welfare Board with a family of four children as a domestic worker. During her six months in this placement she was sexually assaulted and thrashed with barbed wire 'by a white man who ran the station' and who was a member of the household in which she now lived. The applicant ran away from the house and informed the authorities of the assaults. The police investigated the allegations but found insufficient evidence to pursue the matter. The matron of Cootamundra Girls Home, where she was residing prior to the placement and to where she returned after the assaults, wrote to the Welfare Board saying she had not made Linow return to the placement 'for fear' that her allegations were true.³⁴

Valerie Linow lodged an application in the NSW Victims Compensation Tribunal in February 2001 for sexual assaults that occurred between May and October 1958. These were outside the two-year limitation period under s26(1) of the relevant legislation but leave was granted for the matter to be determined by the Tribunal. However, on 15 February 2002, her application for compensation was dismissed by the Tribunal.³⁵ The reasoning given was extraordinary: while the Assessor accepted

33 See Honni van Rijswijk and Thalia Anthony, 'Can the Common Law Adjudicate Historical Suffering? Evaluating *South Australia v Lampard-Trevorrow* (2010)', *Melbourne University Law Review*, 36.2 (2012), 618-655.

34 Christine Foster, 'The Stolen Generation and the Victims Compensation Tribunal: The 'Writing in' of Aboriginality to 'Write out' a Right to Compensatory Redress for Sexual Assault', *University of the New South Wales Law Journal*, 25.1 (2002), 185-193 (pp. 185-6).

35 Chris Cunneen and Julia Grix, 'The Stolen Generations and Individual Criminal Victimization: Valerie Linow and the New South Wales Victims Compensation Tribunal', *Current Issues in Criminal Justice*, 14.3, (2003), 306-309, (p. 306).

that Linow had been sexually assaulted, the Assessor was not satisfied that her injuries were caused by the assaults, due to the fact that she had suffered previous harm as a result of being removed from her parents as a member of the Stolen Generations.³⁶ Alexis Goodstone, Linow's solicitor, expressed the Assessor's opinion as follows:

the claim failed because the effects of the removal from her family had caused such extreme psychological harm that the subsequent sexual assaults did not, in the view of the Assessor, cause Mrs Linow harm.³⁷

The Assessor's determination was appealed and set aside in August 2002.³⁸

Here, Linow's suffering is judged as regrettable and met with sympathy, but is also characterized as 'personal' and aberrant. Further, and most importantly, her suffering is not connected to questions of sovereignty. Issues of Aboriginal sovereignty have tended to be kept separate from the adjudication of colonial and contemporary harms in political and legal discourses these are practices of legal thinking and legal action with which lawyers are complicit. But the refusal of the colonial state to recognise Aboriginal law and sovereignty is key to all aspects of Aboriginal harms, including harms that have been ascribed as individual or personal. Lack of sovereignty manifests in real ways as injury and illness. For example, the state's violence adjudications in the Intervention involves the exclusion of Aboriginal sovereignty. This is a point that is often lost, as sovereignty is more commonly thought of as an issue associated with land claims, rather than of personal harm, and the effects of this artificial division are gendered. As such, the exclusion of sovereignty as an issue to be accounted for in sexual violence forms part of the problematic gendering of Indigenous sovereignty. Sexual violence is in fact structurally connected to state practices of incarceration and punishment, to poverty, abuse of the rule of law, and to colonial histories of forced assimilation. As lawyers and legal theorists, we are implicated subjects in the habits that have brought law to this point. We need to bring out these implicated histories in law to reframe #MeToo in colonial contexts.

³⁶ Cunneen and Grix, p. 307.

³⁷ Alexis Goodstone, 'Stolen Generations Victory', *PIAC Bulletin*, 16.1 (2002), 10-11.

³⁸ Cunneen and Grix, p. 307.

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Dr Honni van Rijswijk is a Senior Lecturer in the Faculty of Law, University of Technology Sydney, Australia. She has published on feminist theories of harm, formulations of responsibility in law and literature, the role of history in the common law, and on questions of justice relating to the Stolen Generations. Honni is currently writing a monograph, *Law and the Girl: Gender, Genre, Violence*.