

FOREWORD

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I am honoured to have been asked to write a foreword for this issue of the *Journal*, which I understand is the first issue of the *University of New South Wales Law Journal* that has focused expressly on gender issues.

It seems very fitting for me to be writing this for the journal of the law school where I first started teaching in the area of gender and law. It is coming up to 30 years since Law and Gender was first taught as a subject in the UNSW Law School's LLB program (1987). Three years later, Jenny Morgan and I published a book that at least in part developed out of our creating teaching materials for that course, *The Hidden Gender of Law* (Federation Press, first published 1990, 2nd ed 2002). In fact, 1990 also saw the publication of some other Australian feminist legal monographs: Margaret Thornton's *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) and Ngaire Naffine's *Law and the Sexes: Explorations in Feminist Jurisprudence* (Allen & Unwin, 1990), as well as a number of other books.¹ The 25th anniversary of that bumper publishing year was celebrated last year at a number of events, as well as in the *Australian Feminist Law Journal* ('AFLJ') last year with particular focus on those three monographs.²

I should point out that at the time these books were published, the journal I referred to, the *AFLJ*, had not yet been established, though prior to its launch in 1993,³ various Australian law journals had published thematic issues focusing on gender.⁴

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1 See, eg, Carol Lee Bacchi, *Same Difference: Feminism and Sexual Difference* (Allen & Unwin, 1990); Regina Graycar (ed), *Dissenting Opinions: Feminist Explorations in Law and Society* (Allen & Unwin, 1990); Jocelyne Scutt, *Women and the Law: Commentary and Materials* (Lawbook, 1990).

2 See Ann Genovese, 'Occasions and Events: Australian Feminist Jurisprudence at 25' (2015) 41 *Australian Feminist Law Journal* 1; Rosemary Hunter, 'Three Landmark Feminist Legal Texts: Personal and Political' (2015) 41 *Australian Feminist Law Journal* 37; Ngaire Naffine and Mary Heath, 'On Law and the Sexes: A Conversation' (2015) 41 *Australian Feminist Law Journal* 19; Margaret Thornton and Ann Genovese, 'On The Liberal Promise: A Conversation' (2015) 41 *Australian Feminist Law Journal* 3; Reg Graycar and Jenny Morgan, 'The Hidden Gender of Law: A Public Talk' (2015) 41 *Australian Feminist Law Journal* 29.

3 See *Australian Feminist Law Journal – List of Issues* <<http://www.tandfonline.com/loi/rfem20#>>.

4 See, eg, Hilary Astor, Belinda Bennett and Penelope Pether, 'Foreword – Engendering New Law Stories: Feminist Legal Theories and Praxis' (1996) 18 *Sydney Law Review* 421.

There were, however, a number of international publications available at that time from which those of us working in the area drew some inspiration: these included the *Harvard Women's Law Journal* (subsequently renamed the *Harvard Journal of Law and Gender*), a journal that describes itself as 'the nation's oldest continuously publishing feminist law journal';⁵ the *Yale Journal of Law and Feminism* which started in 1987;⁶ and the *Canadian Journal of Women and the Law*, which its publisher, University of Toronto Press, notes was founded in 1985, the same year that the equality guarantee of the Canadian Charter of Rights and Freedoms came into force.⁷ This is by no means intended to be an exhaustive list, but merely illustrative of the fact that there was at that time a burgeoning growth of feminist scholarship within law. Even the Australian Law Teachers' Association Annual conference in 1988 marked this by having a number of panels on feminist legal scholarship and inviting legendary United States feminist legal scholar, Catharine MacKinnon, to give a keynote address.⁸

In the *AFLJ* retrospective on the 1990 books, we were asked about aspects of our own intellectual histories and it may be of some relevance that Jenny Morgan and I had undertaken our postgraduate legal studies, respectively, at Yale and Harvard Law Schools, both of which had established pioneering journals on gender and law. I had also spent periods of sabbatical leave in the United Kingdom in 1985/86 (where I worked with a group of women who would go on to found *Feminist Legal Studies*⁹ in 1993), and in Canada in 1989, before we published *The Hidden Gender of Law*.

We also need to recall that the books published in 1990 were researched and written at a time when the internet was barely in existence and certainly not in use in Australian law schools. Thus at the time we commenced our work, we were confined to consulting paper journals and books, and relied on hard copy indexes in law libraries, such as the *Index to Legal Periodicals*. Indeed, we noted in the beginning of the first edition of *Hidden Gender of Law* that when we commenced our work on the book there was no category in that publication for the work we were doing:¹⁰ that was something that changed only in 1988 when the *Index to Legal Periodicals* added 'feminist jurisprudence' to its list of subject headings.

This brief historical background may help to locate the wonderful articles that this journal is now featuring in the current issue. Shelley Bielefeld's article

5 Deanna Parrish and Suria Bahadue, *About JLG*, Harvard Journal of Law and Gender <<http://harvardjlg.com/>>.

6 Yale Journal of Law and Feminism, *About Us* <<https://www.law.yale.edu/student-life/student-journals-and-publications/yale-journal-law-feminism>>.

7 University of Toronto Press, *Journal Profile – Canadian Journal of Women and the Law* <<http://www.utpjournals.press/loi/cjwl>>.

8 This was very much the work of a group of feminist legal scholars then teaching at Sydney Law School, but it would not have happened without the strong support of the then Dean, Professor and later Judge Colin Phegan.

9 See Springer International Publishing, *Feminist Legal Studies: Browse Volumes and Issues* <<http://link.springer.com/journal/10691>>.

10 Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 1990) 2.

about income management and its particularly harsh gendered consequences for indigenous women provides a timely reminder of a significant shift that occurred in feminist legal scholarship. I am referring here to the shift from the early tendency to write about ‘women’ as some loose, undifferentiated group, to the key understanding that women, while they might broadly share some elements of their subordinate gendered status, are as varied as it is possible to be – they are differentiated by, among other things, race, by class, by sexual orientation or gender identity, by religion, and by physical ability. It seems unimaginable now that it was only in 1989 that we were first introduced to the concept of intersectionality by Kimberlé Crenshaw¹¹ in her now famous articles ‘Demarginalizing the Intersection of Race and Sex’¹² in 1989, and, in 1991, ‘Mapping the Margins’.¹³

Of course, we had always known that women were not the same, but ‘intersectionality’ gave us a language in which to express that phenomenon, a clear label that conveyed that central concept, just as Catharine MacKinnon once explained, in relation to sexual harassment: ‘[s]exual harassment, the event, is not new to women. It is the law of injuries that it is new to’.¹⁴

Kate Gleeson’s article, ‘Responsibility and Redress: Theorising Gender Justice in the Context of Catholic Clerical Child Sexual Abuse in Ireland and Australia’, which looks at child sexual abuse and the Catholic Church, also reminds us both of the history of gendered harms¹⁵ and of the centrality of religion to the experiences of women and girls. It is particularly timely in light of the work of the Royal Commission Into Institutional Responses to Child Sexual Abuse,¹⁶ which has garnered considerable public attention and which, it is widely hoped, will result in at least a recommendation of some redress scheme.

There is a widespread history of gendered harms, such as the abuse of young women in institutional care, not only in the Catholic Church, and that history has prompted some attempts to reimagine redress from a feminist perspective. There has been at least one adjudication process developed under an agreement between the Ontario Government in Canada and a group of women survivors of

- 11 For a recent media discussion of the ongoing impact of Professor Crenshaw’s work, and the importance of intersectionality to a key contemporary issue in the United States, see Homa Khaleeli, ‘#SayHerName: Why Kimberlé Crenshaw is Fighting for Forgotten Women’, *The Guardian* (online), 31 May 2016 <<http://www.theguardian.com/lifeandstyle/2016/may/30/sayhername-why-kimberle-crenshaw-is-fighting-for-forgotten-women>>.
- 12 Kimberlé Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) 1 *University of Chicago Legal Forum* 139.
- 13 Kimberlé Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ (1991) 43 *Stanford Law Review* 1241.
- 14 Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) 103.
- 15 On the concept of ‘gendered harms’, see Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2nd ed, 2002) pt 4.
- 16 Royal Commission into Institutional Responses to Child Sexual Abuse <<http://childabuseroyal.commission.gov.au>>.

abuse, which was expressly designed by those women as a consciously feminist process.¹⁷ We wait with interest for the outcome of the Royal Commission.

Rape myths¹⁸ and their resistance to law reform are the focus of the fascinating, empirically based article by Emma Henderson and Kirsty Duncanson, 'A Little Judicial Direction'. Through their careful study of the consequences of how judges explain things to juries, and, in particular, the stages of the trial at which they do so, they leave open the possibility of some cautious optimism that legal change is possible even in an area that has been as resistant to intervention as rape or sexual assault law has historically been.¹⁹

Aileen Kennedy's 'Fixed at Birth' is a timely reminder of the historically immutable gender binary that has so permeated legal discourses. However, that binary is now being challenged, not only in political struggles such as those taking place in the US state of North Carolina in relation to its 'bathroom law',²⁰ but also via court challenges such as that which culminated in our own High Court concluding its judgment in *NSW Registrar of Births, Deaths and Marriages v Norrie* by stating that '[t]he [*Births, Deaths and Marriages Registration Act 1995* (NSW)] itself recognises that a person may be other than male or female and therefore may be taken to permit the registration sought, as "non-specific"'.²¹

Roseanna Bricknell writes about the phenomenon of employer-sponsored oocyte cryopreservation, a very 21st century form of control over women's bodies, a key concern of feminist legal scholarship since its inception. Women's bodies and, in particular, their right to control reproduction remain contested sites, and it was both timely and sobering to be reminded in June 2016 by the Dean of this law school that abortion remains a crime in NSW, subject only to a common law defence of necessity.²²

17 See Reg Graycar and Jane Wangmann, 'Redress Packages for Institutional Child Abuse: Exploring the Grandview Agreement as a Case Study in 'Alternative' Dispute Resolution' (Legal Studies Research Paper No 07/50, Sydney Law School, July 2007); Reg Graycar, 'A Feminist Adjudication Process: Is There Such a Thing?' in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Hart Publishing, 2013) 435.

18 One of the most powerful discussions of how rape myths play out in sexual assault trials, to which the authors refer, is Alison Young, 'The Waste Land of the Law, the Wordless Song of the Rape Victim' (1998) 22 *Melbourne University Law Review* 442.

19 See Julie Stubbs, 'Sexual Assault, Criminal Justice and Law and Order' (2003) 14 *Women Against Violence* 14–26; Reg Graycar and Jenny Morgan, 'Law Reform: What's in It for Women?' (2005) 23 *Windsor Yearbook of Access to Justice* 393.

20 *Public Facilities, Privacy and Security Act*, 2016 NC Sess Laws 3. See Joe Sterling, Eliott C McLaughlin and Joshua Berlinger, 'North Carolina, US, Square Off over Transgender Rights', *CNN Politics* (online), 10 May 2016 <<http://www.cnn.com/2016/05/09/politics/north-carolina-hb2-justice-department-deadline/>>.

21 *New South Wales Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, 501 [46] (The Court). Note that Norrie's case was not about 'intersex' but nonetheless central to challenging binary notions of gender.

22 See George Williams, 'NSW Lags Way Behind on Updating Its Abortion Laws', *The Sydney Morning Herald* (online), 13 June 2016 <<http://www.smh.com.au/comment/nsw-lags-way-behind-on-updating-its-abortion-laws-20160610-gpganw.html>>; *Crimes Act 1900* (NSW), ss 82–4.

Each of these articles raises an important legal issue and one of central concern to women. But it is also important to note that many areas of law that do not at first sight involve women have highly gendered consequences. We have always recognised the gendered nature of family law or sexual assault law, perhaps because the women participants in those areas of law are highly visible. However prior to Hilary Charlesworth, Christine Chinkin and Shelley Wright (all three of whom were at that time working in Australia) winning the American Society of International Law's Francis Deák Prize for their article 'Feminist Approaches to International Law', few outside the world of feminist legal scholarship would have thought of that field of law having a gendered dimension.²³ One of the key themes of *The Hidden Gender of Law* was to suggest that legal categories themselves were gendered. We sought to challenge not only those categories themselves, but also the ways in which they served to limit what were perceived as 'gender issues' in legal discourses.²⁴

This issue of the *Journal* is being published just after an election in Australia, and in the lead-up to an election in the United States that is raising the possibility for the first time of a woman becoming the President of the United States. As I watch that campaign and see the frequent appearances of Senator Elizabeth Warren, named one of *TIME Magazine's* 100 Most Influential People in the World in 2009, 2010 and 2015, and who some have suggested might become Hillary Clinton's running mate, I am often reminded of Senator Warren's important contribution to feminist legal scholarship in her former life as a Harvard Law Professor. In 2002, in a 25th anniversary issue of the *Harvard Women's Law Journal* (subsequently renamed the *Harvard Journal of Law and Gender*), then Professor Warren published 'What Is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics'.²⁵ In that article she said:

Some issues tied to physical differences between the sexes – abortion, birth control, sexual assault, breast cancer – are clearly labeled women's issues. Other issues close to the hearts of many women – child abuse, child care, elder care, child custody, women in poverty – also make it to the top of the list. Economic issues focusing on equality – equal pay for equal work, equal employment opportunity, equal educational opportunity – all find their champions as well. But business and economic topics are often overlooked. Even when women's groups become involved, these issues never seem to become a priority. Moreover, when business topics are on the agenda there is often a well-funded business group pressing for its own interests, drowning out the voices of women.²⁶

Her particular example in that article was a bankruptcy bill that women's groups, who were being ignored, had argued would further impoverish women

23 Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613.

24 For a discussion of a project aimed at creating teaching materials to raise gender issues in areas of law not traditionally seen as gendered, see Reg Graycar and Jenny Morgan, 'Legal Categories, Women's Lives and the Law Curriculum – Or: Making Gender Examinable?' (1996) 18 *Sydney Law Review* 431.

25 Elizabeth Warren, 'What Is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics' (2002) 25 *Harvard Women's Law Journal* 19.

26 *Ibid* 23.

and their children disproportionately. This of course has resonance with Shelley Bielefeld reminding us that, despite the Australian Law Reform Commission pointing out the disproportionate impact income management would have on indigenous women, that concern gained no traction in the debate.

The *UNSW Law Journal* has much to be proud of with this wonderful publication. It is both a great achievement in itself, and may also be the start of an ongoing conversation where the 'gender question' is asked in all areas of law and continues to appear regularly not only in special issues, but in all issues of the *UNSW Law Journal*.