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## **How We Keep Our Pens Mighty by Bri Lee**

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I travel around this beautiful country speaking about issues of law and sexual violence, and I cannot do so without acknowledging that Aboriginal and Torres Strait Islander women are three times as likely as non-Indigenous women to have experienced violence; that despite Aboriginal and Torres Strait Islanders over the age of 18 making up around 2 per cent of our population, they represent 28 per cent of total prisoner population; that we are seeing absolutely no improvements in the rates of Aboriginal deaths in custody and that half of those deaths are of prisoners not even found guilty.

I wrote *Eggshell Skull* because I knew I was getting the red-carpet treatment from the law, and it still nearly broke me. I'm white, English is my first language, I'm able-bodied, I've got steady work and housing, my dad used to be a cop, I'm literally a lawyer, and my matter only took two years, where many take three or four or five, and still there were times I wanted to die, when I came close to dropping the charges. I don't know how we expect people who didn't have what I have to go through that system.

I was a judges associate in the Queensland District Court for one year, in 2015. The judge I worked for did mostly criminal law, and in the District Court that means sex offences. Every week was another trial and a handful of new sentences for either child sexual abuse or adult sexual assault. That time became the first half of *Eggshell Skull*. When I started that job I was fresh out of university and though I loved reading and writing, was quite sure I'd go on to practise law. As an associate you are responsible for many miscellaneous tasks in the courtroom—pulling jurors' names out of the barrel, marking exhibits of evidence—and you also keep a meticulous record of the minutes of each proceeding. Within about a fortnight I was carrying around a notebook of my own, though, a simultaneous and silent commentary. Scraps of dialogue, faces and impressions, sketches of a barrister's shiny dollar sign cufflinks, feelings and thoughts.

I was so shocked by what I was seeing, and yet was always the youngest and most inexperienced person in the room. Not only the descriptions of the alleged offending and the witnesses' testimonies, but also seeing the greasy, rusty cogs of our legal system from the inside. The irony I felt in that role was that although every single part of a legal proceeding was scrupulously recorded, nobody was bearing witness. Seeing the way sexual harassment is rife in the legal profession, and how we're not even remotely close to our judiciary being representative of our population, but then also seeing how the people who made laws and practised law affected the way the law was done. That the system is as fallible as the humans who created it. That there is no such thing as objectivity or impartiality, and that justice is

never blind. That it is one thing to acknowledge with a begrudging nod that ‘the bar might be a bit of a boys’ club’ and another entirely to examine a legal system drafted in a time when women and children were under the dominion of men; then clearly to say that this system, our system, still has not caught up. And of course there was also that problem that I had survived an incident of child sexual abuse.

There are no comprehensive systems in place for people who work in the courts to deal with vicarious trauma. NSW chief magistrate Graeme Henson recently told ABC News that there was an image he would never be able to forget, of a ‘a baby lying in a cot covered with faeces and crawling in cockroaches’. Two Melbourne magistrates, Jacinta Dwyer and Stephen Myall, took their own lives in 2017 and 2018 respectively. Judge Henson has shown great leadership in speaking about issues of vicarious trauma. ‘There’s a difference between the city and the country,’ he also said, noting the increased workload and isolation when you’re out in the regions.

My judge and I went to half a dozen different places—Gladstone, Roma, Gympie, Bundaberg—for two weeks at a time, and it was definitely in those stretches, when I was away from my friends and partner and family, that I struggled the most with what are now abundantly clear to me as PTSD symptoms. At the time, though, of course, I simply couldn’t hack it.

Towards the end of the year I decided to go to the police and make a complaint about my own matter. The only way I can describe the feeling I had once I started that process is by likening it to the realisation that you’ve been looking at a scene through a lens zoomed in, and then suddenly you’ve zoomed out and seen the full picture. I thought the trials I had been seeing were the worst bits. That two days of cross-examination was the ordeal. Then, when I walked into the police station, stripped of my robes and ceremony, things got hard really fast.

I knew two things almost immediately: first, that not many people who were qualified to practise law had ever seen the reality of the experience of a survivor trying to access justice; and second, that even fewer would be willing to torch their careers to speak openly about it. By this time the notebook I had been keeping had grown into a bursting folder of material, and my own internal struggle had grown into seriously masochistic and unsustainable habits.

What I found, though, in those deep dark places, is that it feels good to fight for yourself. And what I discovered, by writing my two-year investigation, as it happened, was the power of words; the monumental ramifications of who gets to speak and whose stories are believed.

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On the afternoon of Tuesday 9 July 2019 the Queensland attorney-general referred consent and ‘mistake of fact’ to the Law Reform Commission. Before that announcement I was trying

to find the right words for how I felt when I saw a post on Facebook that was written by a defence barrister, talking about our fight to have consent and ‘mistake of fact’ referred to the Law Reform Commission. The post had been shared by another defence lawyer, one I knew from my brief time in the courts. It didn’t mention me by name, but it called the campaign ‘alarmist’ and criticised those who had spoken out for not really understanding the situation because we’d never practised criminal law.

And I cried myself to sleep on Monday night because I’m still afraid of adults calling me ‘stupid’, and I cried again on the morning of Tuesday the ninth when I woke up because I felt that ‘alarmist’ was synonymous with ‘attention-seeking’ and ‘false’, and that maybe people thought I was pushing for this campaign and putting my face in the paper because I wanted attention. And honestly, that was one of my greatest fears when I reported my own matter. That language is what kept me from reporting for years.

What I’ve learned in the 18 months of advocacy since my book came out, is that people don’t give a shit about an issue unless they can see a face. Consent was referred to the Law Reform Commission in New South Wales because Saxon Mullins was willing to speak to *Four Corners*. I lost count of the number of times I tried to get journalists and media outlets to listen to what we were fighting for in Queensland, and them asking me if I had a ‘survivor who was willing to speak out’ or a ‘case study’. The best angle was often to co-opt my own distressing history, which had nothing to do with consent, but which allowed for headlines and headshots: fresh traumatic meat to throw to the content-hungry hoards.

Narratives bring out the best and the worst in us. We hear a story of two people and a hero is incredible and a villain is awful. What heights we can reach, and how low we might go. Joan Didion wrote, ‘We tell ourselves stories in order to live,’ and it’s true. It’s people. It’s stories. It’s myths and legends and identities.

But stories trap us, too. Waves and waves of one type of truth, lapping over us for centuries, create deep rivers of ideology. Myths and legends and identities are extremely difficult banks from which to try to burst free. Until the 1980s in Queensland husbands were entitled to their wives’ bodies, it wasn’t until the 1990s that we started getting decent definitions of ‘consent’ in legislation, and until the early 2000s priests were considered untouchable by society and the law, enjoying free range over our children, with institutional protection.

I probably wouldn’t have started pushing for law reform in Queensland I known how long it might take, what it might take from me, and how hard it would be to stick my neck out when I knew who was coming for my head. That’s exactly the feeling I had with my own trial. As the second year of my investigation dragged on, in 2017, I really couldn’t tell you for sure that I could keep going, or that I would have jumped in the deep end if I knew how far down I’d have to go before I could touch the bottom.

We cling to stories. They are the only way we seem to be able to feel and learn. But when we expect and demand that people with stories to tell are the ones who must advocate for change, we are cruel. Rosie Batty's son, Luke, was murdered by his father, and yet we ask her to solve domestic and family violence. Why do we need her story to care that a woman a week is killed by her current or former partner? Behrouz Boochani is an innocent man trapped by the Australian Government in a hellish prison. Why do we need to hear his story to care about the rights of refugees and the human rights violations of off-shore processing? Why is Jordon Steele-John, who uses a wheelchair due to cerebral palsy, the loudest and sometimes only voice for disability rights in parliament? Why do we do this? Why does the #MeToo movement rely on fresh, raw recountings of trauma for oxygen for its flames?

It's because we are addicted to story, because we cannot make sense of this crazy world without narrative.

You know what really sucks? I hate conflict. It gives me belly churns, and I have awful nightmares where I wake up gasping and sweating. I see some people who love the scrap, love debating. I don't. If I feel I have been misunderstood or misrepresented it eats at me for weeks. And you know what else? If you want to make change you have to be prepared to make enemies. And if you're trying to change a system, then the people who benefit from that system, who are rich and powerful and influential in that system, will be the ones you are pitted against. So where does that leave us? We want the stories, and so we make the survivors turn around and walk back into the ring?

Every time I go on *The Drum* I sweat through the entire underarm section of my sensible black blouse. The man who molested me hired a solicitor and barrister before he was even charged, as he is rightly entitled to do, but their conduct made my life hell for two years, and in cross-examination I was called a liar, and now, to try to change the system, I am the one with the story, and so I'm the one getting calls to go on live television and do events opposite barristers. I'm the one whose Facebook page they shit all over with comments about my 'inexperience'.

All this for story. All this for narrative.

I think back to Jessica, the woman whose case I saw and described in my book. The man she accused of raping her had left the state when she immediately raised the alarm, and then he told a healthcare worker in New South Wales that he had raped a woman in Brisbane, mistakenly thinking he was covered by privilege. The jury heard all that, and it was already Jessica's second time going through a trial, and she was cross-examined on what medication she was on and what she was wearing, and she was nervous and not coming across well, and then she apologised and said, 'Sorry, this is the most public speaking I've ever done.' I thought of her countless times during the year until we got to 9 July, because the defendant's

barrister mounted a successful ‘mistake of fact’ defence, because a second jury couldn’t convict that man, and because I will never know what happened to Jessica.

So what does it mean that some people’s first time speaking in public is at their own rape trial? What do you think it means when powerful men can afford the best lawyers and strong-arm survivors into non-disclosure agreements when they make civil law claims for sexual harassment?

What does it mean that Indigenous literacy rates in this country are so dire that only 34 per cent of Indigenous year five students in very remote areas are at national minimum reading standards, and yet when the entire Indigenous community came together and told us what they want, and how they can heal, we said the Uluru Statement from the Heart was an impossibility? Why do you think the government doesn’t like imprisoned asylum seekers on Manus Island having mobile phones? Because if they have communication devices, like Behrouz, they use them to write books, insist we recognise their humanity, and then they win our nation’s richest literary awards.

Before we can ask how we might keep our pens mighty we must first ask who is even allowed a voice, and in which forums.

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I will never forget the precise moment I decided to try to get justice for myself. We were in Warwick, and a man had just read out his victim impact statement to the court, and his wife was there supporting him. Decades earlier, when he was a teenager, his stepfather abused him quite horrifically, and he had just had that man convicted on all counts. And he was so brave reading that letter out. He didn’t know I was there listening the way I was, but I will never forget him. The only two parts of my story that make me cry any more are thinking of him, and thinking of the moment I watched the jury re-enter the courtroom when they were about to deliver a verdict.

And what did I learn from him? When I heard his letter, in his words, and he spoke of closure and relief, I learned that the light at the end of the tunnel was possible. And so I went back to Brisbane and went to the police for my matter. And then I wrote a book, and now I am the beneficiary of countless correspondence from people who have read it and gone on to fight for themselves. For some it meant telling a partner or family member for the first time. For many others it meant going to the police and making a statement, or getting their case reopened. I cannot describe the elation I feel when I think of the offenders out there whose doors are being knocked on, or phones are being called, because that person they thought they could rape all those years ago just read a pink book that made that survivor sufficiently pissed off but also sufficiently hopeful. That is the power of stories and words. That is how they spread to bring out the best in us.

For me, the biggest, most uncomfortable question of the past four years, but particularly the 12 months of advocacy leading to 9 July, is this: who here has money and power, and how are they trying to keep it? Never was my enemy more revealed to me; never was this question more clearly answered, than when I read a list of names of the people who wrote character references for George Pell after he was convicted.

Former prime minister John Howard's letter described Pell as a 'person of both high intelligence and exemplary character', saying he was 'a lively conversationalist who maintains a deep and objective interest in contemporary social and political issues'. John Howard was prime minister the year I was abused. To my knowledge, at least one of my parents, at least once, voted for him. Why did he write that letter? Of all the causes a former PM could take up; of all the individuals who might benefit from his correspondence; of all the ways he could keep his pen mighty? I think he did it because he has power, and he is friends with people who have power, and he would rather believe his powerful friends than consider a world in which people like him—people with power—are questioned or held to account.

Another former prime minister, Tony Abbott, 'called his friend Pell' in support after the verdict. On 9 July our current Prime Minister, Scott Morrison, appeared onstage at a Hillsong Church event beside his friend Brian Houston. During the Royal Commission into Institutional Responses to Child Sexual Abuse, Brian's father, Frank Houston, was found to have abused children, and the NSW police have confirmed that Brian is still under investigation for his role in concealing that abuse. All of this is widely reported on and there is no possible way the Prime Minister is unaware. And it makes me sick.

These powerful people protecting each other's power are a national disgrace, and yet they control our nation. These are the same type of people who discredit survivors speaking out, by using phrases like 'MeToo makes for trial by media' and telling survivors their allegations can't be taken seriously until 'proven in a court of law'. And then, in the single-digit percentage of occasions when a sex crime someone experiences goes all the way to trial and is proven in a court of law, they still support the abuser. What can we do with this information? The complainant, already having suffered the abuse or assault, the most silenced and disempowered, is then further flogged by a legal system in which nobody is there for them.

The fundamental failing of our adversarial system is that defence solicitors and barristers represent the interests of their clients, while the prosecutors serve the interests of the courts. The complainant doesn't get a lawyer. She cannot hire her own lawyer even if she wants to. In a trial she is treated and referred to as a witness, rather than a critical party with stakes in the proceedings like the defendant is. When we talk about civil liberties and the 'right to a fair trial' we normally only consider the defendant's rights, not the complainant's. I will always defend the presumption of innocence. I will always believe in the defendant's

right to representation regardless of their financial status. But there are a million ways in which we could bolster and improve upon the rights of the complainant that do not threaten those of the defendant. The last ten years of procedural and legislative improvements are proof of that.

We decided that it did not compromise the rights of the defendant to stop him from cross-examining the complainant. When we made that improvement we did so because we acknowledged what a retraumatising horror that was. We decided that children and vulnerable witnesses could give evidence via a video link so they didn't have to be in the same room as the defendant, and that this did not compromise the defendant's right to a fair trial either. There are examples from all across this country of some jurisdictions doing certain things better than others, and it is proof that our system was not designed for a world of equals or private crimes, but will limp along in a perpetual state of catch-up. Why? Because the people in power benefit from the status quo. The most vulnerable are forced to punch above their weight round after round, making incremental improvements for those who might come after them.

In supporting consent and 'mistake of fact' being referred to the Queensland Law Reform Commission, retired Supreme Court justice Roslyn Atkinson said the laws in Queensland are 'a hangover from an old attitude reflecting myths about the way women behave'. I am immensely grateful for her Honour adding her respected voice to this debate. The only point on which we differ is that I would say the entire system is a hangover from old attitudes.

Why am I bringing all this up? Because the same imbalance that occurs in courtrooms will be the same one we see and hear when the Law Reform Commission opens for submissions. The Queensland Law Society and the Queensland Bar Association have already been vocal in their support for the status quo, and they will make submissions that have weight and credibility reflecting their experience and power. There is no similar society or association of highly funded and highly trained lawyers representing the interests of complainants. In the greatest ever invocation of the David and Goliath battle, that legend we all so adore, that easy invocation of the Aussie battler identity, we survivors have in our corner the Queensland Women's Legal Service. The chronically underfunded, overworked yet still miraculously effective Women's Legal Service. There will be other organisations and bodies and academics, of course, and they will make excellent submissions, but none will be given the particular weight and credibility of the Bar Association or the Law Society.

The NSW Government is reviewing its consent and 'mistake of fact' legislation, and the NSW Bar Association's submissions were not only to keep the status quo, but in my opinion, to take things a further step back:

the Association considers that a person should not be liable to conviction for a sexual assault in circumstances where he or she honestly believes that there is consent.

Expressing the same point in a different way, the criminal law should not make a person guilty of a sexual assault where, notwithstanding such an honest belief, the accused failed to satisfy some 'objective' standard. It is unjust to make an offender who honestly believed there was consent but lacked reasonable grounds for that belief liable to the same maximum penalty as the offender who knows that consent is absent or is indifferent as to lack of consent.

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The criminal law should not deem an accused to know that there is absence of consent when the accused actually believes that consent is present, even if one reason for that mistaken belief is self-induced intoxication. (pp. 5, 6)

These pens are mighty. They represent the establishment fighting for the establishment. Their submission references countless other judgments and precedents; their arguments supported by laws made decades or centuries earlier by other people in power who look and sound like them. The most common riposte I have heard to our campaign in Queensland—apart from personal attacks—is that these laws are important and fair and must be protected because they have been this way for a long time. It's like we're having different conversations. These laws are now being reviewed because they are outdated. How is it an argument to refer to even older judgments and older laws, as though legal minds in the past had special knowledge that we must adhere to? Unless you're rich and powerful the past is an awful place. I find myself confused, and so I ask, who here has money and power and how are they trying to keep it?

The thing is that in late 2015 when I went to the cops I thought I was taking on a man, and then I suffered the slow and terrible realisation that I was taking on a system. This cruel reckoning is one that all survivors go through if they decide to speak out. When we fight for justice for ourselves we are also fighting an imbalanced adversarial system, funded by an imbalanced department of justice, ruled over by prime ministers who believe a convicted abuser has 'exemplary character'.

One might easily wonder why any of us try at all. I think more of us are trying than ever before because we now have each other's stories. Because the internet has collectivised previously disempowered and disconnected groups of people who now realise their cases are not 'isolated incidents' but patterns of behaviour. Because the church is losing power. Because women are gaining power. Because finally some other people are getting a bit of a say, maybe a voice.



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People often ask me if seeing dozens of defendants in my year as a judge's associate was the thing that finally made me angry enough to speak out and start the advocacy, but it was all the survivors. Every single complainant who took on a system, and a man, which put them through the ringer for years, but who somehow kept fighting. For me, the battle for justice was also one of self-respect; of dignity and the ability to think myself worthy of that fight. In her essay 'On Self-respect', Joan Didion wrote:

The dismal fact is that self-respect has nothing to do with the approval of others—who are, after all, deceived easily enough; has nothing to do with reputation—which, as Rhett Butler told Scarlett O'Hara, is something that people with courage can do without ... However long we postpone it, we eventually lie down alone in that notoriously uncomfortable bed, the one we make ourselves. Whether or not we sleep in it depends, of course, on whether or not we respect ourselves.

And as I have recently made some powerful people cranky, it would seem Rhett Butler and Joan Didion are right, and that the self-respect has nothing to do with reputation.

I think often about the difference between him and me. In the book he is called Samuel, the man who abused me. I think often about how, now that I know the jury believed me, I could have lied a little bit to get him a harsher sentence. The night before the verdict was returned I was thinking about this, and I said to my partner that I knew I had told the whole truth, had been honest about what I could and could not remember, and that I would know for sure, then, if he was acquitted, that the system had failed me.

Samuel, by contrast, was a liar and schemer. He says he was abused as a child, and I believe him in this, because I will not sacrifice my humanity just to spite him, and I like being the kind of person who believes survivors. But knowing this about him, and knowing our respective situations, I think perhaps I could have forgiven him for his offending as a young man, had he not gone on to behave so wholly abhorrently as an older man. To use the tactics, the dodges and the delays that he did; so consistently to accuse me of lying, to refuse to take responsibility for his actions. These are behaviours I cannot abide; this is how I know he and I are different. Didion wrote:

In brief, people with self-respect exhibit a certain toughness, a kind of moral nerve; they display what was once called character, a quality which, although approved in the abstract, sometimes loses ground to other, more instantly negotiable virtues ...

Nonetheless, character—the willingness to accept responsibility for one's own life—is the source from which self-respect springs.

On the afternoon of 9 July 2019 I got a call from ABC reporter Josh Robertson, who had been covering the Queensland campaign. He had been given the exclusive, that the attorney-general and minister for women were about to make an announcement that they were referring consent and the ‘mistake of fact’ defence to the Queensland Law Reform Commission. I made a strange wailing sound and then I hung up and I called my mum. And then as soon as he was free I called my research colleague, Professor Jonathan Crowe, whose hard work had made our evidence-based advocacy possible and who sets incredible standards in allyship. I got a call from the minister for women, thanking me for my work, then I did a piece to camera for ABC News, and then I went and had a beer.

I am only one of many people who fought hard for this referral, and I can only speak to my part of it, but what I know for sure is this: we won this much of the battle with words. I began with the platform provided by my memoir; my story in a book. I did it over a year, with letters, emails and articles. I did it by getting other people to pick up their pens and tell their own stories and write their own letters—all it took was telling them I believed them and that they could make a difference. I did it through research and speeches and off-the-record phone calls. I did it as one of a group of people who, despite the odds, had hope.

Our pens are not mighty with power or money, our pens are not mighty with prestige or institution. My pen is mighty because of my story. And yeah, sometimes it sucks, but that is our steel. We learn our self-respect and when we insist on having our stories heard we are wielding it. And we live in an exhilarating time of individuals speaking truth to power. And my pen is mighty because I used it; we keep our pens mighty simply by using them.