

**ADDRESS AT THE LAUNCH OF THE BOOK "AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW" EDS. HEATHER DOUGLAS, FRANCESCA BARTLETT, TRISH LUKER AND ROSEMARY HUNTER, TUESDAY, 2 DECEMBER 2014, BANCO COURT, LEVEL 3, 415 GEORGE STREET, BRISBANE, 6 PM.**

Thank you, Judge Bradley. Your Honours, distinguished academics, fellow feminists.

The word "feminism" (the "f-word"), as federal MP, Fiona Scott recently noted, "has a PR problem".<sup>1</sup>

The Australian Concise Oxford Dictionary defines "feminism" as "the advocacy of women's rights on the ground of the equality of the sexes." What reasonable person could possibly be offended by the concept of feminism? This is especially so for lawyers for the law is all about rights. Every legal academic, practising lawyer and judge should be proud to be called and to call themselves a feminist. But, sadly, feminism's PR problems mean this is often not so.

I have sometimes mused upon whether the pathological fear of the "f-word" arises from the seldom-used secondary medical meaning of "feminism" also contained in the Australian Concise Oxford Dictionary: "the development of female characteristics in a male person". Is this what has frightened off so many from embracing the label? But whatever the reason, feminism's PR problem is real.

In the foreword to *Australian Feminist Judgments*, the Hon Sally Brown AM notes that during her welcome ceremony as a Family Court judge in 1993, despite being cautioned against using the "f-word", she proudly declared herself a feminist, shocking at least one of her male colleagues.

Two years earlier in Queensland in 1991, the Hon Judge Helen O'Sullivan, also a contributor to this book, similarly used the "f-word" as self-description during her swearing-in ceremony. Some chattering lawyers questioned whether feminist judges could impartially resolve conflicts between male and female litigants or witnesses, as required by their oaths or affirmations of office. Male litigants and witnesses, the chatters argued, could reasonably apprehend they may not get a fair go.

This was not a peculiarly Queensland notion. In the foreword to the 2010 English forerunner to this book, *Feminist Judgments From Theory to Practice*, edited by Rosemary Hunter, Clare McGlynn and Erika Rackley, Baroness Brenda Hale, Deputy President and the only female justice ever appointed to the Supreme Court of the United Kingdom, also questioned "Is it possible to be both a judge and a feminist?"

Feminism's bad PR even pervades academia. The editors of this book, Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter, refer in their introduction to Margaret Thornton's observations that women law students in the mid-2000s in Britain, Canada, New Zealand and Australia did not want the word "feminist" to appear on their academic transcripts in case it interfered with their

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<sup>1</sup> Clementine Ford, "What's so wrong with being a feminist?" *Sydney Morning Herald* (online) 3 November 2014 <<http://www.smh.com.au/comment/whats-so-wrong-with-being-a-feminist-20141103-11g2dw.html>>

employment prospects, and that "merely mentioning the 'f-word' in class is enough for students to sigh and put down their pens".<sup>2</sup>

And, only recently, Australia's first woman foreign minister and presently only female member of federal cabinet, the Hon Julie Bishop, a lawyer, gave an unquestionably feminist address to the National Press Club, launching a "Women in Media" group. When asked about the "f-word", she responded that it was "not a term I find particularly useful these days ... it is not because I have some pathological dislike of the term. I just don't use it ... it's not part of my lexicon."<sup>3</sup> A whole new debate about the "f-word" and its PR problem ensued.

When I spoke at a UQ judgment writing workshop in this project in December 2012, I suggested the answer to Baroness Hale's question, "Is it possible to be both a judge and a feminist?" is "Not only is it possible for judges to be feminists, but if true to their oaths and affirmations of office, arguably context may require all judicial officers, women and men, to be feminists". The judicial oath or affirmation is in largely identical terms throughout the common law world: to sincerely promise and swear or affirm to at all times and in all things do equal justice to the poor and rich and to discharge the duties of office according to law to the best of the judge's knowledge and ability, without fear, favour or affection.<sup>4</sup> How could the contextually appropriate advocating of women's rights on the ground of equality of the sexes result in a reasonable apprehension of bias? There is complete synergy between feminism and the judicial oath.

It is time to "mainstream" the "f-word", especially amongst law students, legal academics, legal practitioners and judicial officers, both male and female. In this respect, I am pleased to see that at least two of the 58 learned contributors to this book are men: Associate Professor Jonathan Crowe from UQ and Wayne Morgan from the ANU College of Law.

But, what is a feminist judgment? This book does not define the term, but I apprehend a feminist judgment contextually advocates for women's rights on the ground of the equality of the sexes; I am confident it does not develop female characteristics in a male person. Advocating for women's rights on the ground of the equality of the sexes is not a discrete women's issue; it is a key human rights concern for all.

Professor Hunter, in the introduction to this book, suggests, and the other editors adopt, the notion that a feminist judge should

- "ask the woman question" and notice the gender implications of apparently gender neutral rules, as well as the implications for other traditionally excluded groups;
- "include women", writing women's experiences into the judgment (both as litigants and collectively) and in the construction of legal rules;

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<sup>2</sup> *Australian Feminist Judgments: Righting and Rewriting Law*, eds Douglas, Bartlett, Luker and Hunter, Hart Publishing, 2014, p 16.

<sup>3</sup> Judith Ireland, "I'm no feminist: Julie Bishop" *Sydney Morning Herald* (online) 29 October 2014 <<http://www.smh.com.au/federal-politics/political-news/im-no-feminist-julie-bishop-20141029-11dn7m.html>>

<sup>4</sup> See, for example, s 3 *Oaths Act* 1867 (Qld).

- challenge gender bias;
- contextualise and particularise, reasoning from context and making individualised rather than categorical or abstract decisions;
- seek to remedy injustice and improve the conditions of women's lives;
- promote substantive equality;
- be open and accountable about the choices made between competing interests; and
- draw on feminist scholarship to inform decisions.

These should be aspirational, unexceptional, contextual targets for all judicial officers, male and female. But the harsh reality is that the temporal pressures flowing from heavy judgment writing loads mean that Australian judicial officers seldom have the luxury to fully explore these matters in their judgments. This is especially so if the parties' arguments have not raised the issue. Nevertheless, those judicial officers who take the time to dip into this book will learn a great deal about how to realise these aspirations.

The book explores 25 significant Australian legal decisions across varying time spans, and legal fields. The 25 re-imagined feminist decisions sometimes, but by no means always have the same outcome as the original, but their legal reasoning is always distinctly feminist. I formed the impression that the feminist judgment writers relished their tasks, had fun along the way, and were satisfied with the final product. Just like real judges! (You can decide if that is irony!) Each feminist judgment is preceded by a useful commentary by another distinguished legal academic.

This is a serious tome of over 450 pages. It will be a disciplined and determined reader who can methodically consume it from page 1 to page 451 (excluding the comprehensive index). I am not so disciplined and determined! I suggest readers commence with Sally Brown's excellent foreword and the editors' introductory chapter which gives a helpful overview of the book, together with their second chapter, "Reflections on Rewriting the Law." For the purpose of preparing today's addresses, Chief Justice Bryant and I agreed to share the rather daunting task of dipping into this book, with Diana taking on its Part 1, Public Law, which comprises Constitutional Law, Tax Law, Immigration Law and Environment Law. In Part 2, Private Law, I took on Torts and Diana, Consumer Protection and Equity. Unsurprisingly, I took on Part 3, Crime and Evidence, which comprises Criminal Law, Evidence and Sentencing and in Part 4, Interpreting Equality, Diana took on Family Law and Discrimination Law, with me taking on Treaty Law.

In the section on Torts, Kylie Burns from Griffith University reinterprets *Cattanach v Melchior*,<sup>5</sup> a case in which I presided in the Court of Appeal on its way to the High Court. Unlike in real life, Burns J dismisses the appeal to the High Court, upholding Holmes J's findings at trial and my decision in the Court of Appeal, awarding Mrs Melchior tortious damages resulting from her unexpected pregnancy and the subsequent birth of her child following her negligently performed sterilisation process. Terrific judgment, that one!

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<sup>5</sup> [2003] HCA 38.

Moving to Crime and Evidence, Adrian Howe, also from Griffith, agrees with the majority of the High Court in refusing special leave to appeal in the 1963 case of *Parker v The Queen*.<sup>6</sup> Howe J explores the law relating to provocation in respect of men who kill their wives whom they suspect of adultery. Unlike in the original decision, her Honour notes that "when provocation succeeds on slender or spurious evidence justice miscarries. ... [I]t is essential that if confessed or projected adultery is not to become a licence to kill, courts adhere to a strict objective standard of self-control that recognises *inter alia* the legal right of a woman to leave an unsatisfactory relationship."<sup>7</sup>

Penny Crofts from UTS and Renata Alexander from Monash allow Jo-Anne Taikato's appeal against her conviction for possessing a spray can of formaldehyde which she carried in her handbag for self-defence purposes. Unlike the original New South Wales Court of Criminal Appeal decision,<sup>8</sup> the High Court Justices Crofts and Alexander, in determining whether Ms Taikato had a well-founded fear of attack in a public place so that she had a defence to the charge, took into account her more generalised feelings of insecurity reinforced by her prior experiences of threat.

In the real *PGA v R*<sup>9</sup> the majority of the High Court held that a husband's immunity from prosecution for the rape of his wife had ceased to be part of the common law, at least in South Australia since 1935. Mary Heath from Flinders Law School and Wendy Larcombe from Melbourne Law School interestingly agree with the conclusions reached in the dissenting judgments of Heydon and Bell JJ that rape within marriage was not a crime known to the common law in 1963 so that the appellant could not be prosecuted for the rape of his wife at that time. But unlike Heydon and Bell JJ, the feminists Heath and Larcombe JJ analyse the deep wrong done to married women in the development and enforcement of that unjust law which persisted until abolished by statute.

Retired Queensland District Court judge and avowed feminist, Helen O'Sullivan, undertakes a radical re-writing of *RPS v The Queen*,<sup>10</sup> abolishing the right to silence. Unlike the real High Court, O'Sullivan J allows trial judges to direct juries that, in assessing an accused person's guilt, they can take into account any evidence they consider relevant to the question of whether it is reasonable to expect an accused to have given evidence in assessing an accused person's guilt.

In the *Phillips v R*<sup>11</sup> the accused went to trial and was convicted on multiple sexual offences involving six female complainants aged from 14 to 18. He appealed unsuccessfully to the Queensland Court of Appeal but the High Court allowed his appeal, quashed his convictions and ordered re-trials as the charges involving the different complainants were wrongly joined. Associate Professor Annie Cossins from the University of New South Wales reinterprets this vexed and complex question

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<sup>6</sup> (1963) 111 CLR 610.

<sup>7</sup> *Australian Feminist Judgments: Righting and Rewriting Law*, eds Douglas, Bartlett, Luker and Hunter, Hart Publishing, 2014, p 240-241.

<sup>8</sup> *R v Taikato* (unreported, Court of Criminal Appeal, New South Wales, Meagher JA, Abadee and Ireland JJ, 6 April 1994).

<sup>9</sup> (2012) 245 CLR 355.

<sup>10</sup> [2000] HCA 3.

<sup>11</sup> (2006) 225 CLR 303.

ensuring the voices of the six complainants are heard. Cossins J dismisses Phillips's appeal, finding that the offences were joinable as identity was not in issue and the offences established a pattern of sexual aggression, force and/or violence so that it was objectively improbable that each complainant would consent. It followed that the evidence on all charges was cross-admissible. There was a high degree of probative value sufficient to outweigh the prejudicial effect and the charges were rightly joined.<sup>12</sup>

All the feminist judgments on sentencing concern sentences imposed on men for crimes against women and, you guessed it, none were reduced in the re-writing. In *R v Webster*<sup>13</sup> a New South Wales judge sentenced an offender to 14 years imprisonment for the murder of a 14 year old girl at a beach party. Before her death she was subjected to extremely violent non-consensual sexual intercourse, probably with many young men. Honni van Rijswijk and Lesley Townsley, both from UTS, rewrite the judgment in this dreadful case to include the perspective of the 14 year old victim. Whilst giving weight to Webster's youth and rehabilitative prospects, Townsley-van Rijswijk J (I love the way some multiple authors blend their names into the name of the fictional judge) considered the objective gravity of the crime warranted a minimum term of 14 years imprisonment to be followed by six years on parole.

In the Victorian case of *R v Middendorp*<sup>14</sup> the offender was acquitted of murdering his wife but convicted of the lesser statutory offence of defensive homicide on the basis of excessive self-defence in the context of partner violence. In this feminist judgment, Kate Fitz-Gibbon from Deakin, and Danielle Tyson and Jude McCulloch, both from Monash, deliver a feminist-nuanced analysis of partner violence. Their judge (Justice Justicia) imposes the penalty of 17 years imprisonment, to serve a minimum of 14 and a half years, a sentence exceeding all previous sentences for this offence.

In the original *R v Morgan*<sup>15</sup> the Victorian County Koori Court imposed a sentence of three years and six months imprisonment with a minimum non-parole period of 18 months for various offences involving serious family violence. Morgan successfully appealed and his sentence was reduced. Elena Marchetti from University of Wollongong and Janet Ransley from Griffith, in the judgment of Marsley JA, (another blended judicial name) emphasise both the female victim's voice and experiences and the Elders' views in the County Koori Court. Whilst taking into account Morgan's efforts at rehabilitation, Marsley JA positively considers the cultural appropriateness of Indigenous sentencing courts for offender, victim and the Indigenous community. Her Honour concludes that Morgan's participation in the Koori Court was not a mitigating factor; the original sentence was appropriate and his appeal is dismissed.

The last of the 25 judgments in this book concerns *Tuckiar v The Queen*,<sup>16</sup> a seminal 1934 decision about barristers' obligations to clients in criminal cases. Nicole

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<sup>12</sup> *Australian Feminist Judgments: Righting and Rewriting Law*, eds Douglas, Bartlett, Luker and Hunter, Hart Publishing, 2014, p 304-305.

<sup>13</sup> Unreported, Supreme Court of New South Wales, Wood J, 24 October 1990.

<sup>14</sup> [2010] VSC 202.

<sup>15</sup> [2010] VSCA 15.

<sup>16</sup> (1934) 52 CLR 335.

Watson, a member of the Birri-Gubba People and the Yugambeh language group, and a Senior Researcher at UTS, has written the judgment of Foley CJ with which Watson J agrees. Their Honours are members of the First Nations Court of Australia in 2035, and s 25 of the *Treaty Between the Republic of Australia and the Confederation of Aboriginal and Torres Strait Islander Nations Act 2028* is in force. Their Honours attempt to bridge the gap between a white legalist approach and Indigenous law. They refer to Tuckiar, a traditional Yolŋgu man, as Dhäkiyarr. At his original trial Dhäkiyarr was accused of murdering Constable McColl. Their Honours refer to the evidence at the trial that he had seen McColl having sex with one of Dhäkiyar's wives and that only when McColl fired at him four times did he retaliate by spearing McColl. Forcibly taking Aboriginal women and having sex with them outside customary marriage, their Honours found, were serious breaches of Yolŋgu law. This re-imagined judgment is written from the perspective of Dhäkiyar's wife, Djappari. The judgment empowers Djappari as a sovereign Yolŋgu woman. Their Honours find that Djappari was a victim of McColl's assault and conclude their judgment with this statement:

"Instead of receiving the protection of the rule of law, however, Djappari was unlawfully detained at the hands of police officers. At her husband's trial and subsequent appeal, Djappari was not even afforded a name, but referred to as a 'lubra'. In a final insult, Djappari was never told what became of her husband after his release from goal, although it has long been suspected that police officers were responsible for his death. This Court has attempted to rectify some of the harm that was inflicted on Djappari's humanity. We have recognised her sovereignty as a Yolŋgu woman. We have also cast a light on the pervasive roles of race and patriarchy in the evolution of Australian law. By doing so, we hope to play but a small part in rebuilding the legal system from its colonial origins to one that affords genuine equality to all citizens of the Republic."

I hope sharing my insights into *Australian Feminist Judgments: Righting and Rewriting Law* has given you a taste for this intriguing book. Whether you are a judicial officer, a practising lawyer or a legal academic, whether you are male or female, this book encourages feminist thinking in case preparation, in making oral and written submissions, in judgment writing and in the subsequent academic analysis of judgments. It will be a useful academic resource. It challenges us, when the context permits, to advocate for women's rights on the ground of the equality of the sexes whilst performing our academic, legal and judicial work. We can do this as feminists, without fear of developing female characteristics in men. This book is a reminder to us to mainstream the "f-word", to proudly be and call ourselves feminists, and to end feminism's PR problem.