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Reflections on Rewriting the Law

HEATHER DOUGLAS, FRANCESCA BARTLETT,
TRISH LUKER and ROSEMARY HUNTER

In this chapter we draw on interviews undertaken with the authors of the feminist judgments in this collection to present both an overview of, and their reflections on, the judgments collected here. We consider the challenges the writers encountered and how they overcame those challenges and the strategies used to write feminist judgments in existing cases.

We conducted semi-structured interviews with the majority of the writers of the feminist judgments shortly after the final version of their judgment was submitted to us. In the interviews we aimed to capture the immediate reflections of the authors about how they approached the task of rewriting.

In the first part of this chapter we consider three of the challenges the writers commonly told us they grappled with in their writing process: the need to reach a decision; finding their judicial voice; and how, or whether, to refer to background information, such as academic writing and social facts, explicitly in their decisions.

In the second part of the chapter we consider the strategies used by the authors to write their feminist judgments. Many of the strategies adopted are similar to those employed by writers involved in the English Feminist Judgments Project and outlined by Rosemary Hunter in her analyses of feminist judging.¹ While we consider how the writers involved in the Australian project employ these previously observed strategies, there are two distinctive features of the Australian project which we also explore. The first is the invocation of legal formalism as feminist method. The second concerns the diverse and compelling ways Indigenous women have engaged with the rewriting process.

Challenges in Rewriting Judgments

The Need to Reach a Decision

Chief Justice French of the High Court of Australia has recently explained the distinctive role of judgment:

¹ Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010); Rosemary Hunter, 'Can *Feminist Judges* Make a Difference?' (2008) 15 *International Journal of the Legal Profession* 7; Rosemary Hunter, 'An Account of Feminist Judging' in Hunter, McGlynn and Rackley (eds), *ibid*; Rosemary Hunter, 'Justice Marcia Neave: Case Study of a Feminist Judge' in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Hart Publishing, 2013). See also Ch 1 of this volume.

It is an important feature of the judicial process that its focus is always upon the determination of the matter before the court. Where a judge writes reasons for decision he or she writes them by way of explanation for the decision in the particular case. A judge is not required to travel further than is necessary in order to determine the case.²

In judgment-writing, a judge must determine the case. She must make orders and dispose of arguments. In contrast, there is no requirement for scholarly writing to decide or to offer particular solutions to legal problems.³ Academic critique can suggest alternatives and qualified conclusions. There is a significant difference between how academics and judges speak and make claims to truth.⁴ Almost all of the writers involved in this project were academics, and some reported to us that they struggled with the requirement of making a decision.⁵ While in a number of cases interviewees told us they knew what they would decide from the outset, others said that they tried to work through the law to its conclusion – a process that meant they did not know if they would, or could, decide as they hoped. Perhaps most compellingly, in *PGA v R* the feminist judgment decided *against* the complainant in relation to an accusation of rape within marriage. In this case the writers believed the law took them in a certain direction. The writers explained that one of the reasons they selected *PGA v R* was that it tested the limits of the common law. Mary Heath explained:

[*PGA v R*] is a really rather poignant case from a feminist perspective, in that there are so many issues for feminists in here about what the complainant might hope for and what you might hope for her, to the impact on our understanding of the feminist activism of the 1970s, and so on.

In this case, the feminist judges highlighted the feminist activism which had inspired reform of the law to remove the common law immunity held by husbands who had raped their wives. However, this reform occurred after the rape alleged by the woman before the court. They found that the prosecution of a husband for the rape of his wife in the 1960s could not be sustained. The writers did not want to forget the woman involved or those women who had experienced similar sexual violence within their marriages and could not access the criminal law, and they took the unusual approach of giving an apology for the gendered violence perpetrated by the common law for so long.

Academics often work in the abstract in relation to a case, frequently critiquing the decided case with a view to influencing future legislation and decisions. In contrast, for a judge, the parties in a case demand a resolution of the specific conflict between them on the basis of a particular set of available legal arguments and evidence. They often have conflicting, but also compelling, arguments to make. Jennifer Nielsen reflected on these difficulties inherent in writing a judgment, observing that there was a

complex set of interests that had to be met in writing one judgment. [This] was really quite illuminating I think, because it . . . put a lot of decisions in a different context to how you might assume – how I might have assumed – that they'd been drawn.

Nan Seuffert reported that, as an academic, she had been frustrated with the courts' limited approach to deciding asylum-seeker cases and the failure of judges to consider and

² Chief Justice Robert French, 'Judges and Academics: Dialogue of the Hard of Hearing' (2013) 87 *Australian Law Journal* 96, 101.

³ Rosemary Hunter, Clare McGlynn and Erika Rackley, 'Feminist Judgments: An Introduction' in Hunter, McGlynn and Rackley (eds), above n 1, 17.

⁴ *Ibid* 15.

⁵ We note that a number of writers in this collection have been or are decision-makers, some sit on tribunals and one is a retired judge.

acknowledge feminist scholarship. However, after writing her judgment she explained she had

a new appreciation for judges and what they have to do and the difficulty of being a feminist judge which we know theoretically, but maybe not so much in practice. We read the cases and we think oh, this is so limited compared to everything we know about this topic, and so little of feminist work has gotten into that judgment and why is that and why does it seem so narrow. I really have a new appreciation, I think, for the task . . . and for the limitations of the genre.

Most of the feminist judgments included in this collection come to a different conclusion to the original case or to the majority judgment.⁶ In seven cases,⁷ however, the feminist judgment-writers agree with the outcome of the original decision but take the opportunity to provide a different account of the facts or to adopt another understanding of applicable legal principle, or both. Lady Hale of the United Kingdom Supreme Court has observed that concurrences are a commonplace in the common law system, where a 'preference for plurality judgments would not rule out certain sorts of concurring judgment, which can enhance rather than detract from the power of the lead judgment.'⁸ For example, Adrian Howe's feminist judgment in *Parker v R* concurs with the majority decision, which was later overruled by the Privy Council. Her emphasis on the historical development of the provocation defence through an examination of the precedents arguably strengthens the majority judgment. She explained: 'When the majority judgment, which I think was correct, was overruled in the Privy Council, it revealed that division within judicial thinking over time between taking a hard line and a soft excusatory line on provocation.'

Kylie Burns' judgment in *Cattanach v Melchior* also concurred with the majority, but her judgment provided an opportunity to address a gap in the majority reasoning in relation to whether pregnancy is a form of economic loss, or some other form of damage or harm. This again may be said to strengthen the majority judgment:

In fact, when you read the case as a whole, there actually isn't a majority on whether . . . the kind of damage she suffered was economic or not. It's kind of left a little bit open. It's yes in some opinions, no in others, maybe. So for me that kind of damage is just not pure economic loss. It's clearly consequential and I think that has a feminist aspect to it. The disconnection of these damages, particularly related to women, from the harm is a feminist issue. So part of the judgment was talking about that aspect of it.

Nevertheless, not all concurrences have this effect. For example, Lisa Sarmas' judgment in *Trustees of the Property of Cummins v Cummins* (*Cummins*) is highly critical of the majority's reasoning in developing new principles of trust law. Jennifer Nielsen's judgment in *McLeod v Power* takes the opposite view from the original judgment on a key point of interpretation of racial vilification legislation. And while the feminist judge in *R v Webster*

⁶ *Dietrich v R*; *Goode and Goode*; *JM v QFG & GK*; *Lodge v Federal Commissioner of Taxation*; *Louth v Diprose*; *Phillips v R*; *PGA v R*; *Re Minister for Immigration and Multicultural and Indigenous Affairs & Anor*; *Ex parte Applicants S134/2002*; *R v Middendorp*; *R v Morgan*; *R v Pearson*; *Ex parte Sipka*; *R v Taikato*; *RPS v R*; *State of New South Wales v Amery*; *U v U*; *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage & Ors*.

⁷ *ACCC v Keshov*; *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*; *Cattanach v Melchior*; *McLeod v Power*; *Parker v R*; *R v Webster*; *Trustees of the Property of Cummins v Cummins*.

⁸ Brenda Hale, 'Judgment Writing in the Supreme Court' (Paper presented at the Supreme Court First Anniversary Seminar, London, 30 September 2010) 4. See also in the Australian context Matthew Groves and Russell Smyth, 'A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903–2001' (2004) 32 *Federal Law Review* 255, 275.

imposes the same sentence on the offender, her narration of the facts tells the victim's story and analyses the offender's actions quite differently from the original sentencing judgment.

Finding a Judicial Voice

Former High Court Justice Michael Kirby has observed that

judges, with gifts of communication, writing in a simple, straightforward and 'magisterial' style tend to have the greatest influence because of their clarity of expression. On the other hand, rhetoric and the use of vivid phrases play an important part in persuasion.⁹

Australian judicial officers have often considered the question of what is an appropriate judicial voice,¹⁰ and have tended to emphasise the importance of brevity and clarity of writing style,¹¹ as well as transparent reasoning.¹² Often, judges have described the task as an 'art'.¹³ The persuasive and authoritative tone adopted in judgments is arguably quite different from the qualified approach of scholarly writing.

We asked interviewees to reflect on the question of judicial voice. A number of interviewees explained that maintaining the judicial voice was very difficult. In the workshops, participants often noticed where a judgment-writer had been equivocal in how they dealt with a point or that they had discussed an issue in the abstract without relating it to the issue at hand. Some of the writers commented specifically on the intellectual shift they had to make in order to write in a judicial voice. For example, in rewriting *PGA v R*, Wendy Larcombe observed:

I think we realised [the difference] between the judicial voice and the academic voice. Initially we were wanting to work with the more familiar academic voice, in which you're used to bringing forward a lot of support for the propositions that you're putting forward. We had to cut that. As a result, the judicial voice sounds much more individualised.

Jennifer Nielsen explained that it was only in the second draft of her judgment in *McLeod v Power* that she found her voice. She explained:

I started in my mind with an exercise of trying to actually rewrite [the original] judgment instead of writing my own judgment fresh. I probably followed it a little bit too much and I don't think I let my own voice come through as well as I should have in the original draft. But I was mindful of that in the redraft, in the second drafting, and this process to try and make my own voice the voice instead of the original message.

⁹ Michael Kirby, 'On the Writing of Judgments' (1990) 64 *Australian Law Journal* 691, 705.

¹⁰ See, eg, Ruth McColl, 'The Art of Judging' (2008) 12 *Southern Cross University Law Review* 43; Sir Frank Kitto, 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787; Sir Harry Gibbs, 'Judgment Writing' (1993) 67 *Australian Law Journal* 494; Sir Laurence Street, 'The Writing of Judgments: A Forum' (1992) 9 *Australian Bar Review* 130; LJ Priestley, 'The Writing of Judgments: A Forum' (1992) 9 *Australian Bar Review* 130; John Doyle, 'Judgment Writing: Are There Needs for Change?' (1999) 73 *Australian Law Journal* 737.

¹¹ Gibbs, *ibid*; Justice Susan Kiefel, 'Reasons for Judgment: Objects and Observations' (Speech delivered at the Sir Harry Gibbs Law Dinner, Queensland, 18 May 2012).

¹² See also Justice Roslyn Atkinson, 'Judgment Writing' (Speech delivered to Queensland Civil and Administrative Tribunal members, Brisbane, 6 February 2010).

¹³ Lord Hope, 'Writing Judgments' (Speech delivered at the Judicial Studies Board Annual Lecture, London, 16 March 2005), cited in Erika Rackley, 'The Art and Craft of Writing Judgments' in Hunter, McGlynn and Rackley (eds), above n 1, 44. See also Kitto, above n 10, in which he laments that there is no formula that makes writing judgments easier as a judge matures.

In trying to find their own voice, several writers referred to judgments they admired or judges they thought wrote well. For example, in rewriting the judgment in *Cattanach v Melchior*, Kylie Burns explained:

I was particularly influenced by . . . Lady Justice Hale, as she then was: some of the cases . . . where she'd written these beautiful, strong, feminist judgments in a kind of voice that I quite liked. I quite like the Kirby voice too. So I was thinking about [them] on the way through. I'd read examples of what I thought was quite good and I knew the ones I really didn't like too, from reading a lot . . . of close analysing of High Court cases.

In rewriting *Phillips v R*, Annie Cossins observed that she was influenced by the judgments of Canadian judges such as Justice Beverley McLachlin and Madame Justice Claire L'Heureux-Dubé, as she reflected:

It was really about the voice . . . Of course, one has a voice. When you write anything, you have a voice, but that really made me think about, well, whose voice do I want to have? That's why I chose those Canadian judges. They were sitting on my shoulder. I still don't think I was as radical as them, or as eloquent.

In her rewriting of *R v Taikato*, Isabella Alexander explained she wanted to 'channel Lord Denning' because 'for all his failings' his 'narrative style of judgment brought people along with him and it was persuasive writing'. She observed that she saw the opportunity to rewrite a judgment as a law reform or legally persuasive exercise, where a conciliatory voice was adopted to 'bring everyone along', from academics to judges.

While judgment-writing may be described as an art of persuasion, many interviewees also emphasised the restraint needed in the judicial voice. For example, Anita Stuhmcke recounted that she initially had an angry reaction to the case of *JM v QFG & GK* – a case involving a lesbian couple's access to assisted reproductive technology – when it was handed down. She reflected:

[I]t would have been really nice somewhere in that judgment just to say really what one thinks. But I mean whether that [was] the parameters of the project or the judicial voice that was adopted, it can't be done. So . . . in some ways the ranting that I had originally is still locked up deep inside me.

Several writers found adopting the judicial position empowering and liberating, because it was an opportunity to use a different language in writing the decision. Danielle Tyson, one of the authors of the sentencing judgment *R v Middendorp*, reflected on the powerful effect of judgments and of the language employed in a judgment:

I wanted the judgment to be written not necessarily in the third person, so either in the first or second person. That was one of the things I was very keen on doing, because I think that that has a much more powerful effect . . . in the context of a courtroom, that can have a lot more symbolic power, and the court's quiet and you're addressing the accused, and you can really inflect your tone of addressing [the accused] sternly and in a condemnatory way – so that was one of the first things I set about doing in my part.

Drawing on Academic Scholarship, Social Facts and Empirical Research

In Australia, there has been very little judicial comment about whether it is appropriate to cite legal periodicals in reasons for judgment and, according to Russel Smythe's research, the

issue seems to be a matter of judicial preference.¹⁴ For example, Helen O’Sullivan, a retired District Court judge, commented that in rewriting *RPS v R*:

I did not grapple with the thorny issue of using background literature because I had become accustomed to not doing this while I was still a Judge. However, I support the Canadian judges who do this, and I would like to see our appellate courts go the same way.

Chief Justice French lists what he considers ‘impermissible use’ of academic work in judgment-writing, as including:

[T]he purely ornamental and the thoughtless padding out of references without direct relevance to the proposition which they are said to support. Reliance upon academic opinions cannot be a substitute for direct consideration of the relevant authorities and statutory provisions.¹⁵

In the project workshops there was significant discussion about when and where legal scholarship should and should not be cited. The judgment-writers in this collection, like judges generally, took a variety of approaches.

However, unlike judges, the writers in this project could rely on commentaries accompanying their judgments to reflect the scholarly sources by which they were influenced, including the influence of case law or scholarship *after* the case was decided. Some of the judgment-writers worked closely with commentary writers to ensure that important scholarly work they drew upon was acknowledged. For example, in rewriting *R v Webster*, the authors were informed by scholarship around masculinities,¹⁶ yet Honni van Rijswijk observed:

I didn’t reference [this scholarship] mainly because I think my understanding of the sentencing judgment was that it wouldn’t fit, so I sent those to [the commentary writer] and just gave her a list of what I thought she could include.

In the feminist judgment in *Louth v Diprose*, Francesca Bartlett was influenced by later critiques of the case,¹⁷ a wider body of feminist critique¹⁸ and developments in this area of private law, in rethinking the facts and whether they satisfied the unconscionability doctrine. However, she could not expressly refer to these influences or developments.

Feminist scholars and activists have long critiqued claims to neutrality and objectivity of legal decision-makers.¹⁹ While it is now generally acknowledged that judges are people who have background experiences, knowledges and opinions, how far these ‘extra-legal’ sources should influence their decisions continues to be a controversial topic. Judges who have explicitly identified too strongly with a particular social position or experience have often

¹⁴ Russell Smyth, ‘Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-Legal Periodicals in the High Court’ (1998) 17 *University of Tasmania Law Review* 164, 168.

¹⁵ French, above n 2, 104. Rosemary Hunter makes the same point in relation to the use of feminist scholarship by feminist judges in ‘An Account of Feminist Judging’, above n 1, 42.

¹⁶ See, eg, Felicity Holland and Jane O’Sullivan, “‘Lethal Larrikins’: Cinematic Subversions of Mythical Masculinities in *Blackrock* and *The Boys*’ (1999) 13 *Antipodes* 79.

¹⁷ Lisa Sarmas, ‘Storytelling and the Law: A Case Study of *Louth v Diprose*’ (1994) 19 *Melbourne University Law Review* 701; Bibi Sangha and Bob Moles, ‘Gendered Stereotypes and Unconscionability – Can we Trust the Judges to Get it Right?’ (1997) 1 *Flinders Journal of Law Reform* 145.

¹⁸ See, eg, Richard Haigh and Samantha Hepburn, ‘The Bank Manager Always Rings Twice: Stereotyping in Equity After *Garcia*’ (2000) 26 *Monash University Law Review* 275; Paula Baron, ‘The Free Exercise of Her Will: Women and Emotionally Transmitted Debt’ (1995) 13(1) *Law in Context* 23.

¹⁹ See Reg Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2nd ed, 2002).

been accused of bias.²⁰ While judgments in this collection avoid explicit acknowledgement of background factors, overwhelmingly, when interviewed, the writers agreed that their background and experiences had influenced their judgment. For example, many of the judgment-writers said that it was their scholarship in the area of law and feminist jurisprudence which largely informed their approach. Many writers had previously written scholarly articles about the judgment they rewrote. In a few cases, the judgment-writer commented on personal connections to the facts of the case. For instance, a couple commented that the crime occurred in their home town. Kerrie Sadiq noted that the woman involved in a tax law decision had a child who was born around the same time as she was born. She commented on what she saw as a very specific context of the time in terms of gendered roles within a family:

So it had a very personal sort of connection for me thinking, you know, here was this mother with a child the same age as me, and here I am actually not fighting to work. I am able to work. I'm able to earn an equal income . . . [I]t kind of pulled me up too, on what a different kind of upbringing I had; Mum and Dad, and Dad went out to work, and Mum stayed at home – left [work] when she was pregnant with me – all the traditional kind of things, and here were these other women fighting cases.

Another writer was appalled at the offhand way in which sexual violence was described by the court and expressly 'put [herself] in the shoes' of the victims and drew on her experience as a woman when writing. Some authors also commented that their connection with the case was their experience as a student having studied the case with a sense of dismay. One interviewee said this was an empowering part of the project as a whole. This author explained that when she read feminist versions of some of the judgments she had previously studied she thought: 'thank God somebody has finally rewritten that [judgment] in a way that does justice to the victim'.

In several cases, the original judgment of the High Court, which has greater latitude to decide on matters of policy,²¹ included express reference to extra-legal materials or there were earlier decisions in the case which contained reference to such materials. For example in *State of New South Wales v Amery*, Beth Gaze draws on extra-legal materials about women in the workforce and the gendered disadvantages they suffer which had been put in evidence before a series of tribunals and courts below. In some judgments, writers did not have the advantage of such background material being put before the court. Nevertheless, it was possible to include extra-legal knowledge or theory without expressly referencing it, by taking 'judicial notice' of a fact or consequence, in the sense that they stated it from the 'common sense' or social knowledge of the judicial officer.²² The limits to the doctrine of judicial notice have been discussed by the High Court in *Thomas v Mowbray*: 'the inquiry must be into the "common knowledge of educated men" as revealed in "accepted writings", "standard works" and "serious studies and inquiries" . . . In short, matters judicially noticed at common law must be indisputable'.²³

²⁰ Reg Graycar, 'Gender, Race, Bias and Perspective: OR, How Otherness Colours Your Judgment' (2008) 15 *International Journal of the Legal Profession* 73; Martha Minow, 'Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors' (1992) 33 *William and Mary Law Review* 1201.

²¹ See Kylie Burns, 'The Australian High Court and Social Facts: A Content Analysis Study' (2012) 40 *Federal Law Review* 317.

²² Hunter (2010), above n 1, 39–40; Hunter (2013), above n 1, 399–418.

²³ *Thomas v Mowbray* (2007) 233 CLR 307, citing Dixon J in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

Not least because of its gendered expression and questionable logic, this approach is a significant shift away from the academic approach to writing which is required to be scrupulously well-referenced. It is a powerful statement to assume a position of authority to find a 'social fact' that requires no reference.²⁴ Appropriating this tool can be a site of resistance to persistent gendered norms in decision-making. Yet there are dangers to this approach. A judge can inform herself of things which may challenge gendered stereotypes, or perpetuate them. There was conscious use of judicial notice in a number of the feminist judgments. For example in *Dietrich v R*, which concerned the question of whether a person unable to afford legal representation is entitled to state-funded representation in order to ensure a fair trial on a serious criminal charge, Jenny Morgan and Reg Graycar state in their judgment: 'we are entitled to take judicial notice of the fact that the vast majority of legal aid for criminal trials goes to men as it is men who commit the vast majority of criminal offences, particularly serious criminal offences.'

Another approach adopted in the judgments was to use social science or empirically based material to support findings. Again this approach may risk appeal.²⁵ As Lady Hale observes in response to the question 'should judges be socio-legal scholars?': '[t]he short and easy answer to this question is "no, of course not"'. Hale advocates that judges should be *legal* scholars, although she suggests that 'even this can be dangerous if carried too far'.²⁶ However, there are a number of instances where the feminist judgments cite empirically based material. Zoe Ratus, who rewrote *Goode and Goode* with Renata Alexander, observed:

I certainly think it's totally valid that we decided that we were going [to use extrinsic material] in the sense that that's the kind of decision that some judges on the Full Court [of the Family Court] have made . . . [T]he way that we've done it is very circumspect and rather than in any way endeavour to be very specific, [we said] . . . 'we are comforted by the fact that . . . there is significant social science literature which supports the statutory interpretation that we came to'.

In *Phillips v R*, a case involving the rape and sexual assault of six young women, Annie Cossins drew on statistical data. She commented:

[O]ne [victim] was 14, 15, 16 . . . [The victims] are in places where they expect to be safe, going to a party. They're young, they're naïve . . . I looked at the . . . ABS stats on which age group was most vulnerable to sexual assault in Australia, and it was the 0 to 14 age group, or 0 to 16, and I said, we have to – well, I didn't say we, but I am going to take account of the vulnerability of this particular age group, because the complainants fell into that age group.

In deciding the case of *Cattanach v Melchior*, Kylie Burns commented that in obiter dicta she would have made further remarks about the development of the law in relation to the consideration of social facts:

[T]he bit in the judgment where I talk about what the role of the policy is . . . we've recently in the High Court said we shouldn't be going on this perilous journey. Yes, let's not go on that perilous journey unless you've got good evidence. Probably if you had 10,000 words, you could have said

²⁴ For another discussion of use of social facts, see Claire L'Heureux-Dubé, 'Re-examining the Doctrine of Judicial Notice in the Family Law Context' (1994) 26 *Ottawa Law Review* 551; Zoe Ratus, 'Shifting Language and Meaning Between Social Science and the Law: Defining Family Violence' (2013) 36 *University of New South Wales Law Journal* 359; Kylie Burns, 'It's Not Just Policy: The Role of Social Facts in Judicial Reasoning in Negligence Cases' (2013) 21 *Torts Law Journal* 73.

²⁵ Where the material informs a reason for deciding, the test appears to be whether the material is available to the parties to present arguments to the court: *Aytugrul v R* [2012] HCA 15 (18 April 2012).

²⁶ Brenda Hale, 'Should Judges Be Socio-Legal Scholars?' (Paper presented at the Socio-Legal Studies Association 2013 Conference, University of York, 26 March 2013).

... even if we go down the perilous journey, which is the preferable journey, then here's all the other stuff which also supports [the outcome] ... [I]n some ways, if you go down that journey that would be a more transformative approach ... I just think, for me, I think there were other things we could easily do to make it feminist without going there.

Other writers sought further information about the context of the dispute before them by obtaining transcripts of proceedings, and other documents filed by the parties. Information about the parties and what they said at trial, in addition to what is contained in the original judgments, was often referred to in the feminist judgment to bring out the story of one or several of the parties.²⁷

Strategies of Feminist Judgment-Writing

Feminist Theoretical Approaches

Many judgment-writers told us that they did not feel the need to specifically refer to feminist scholarship, and few could specifically identify a feminist theoretical approach they had applied in rewriting. Some writers explained that they approached the role with a background of feminist activism or practice. For instance, Rathus commented that she and her co-writer, Renata Alexander, drew on '30 years of working with women'. Renata Alexander observed of her judgment in *Goode and Goode*: 'I didn't consciously adopt any of [my knowledge of feminist and queer theory]; it was more the practical implications of what it would mean for women and for children. So again, it was the application rather than the theory.'

Several judgments incorporate a notion of care and interconnection into their legal approach. In *Re Minister for Immigration and Multicultural and Indigenous Affairs & Anor; Ex parte Applicants S134/2002*, Charlotte Steer said she was influenced by a feminist ethic of care when she drew an expansive role for a decision-maker in asylum-seeker matters. In that case, the decision-maker did not read or was not aware of information in the files which indicated that the husband of the applicant and father of her children was in Australia and held a protection visa. Had the relevant tribunal member exercised care in understanding the position of the family, the outcome for the applicant for refugee status may have been different. Steer commented: '[m]y judgment follows the legal reasoning of the minority judgment, but it puts more emphasis on the importance of recognising family connections and of making a choice in statutory interpretation that promotes connection to networks of relationships'.

In the *Wildlife Whitsunday Case*, Lee Godden refers to an idea of 'eco-feminism' which emphasises the 'adoption of more holistic conceptions of the environment that emphasise the interconnectedness of all life forms and the need for a nurturing approach that creates a bond between people and nature'.²⁸ This case concerns a judicial review action brought in

²⁷ Appellate courts would have access to transcripts as well as other documents filed for the case. Indeed, as we describe in Ch 1, judges who spoke to participants in the workshops suggested that these resources were frequently useful to them as judges and could be legitimately drawn upon in writing reasons.

²⁸ Jacqueline Peel, commentary to *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* in this collection.

the Federal Court by conservationists in relation to an environmental assessment of two proposed coal mines in Queensland. Godden, substituting her decision for that of the original judge and reversing the result, upholds the contention of the applicants that there are likely to be significant impacts on World Heritage sites when a cumulative and holistic approach to climate change and the environment is adopted.

Another approach of the feminist judgment-writers is to highlight the deleterious effects of the liberal legal dichotomy between public and private.²⁹ In *PGA v R*, the judgment emphasises the private realm of the home and marriage as unprotected by the common law, thus depriving women subject to violence in marriage of a legal remedy. The writers point out that we cannot just assume the common law will develop to address these entrenched gendered structures. *Appellant S395/2002* concerns the relationship between refugee status and persecution on the basis of sexuality. While this is a legitimate ground on which to claim asylum, in his commentary, Wayne Morgan observes decision-makers in Australia

began to draw distinctions between gay men and lesbians who were ‘discreet’ about their sexuality, and those who were not. Decisions began to be made that, if the applicant concerned had been ‘discreet’ about their sexuality in the past, then they did not have a well-founded fear of persecution.³⁰

The feminist judgment in this case, concerning a couple who had a same-sex relationship in Bangladesh and were subject to intimidation, but whom the tribunal felt were not in danger if they were ‘discreet’, corrects this privatising of their sexuality which operated to deprive them of the protection of the Refugee Convention.

Recognising Women’s Stories and Gendered Experiences

Many of the judgments ‘ask the woman question’.³¹ In *Dietrich v R* the feminist judges decide, with ‘judicial notice’ of the reality that directing legal aid funding to those accused of serious crimes would have a gendered effect, that a trial should not generally be stayed in the absence of legal representation, unless there are exceptional circumstances. In discussing her rewriting of the case, Morgan commented: ‘[t]o a large extent we were doing that sort of very old-fashioned thing of just asking the gender question. What implications does this have for most women or particularly for poor women?’ In *Cummins*, Lisa Sarma employs a similar strategy to systematically expose and analyse the specific results of a presumption of formal equality between spouses in ownership of the family home under a resulting trust.

Several judgments also endeavour to include women by writing women’s experiences into the judgment.³² For instance, in *R v Pearson; Ex parte Sipka*, a constitutional law case about the right to vote, Kim Rubenstein foregrounds women’s role in the constitutional debates prior to Australian federation in her first words. She begins her judgment: ‘Listening closely to the women of the 1890s who were the first with an electoral voice in Australia.’

²⁹ There is a large feminist literature critiquing the public/private distinction. For a recent summary, see Rosemary Hunter, ‘Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism’ in Margaret Davies and Vanessa E Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate, 2013) 13–30.

³⁰ Wayne Morgan, commentary to *Appellant S395/2002* in this collection.

³¹ Katherine T Bartlett, ‘Feminist Legal Methods’ (1990) 103 *Harvard Law Review* 829.

³² See also Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (AIJA, 2nd ed, 2007) 19 regarding sensitivity towards the parties, and others, in describing them and their actions in a judgment.

Reflecting on this approach, Rubenstein observed:

I just spend a lot more time on the role of those women at the time of federation, and give a lot more voice to them . . . I think placing the women's stories at the centre of what I was doing was what I felt was my feminist tone and approach. So storytelling their experience being a significant part of [it], then thinking about the constitutional principles that were at play.

In a similar vein, Penny Crofts' and Isabella Alexander's judgment in *Taikato v R* begins with the statement: 'One night, Jo-Anne Taikato and her husband returned home to find an intruder in the process of breaking into their house.' While Jo-Anne Taikato was charged with an offence relating to carrying formaldehyde in her handbag in a public place, her experience of home invasion contextualises her safety concerns and helps explain why she might carry such a substance. Isabella Alexander explained that:

[O]ur approach was generally one . . . of bringing in the defendant's experiences, and specifically her experiences as being a woman who had suffered a home intrusion and being on the street. So in that sense it kind of . . . played into all the Take Back the Night movement and other movements and community responses to the issue of violence against women such as White Ribbon Day.

In *ACCC v Keshow*, Heron Loban emphasises the concern shown by Indigenous mothers for their children's education as a legally recognisable vulnerability. In *Appellant S395/2002*, Nan Seuffert carefully considers the lived experience and personal histories of the applicants for asylum. She commented: 'I tried to . . . put in a bit more context and make [the applicants] seem a bit more human, and I think those are feminist things to do in a judgment.'

Several of the judgments involving criminal law focus on how the victim is represented, and try to write her voice more clearly into the judgment. For example, in *R v Morgan*, Elena Marchetti commented that a way in which her and Janet Ransley's feminist judgment is different from the original is that they are

also bringing the victim back in [to the Court of Appeal judgment], because the original [County Court] judgment I think was quite effective at doing that, and she seemed to get a little bit lost again in the appeal judgment.

Danielle Tyson, one of the feminist judges in the sentencing judgment for defensive homicide in *R v Middendorp* explained that:

I've been following an exemplary judge who has been making particular statements around the impact of the crime and the sentencing process on the victim's family and acknowledging that that can never take away the worth of their loved one and so on, and that was something that I thought was very powerful, and I wanted to have in the judgment.

While this was a common strategy of writers involved in the project, not all were satisfied with how far they were able to go. For example, Mary Heath who co-wrote *PGA v R*, observed:

[T]he lives of women should be central in the judgment, not peripheral to it – that they should be a relevant consideration rather than a peripheral consideration, and I think we have ended up with a judgment where that underpinning principle is there and it's sketched in, but it is only sketched in, and I think we would probably both prefer that were different.

Furthermore, as some of the judgments show, a feminist judgment may not simply be about writing the woman victim into the judgment, although this is important. It could also be about how men and masculinity are represented. Tyson observed: 'I've been interested in

... how judges use language, the kinds of adjectives used that can minimise understandings of domestic violence, that can construct the subjectivity of the defendant, and the deceased in particular ways.' The feminist judges Honni van Rijswijk and Lesley Townsley, in *R v Webster*, another sentencing case, also demonstrate this approach. As Townsley commented:

What's really loud in the narrative [of the original judgment] ... it was about masculinities, but the masculinities were construed in a particular kind of way which I found a bit offensive ... When I think of feminism ... I always think of how masculinity is presented.

Some of the judgment-writers give names to the participants to give them identity. For example in family law cases, which are subject to statutory restrictions on identifying the parties, children are typically referred to only by letters ('A', 'K', etc), and parties' names are also initialised or pseudonymised. In the two family law cases in this collection, *U v U* and *Goode and Goode*, however, parties and children are given full pseudonyms to avoid dehumanisation. In relation to *Goode v Goode*, Renata Alexander explained: 'the Full Court never talks about real children and their age and their names and things, so we've tried to humanise it from that point of view'. Similarly, in *R v Middendorp*, Tyson explained: '[w]e didn't call her "the deceased" or "the victim" in the case ... we wanted to call her by her name the whole time.'

Many of the cases in this collection attempt to contextualise and particularise the circumstances of the case and to present a judgment that is practical in its reasoning rather than abstract.³³ For example while the majority judges of the High Court in *Dietrich v R* claimed that a decision to stay a case where there was no legal representative was not the same as demanding that legal aid be applied to the case,³⁴ the feminist judges reject this idea as a 'distinction without a difference'.³⁵ Similarly in *State of New South Wales v Amery* the feminist judge, Beth Gaze, rejects the idea that women necessarily make a choice between full-time and casual work. She points out that in reality the women respondents in the case actually had little choice. In her interview Gaze explained she wanted

to be able to try and personalise it so a person reading it could see how limited the choices were that were available to these women and how they got constrained into being paid less for essentially the same work as the male teachers were doing.

In *Cattanach v Melchior*, a central issue was whether a pregnancy which occurred after a negligent sterilisation could be considered a harm for which damages could be claimed. In this case the feminist judge, Kylie Burns, describes the parental relationship in a very concrete and contextualised way. She described her approach:

So getting that story bigger and clearer, so that the female plaintiff, the mother, doesn't just disappear. Because that was one of the original critiques I'd made of the case when it came out, that everything was parenting and parent and the two roles were put together, even though the main damage is predominantly suffered by the mother ... I was re-writing it to make her story fuller, to weave her story further through the facts. But also to try and do it in a way that was relevant.

Several of the criminal law judgments are distinguishable from the original judgments in their careful particularisation of the use of violence against women by male perpetrators.³⁶

³³ See Hunter (2008), above n 1, 12.

³⁴ See, eg, Deane J in *Dietrich v R* (1992) 177 CLR 292, 332.

³⁵ See also the feminist judgment in *JM v QFG & GK*.

³⁶ See *R v Webster*; *R v Middendorp*; and *Phillips v R*.

Challenging Gender Bias, Remediating Injustice and Promoting Substantive Equality³⁷

Gender bias inherent in some of the original decisions is challenged in feminist judgments in this collection. For example, in relation to *RPS v R*, Helen O'Sullivan commented, with reference to her previous experience as a District Court judge, that:

I enjoyed the challenge of writing the judgment so that it followed normal judgment-writing protocols but also reflected feminist jurisprudence. I welcomed the opportunity to examine important concepts such as a fair trial, the role of the jury, the privileging of the accused, and the silencing of victims.

In her judgment she challenges the traditionally limited conception of a fair trial and asks: fair trial for whom? (especially in the gendered context of sexual offences). Her judgment finds that the concept of a fair trial should be understood not just from the defendant's perspective but from the victim's perspective as well.

Phillips v R involved the sexual assault and rape of six young women, with the issue being whether the trials should be heard together. In deciding that they should be heard together, the dissenting feminist judge, Annie Cossins, finds that the evidence of the victims is relevant as similar-fact evidence in the trial.³⁸ She observed:

I remember [the judges'] phrase [from the original judgment], that what the six complainants had suffered was a type of sexual behaviour at the hands of the defendant that was entirely unremarkable. I thought, 'goodness me . . . so you can be sexually assaulted and it is entirely unremarkable?' 'So therefore, what's the problem?' That was almost what I felt they were saying . . . As a woman, I've always felt that sexual assault was entirely remarkable. That's an experiential thing that probably really most men are never going to have to go through.

In *Louth v Diprose*, Francesca Bartlett disputes the interpretation in the original judgments of female self-interest as unusual, suspect and predatory and the mirror inference that male irrationality and weakness is 'bizarre' and must have been induced. Indeed, she noted that she was concerned to show that it was only by employing these stereotypes that the trial (and later) judgment filled in the evidentiary gaps to produce a particular legal result of the woman acting unconscionably. Once freed of these gendered tropes, the feminist judgment finds no evidence of victimisation and also makes room for a more understanding account of the woman's story (as neither the victim nor the aggressor).

In discussing his judgment in *U v U*, Jonathan Crowe observed that 'at the appellate level, [there is a tendency for] just summarising the facts. But the way the facts are presented is always selective, always has some sort of preparing the ground.' He also suggested that the original judgment perpetuated a narrative that there was 'a natural sort of process' of producing parenting proposals. In contrast, his rewritten judgment paints a picture which emphasises that 'it's not really a natural process. There are presumptions operating about the role of the different parents in parenting.'

While most of the cases in this collection seek to remedy injustice and improve the conditions of women's lives, one particularly original example of this strategy is the apology presented by the feminist judges in *PGA v R*. In this case the feminist judges, unusually,

³⁷ These are strategies of feminist judging suggested by Hunter (2008), above n 1.

³⁸ To be admissible in Australia, this type of evidence requires 'striking similarity' between the similar facts.

apologise to women injured as a result of the common law rule that afforded husbands immunity for marital rape. Wendy Larcombe and Mary Heath observed that:

[T]his just became glaring, that you had no way for the common law to review its rules in this area and to update those rules to . . . reflect changing social attitudes. So the apology was on behalf of the court, recognising that it, as the custodian if you like of the common law in Australia, had not been able to deliver justice to married women because its processes were flawed. [Larcombe]

You need other forms of recognition, of recompense, of social acknowledgement of the wrong that married women were subjected to across most of the 20th century, so some other form of therapeutic or corrective justice beyond the decision that we were able to make. [Heath]

Several of the judgments in this collection attempt to promote substantive equality. For example, in *Cummins*, Sarma rejects the formal equality reasoning of the majority judges, who adopt an inference of equal beneficial ownership in the family home through a resulting trust. She observes that while this inference may provide just results for some (heterosexual) couples, in many cases this inference of equality will result in a loss of rights for the woman in a relationship. Sarma argues that without a solid empirical or policy basis, which was not argued in the case, there is no reason to extend trust principles beyond their traditional basis which often provides substantive equality to parties.

In her judgment in *Lodge v Federal Commissioner for Taxation*, a case concerning the tax-deductibility of childcare expenses, Kerrie Sadiq makes her decision on the basis that there should be equal treatment of claims for expenses by taxpayers whether they are men or women, and without regard to whether they are occupying traditionally gendered roles. She observed: 'pragmatically, I was coming from an equity point of view and equality point of view first of all'. Nevertheless, this is one of a handful of judgments which may be contested by feminists writing now, as its outcome would produce a taxation system which would benefit high income earners more than low income mothers.

In this context, Hunter suggests that a feminist judge should be open and accountable about the choices made between competing interests.³⁹ The feminist judges in several cases in this collection point to the difficult choices they must make and carefully weigh the reasons for their choices.⁴⁰ In the family law relocation case of *U v U*, Jonathan Crowe considers the reality that it continues to be women who are usually the primary caregivers to children. Although he accepts that the mother has interests in her own right, he also finds that the best interests of the mother and child are interconnected. If the mother's relocation is in her best interests it also follows that it is likely to be in the best interests of the child:

[I]f you acknowledge all the rights and issues, and say you're weighing the interests, there's a substantive decision to be made. You can't just take it for granted it comes out a particular way. That's one way of acknowledging the robust interests that children and the different parents have, and making sure they're all acknowledged.

Legal Formalism as Feminist Method

Several of the judgments in this collection explicitly use 'the master's tools'⁴¹ of formal legal method to achieve what they consider to be more just and appropriate results. This occurs

³⁹ Hunter (2008), above n 1, 14.

⁴⁰ See, eg, *Cummins*; *Phillips v R*; *State of New South Wales v Amery*.

⁴¹ Audre Lorde, *Sister Outsider: Essays and Speeches* (Crossing Press, 1984) 110.

in the context of both common and statute law. The potential rationale and effectiveness of such an approach was adverted to by Annie Cossins:

I was aware of Justice Gaudron . . . I thought she would do the black letter law stuff just to make sure that it all held up. As a feminist judge, you don't want to let the side down so that the blokes come along and go, well, phfff – see, there you go, female judges, they don't know anything, or they don't know what they're talking about.

In common law cases, this approach is manifested in close attention to precedent and/or the exercise of judicial restraint. For example, Adrian Howe's judgment in *Parker v R* traces the history of the doctrine of provocation and identifies a number of older cases which might have been cited by the High Court and may have encouraged the law on provocation to develop in a different way. In particular, her history demonstrates that the notion of what constituted legally sufficient provocation had been progressively and unjustifiably widened, with gendered consequences in cases in which men killed their wives on suspicion of adultery. She observed: 'I had the precedents. The 1946 *Holmes* case is the classic, the high point of judicial resistance to expanding provocation. There's nothing better after that, not even in the 21st century.'

In *Cummins*, the feminist judgment adopts 'traditional trust principles' (of a common intention constructive trust) to decide the case, rejecting the majority's extension of the doctrine of resulting trust as unprincipled and unhelpful, both doctrinally and empirically. Similarly, in *Dietrich v R*, the feminist judgment rejects the judicial activism of the majority of the High Court and declines to extend the substantive right to a fair trial in serious criminal cases, on the basis that to do so would impermissibly violate the separation of powers between the judiciary and the executive. In all three cases, the more conservative or restrained approach is one which, in the view of the feminist judges, is more likely to benefit women than the alternative. The feminist judgment in *PGA v R* also falls within this category of judicial restraint, with the feminist judges, as discussed earlier, considering it inappropriate to retrospectively rewrite the common law so as to abolish the marital rape immunity. Larcombe commented that:

When I read people who critique our position or who accept the position of the majority in the High Court, I find their preparedness to exonerate the common law process and the courts that apply it from any responsibility at all for that situation to be quite profoundly unsatisfying.

Carefully applying the rules of statutory interpretation is a strategy used by other feminist judges in this collection to correct the outcome of a case or a misunderstanding about the meaning or import of a legislative provision. Notably, three of these cases are in the area of discrimination law, where highly restrictive interpretations of anti-discrimination legislation by appellate courts have, arguably, undermined the purposes of the legislation and made it extremely difficult for complainants to succeed.⁴² The feminist judgments, by contrast, are concerned to give full effect to the legislation by reference to its stated objectives. For example, Beth Gaze commented: 'I actually wanted to [rewrite the judgment in *State of New South Wales v Amery*] by following what I regarded as a correct and clear legal method.' She said that she believed this, itself, could be a feminist strategy:

[D]o you necessarily have to flag it as being about women's interests when you're writing a feminist judgment? Or is it enough actually to just be really quite legalistic on the legal method and the

⁴² In the federal context, see Beth Gaze and Rosemary Hunter, *Enforcing Human Rights in Australia: An Evaluation of the New Regime* (Themis Press, 2010).

precedent that you're dealing with and to reach the particular result that you think is right? To set the precedents up in a way that's actually fully respectful of the interests of women?

Similarly, in *JM v QFG & GK*, which concerns refusal of access to assisted reproductive technology services for lesbian women, Anita Stuhmcke relies on careful consideration of the purpose underlying the legislation. She observed:

So if I had been sitting there . . . as that fourth person [on the court] . . . I wanted them, the other [judges], to take note of the fact that within the same paradigm at black letter law they could reach a different decision . . . That's why . . . the end result . . . was perhaps a more clinical piece than what I would have cathartically wanted to engage in, because to make them understand that the decision that they were coming to was wrong in law, I felt I had to engage with them there.

As discussed below, in the third discrimination case, *McLeod v Power*, the feminist judge finds, on the plain meaning of the words in the statute, that 'white' does constitute a race, colour, or national or ethnic origin.

The last judgment taking a strict approach to statutory interpretation is the family law case of *Goode and Goode*. In this case, the issue was about how to interpret a complex set of new provisions introduced into the *Family Law Act 1975* (Cth) by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). While the majority of the Full Court of the Family Court appeared to focus on the political intentions behind the amendments, the feminist judges engage in a careful reading of the new provisions themselves, finding that, rather than being compelled to divide children's time equally between their parents, the court retains the capacity to decide each case in the best interests of the relevant children. This is an important message in a context in which the amendments had generated expectations and misapprehensions about parental rights to equal time with their children. Rathus observed 'the extent to which men arrive in their various offices thinking that they have a right to equal time . . . The women arrive thinking that the fathers have a right to equal time', and continued by noting 'the irony, that to be good feminist judges, what Renata and I did was engage in straightforward statutory interpretation, which is actually what the Full Court failed to do.'

These judgments demonstrate that feminist judicial method does not necessarily involve pushing the boundaries of legal method, but in some instances may call for a more traditionally 'black letter' approach.

Indigenous People, Feminism and the Law

Five judgments in the collection are in cases involving Indigenous people. Two of these cases, *R v Morgan* and *McLeod v Power*, were rewritten by non-Indigenous contributors who felt able to rewrite the judgments within the constraints originally set by the project, while drawing on critical whiteness theory⁴³ and the theory of intersectionality, which recognises that gendered identity intersects with other identities such as race and class.⁴⁴ In *McLeod v Power*, Nielsen challenges the concept of whiteness as not-raced when she interprets racial

⁴³ See generally: Aileen Moreton-Robinson (ed), *Whitening Race: Essays in Social and Cultural Criticism* (Aboriginal Studies Press, 2004); Aileen Moreton-Robinson, *Talkin' Up to the White Woman: Indigenous Women and Feminism* (University of Queensland Press, 2000).

⁴⁴ See Emily Grabham et al, 'Introduction' in Emily Grabham et al (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge, 2009) 1.

discrimination legislation.⁴⁵ The case arose from a complaint of racial vilification lodged by a white male prison officer against an Aboriginal woman, Samantha Power, who had come to visit her partner who was in custody. Ms Power had arrived at the prison, after a long bus journey with her four young children to discuss the threatened removal of one of them by social services, only to be denied entry. She swore at the officer when being ejected and referred to him using the word ‘white’. While Nielsen agrees with the original decision that Ms Power’s remarks did not constitute racial vilification, she takes issue with the assumption that there is no white race. When asked how race and gender intersect in the judgment, Nielsen said:

[T]o me an interrogation and analysis of power and how power is used to oppress or privilege, to me is kind of the heart of a feminist . . . approach. Typically I suppose a feminist lens would tend to highlight gender and the influence of gender. But not only. I think that feminism has broader reach and I think that . . . it has developed much more sophisticated capacities to analyse across a range of sites.

In *R v Morgan* the feminist judges consider the role of Indigenous sentencing courts, emphasising the need for intersectional methodology to underpin these courts, and highlighting the victim’s voice and experience and the Indigenous elders’ views as key considerations in sentencing. While the original sentencing occurred before an Indigenous sentencing court where Indigenous elders were involved in the process, the feminist judges, Elena Marchetti and Janet Ransley, present an extra voice on the Court of Appeal. They reinstate the original sentence of the Indigenous sentencing court. Marchetti explained:

I guess we pay more attention to recognising the fact that in the original sentencing decision, there would have been the elders present, and just being mindful of the fact that we couldn’t move too far away from what that original decision was, if it wasn’t incorrect in law, because the original sentencing judge had the benefit of that cultural input, which was about a domestic violence issue.

In contrast to these writers, the three Indigenous authors, Irene Watson, Heron Loban and Nicole Watson, wanted to extend the legal genre in various ways. Loban sits as a second, Indigenous, judge in the Federal Court, where usually a single judge would sit to hear a trial. As the Indigenous judge in *ACCC v Keshow*, she focuses on retelling the stories of the Indigenous women – quoting them directly – as mothers living in remote communities concerned about their children’s education.

In the cases of *Kartinyeri v The Commonwealth* considered by Irene Watson and *Tuckiar v R* rewritten as *In the matter of Djaparri (Re Tuckiar)* by Nicole Watson,⁴⁶ the sovereignty of Australian law, and thus its courts, is itself questioned. Australian law is found to be, at best, limited in its capacity to recognise and account for Indigenous perspectives and laws, especially Indigenous women’s perspectives and laws.

Each writer, in different ways, draws on Indigenous people’s traditions of storytelling. In her response to *Kartinyeri v The Commonwealth*, Irene Watson opens the collection with a chapter which rejects the common law judgment form; she enacts the oral tradition of the land and people to show how Aboriginal women’s law has been misinterpreted and suppressed. Such an articulation of stories in a sovereign First Nations legal system is, she argues, not possible within the Australian common law system. She concludes that the rewriting of *Kartinyeri v The Commonwealth* was impossible, as the methodology of the

⁴⁵ *Racial Discrimination Act 1975* (Cth) ss 18B–18F.

⁴⁶ *Kartinyeri v The Commonwealth* (1998) 195 CLR 337; *Tuckiar v R* (1934) 52 CLR 335.

project ‘would not prise open spaces for Nunga women because the rewriting needs to be done from “another space”, outside the jurisdiction of the Australian common law and the sovereignty of the Australian state’.

In the final judgment in this collection, *In the matter of Djaparri (Re Tuckiar)*, Nicole Watson observed that she needed ‘latitude’ so she could ‘bring this alternative history [of the case] and . . . shine a light on how the entire society in 1930s Darwin was raced and law was but one instrument of that racial oppression’. She draws on Indigenous peoples’ storytelling traditions and on critical race theory. In her judgment, she imagines a more reconciled Australian future where there is a treaty between an Australian Republic and a Confederation of Aboriginal and Torres Strait Islander Nations. In this future world there is also a new healing court, the First Nations Court of Australia, tasked with casting light on the lived experience, the stories, of Aboriginal and Torres Strait Islander people. Watson explained that she employed:

[A] form of outsider storytelling that critical race theorists describe and that’s really influenced a lot of my scholarship, particularly Richard Delgado’s work. So it was a tool for injecting this outsider narrative next to the established High Court judgments . . . I think critical race theorists have – well the early critical race theorists like Richard Delgado, Derrick Bell, Mari Matsuda, they’re the people who really influence my work and . . . they were obviously people from oppressed backgrounds, similar to mine, but they’re all legal scholars so I found a particular resonance I guess in their work.

Conclusion

The Australian Feminist Judgments Project has allowed space for a diverse group of Australian feminist academics and practitioners to come together to discuss the theory and application of feminism in legal decision-making. The contributors employ a wide variety of techniques and strategies to rewrite existing judgments as feminist judgments, demonstrating the potential and possibilities for feminist approaches to judgment-writing and feminist praxis more widely. Of particular interest in this collection is that a number of the judgments show how legal formalism may be co-opted as feminist method. Through careful statutory interpretation, vigilant attention to the doctrine of precedent and a deeply considered exercise of discretion, a judgment can reflect feminist aspirations and concerns. Nevertheless, the essay and judgments written by the Indigenous authors represented here show there are limitations to the feminist judgments project methodology and that these limitations are not easily overcome. The jurisdiction of Australian law is deeply contested by Indigenous people and new spaces, forums and forms of law are needed if the sovereignty of Indigenous people is to be properly recognised.

Importantly, both the scope and limits of the project force us to think about how legal judgments are written, what is taken for granted and what could be done differently. In doing so, we hope they will prove instructive, not only for academic feminists, but also for law students, legal practitioners and judges.