Address to Queensland Justices Association on International Womens Day, 8 March 2015

Judge Sarah Bradley, District Court of Queensland

Thank you, Marian[1]. Happy International Women's Day, everyone! It's a real pleasure to be here and to have the opportunity to share this important day with you.

Firstly, I acknowledge the traditional owners of the land on which we are gathered, past and present.

Last December I was involved in the launch of this book[2] in the Banco Court in the Supreme and District Court building in Brisbane.

Marian was at the event, and after the launch she approached me with a request to speak to you today. Marian has asked me to tell you about the book and one or two of the judgments which are examined in it.

The book is titled "*Australian Feminist Judgments: Righting and Rewriting Law*". Don't let the words "feminist" or "judgments" put you off.

The word "feminist" has sadly fallen out of favour in some circles, in recent times, but the word simply means *someone who advocates for or supports the rights and equality of women*. I don't think the people in this room would be here on this particular day if each of them didn't support those rights.

Although the word "judgments" is a legal term, the topics in the book are all very relevant to the real world.

The book is edited by four eminent, female academic lawyers and contributed to by over 50 academic and practicing lawyers, most of whom (but not all) are women.

The book collects 25 actual judgments from Australian courts and in each case the contributors have written "alternative" judgments.

In those judgments the authors have imagined the decision and the reasoning that might have been adopted if a feminist judge had heard the case.

The authors were required to write within the legal genre of decision-making and produce an "authentic" and legally plausible judgment.

So although the rewritten judgments are products of imagination, they are the product of accepted feminist theory and read as real judgments.

The book is produced in an Australia where women's voices are still not heard in equal numbers.

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[1] Marian Vierveyzer, Director – QJA Board

[2] *Australian Feminist Judgments, Righting and Rewriting the Law;* Ed. H Douglas, F Bartlett, T Luker, R Hunter. 2014 Hart Publishing

For example, there are only two women in the Federal Cabinet, only about a third of Australia's judges and magistrates are women, and men still vastly outnumber women as partners in the major legal firms (this is despite the fact that women have been graduating from law schools in at least equal numbers for at least 30 years).

So there is a long way to go before women have an equal voice as lawmakers, law decision-makers and legal practitioners.

The jury is still out though on whether women judges make any difference to the practice or substance of decision-making. This book however might provide a clue as to whether we do.

The first judgment I want to tell you about is the *Australian Competition and Consumer Commission (ACCC) v Keshow*, which was decided by a single male judge in the Federal Court of Australia in 2005.

The case involved action by the ACCC against Ramon Lal Keshow for misleading or deceptive conduct and unconscionable conduct.

It arose in relation to agreements entered into by Keshow with eight indigenous women who all lived in remote Aboriginal communities outside Alice Springs, to supply to them children's educational materials and household goods.

Keshow had entered the communities without the required permission from the community councils, and he approached the women, all mothers, uninvited.

He told them the educational materials would help their children and had the women sign payment forms.

All the women were in receipt of benefits through Centrelink, all but one spoke little or no English, and all had limited or no English literacy skills.

Some women received some materials, others received nothing at all, or were given unrequested goods such as televisions and tape recorders (some of which did not work).

Deductions of thousands of dollars were made from most women's accounts, the largest sum being $10,400, and all amounts were greater than might have been the value of the materials provided, if any.

The ACCC provided a male, white anthropologist expert witness who spoke to "socioeconomic, cultural, gender and age factors" relevant to the women and their communities.

The original judge did find that Keshow had engaged in unconscionable conduct and issued injunctions restraining him for three years from entering into specific communities and imposed conditions on his business.

The feminist judgment in the book is written by Heron Loban, who is a Torres Strait Islander woman and a senior lecturer in the School of Law at James Cook University.

Unsurprisingly, Ms Loban comes to the same conclusion as the Federal Court judge but relies not only on the imbalance in educational and commercial literacy between Keshow and the women, and the fact that he had taken advantage of their limited commercial sophistication that the original judge relied upon, but also on more subtle cultural and gender factors.

For example:

- the desire of the women, who lived in communities where only basic educational services existed for a good education for their children;
- the fact that all but two of the women spoke an Aboriginal language as their first language, and;
- the fact that they felt pressured by Keshow to deal with him, a practice referred to in Aboriginal English as "humbugging".

Ms Loban's judgment is therefore much more reflective of the women's actual experience and gives them a voice in the reasons for the decision.

Another rewritten case which will be of interest to a great many women is a taxation case decided by a judge of the High Court of Australia back in 1972.

In *Lodge v Federal Commissioner of Taxation*, it was held that childcare costs cannot be claimed as a tax deduction.

In the feminist judgment in the book, it is accepted that childcare expenses are incurred to enable the taxpayer to work and to work more efficiently and therefore are deductable.

The original High Court judge (a male), found that although Ms Lodge worked mostly from home as a costs clerk, childcare expenses were private in nature even though Ms Lodge could not earn an income without incurring childcare costs.

Ms Lodge's evidence was that she could not be paid enough money to earn a living for herself and her daughter unless her daughter was in childcare.

The feminist judgment finds that Ms Lodge's childcare expenses are no different to the businessman who is allowed a deduction for his annual golf club subscription where the club is used for business entertainment.

The rewritten judgment refers to the significant social change over the decade prior to 1972 (when the case was decided) particularly in relation to changes in attitudes to women in the workforce and the increasing female participation in the workforce.

It refers to the lifting of the requirement on married women to resign from their jobs in the Commonwealth public service in 1966 and the implementation of the principle of equal pay for equal work.

There are rewritten judgments of cases involving constitutional law, immigration law, criminal law, environmental law, family law and other disparate areas of law.

It is a serious academic and legal exercise but is, I believe, accessible to non-lawyers and is a wonderful example of the feminist imagination at work and a glimpse of a world in which major decisions could be arrived at differently.

Marian did ask me also to speak to you about matters where an error or failure on the part of a justice of the peace may have had an impact on the outcome of a case. In the short time remaining, I will mention a couple of such matters.

You may be called upon to be a support person when police are interviewing someone they suspect has committed an offence.

There is a legal requirement for a support person to be present when certain people are being interviewed by the police, for example children under 18, Aboriginal and Torres Strait Islander people, and people with certain incapacities.

Records of such interviews have been found to be inadmissible as evidence in court when the person interviewed has made admissions in cases where the support person has failed to carry out their role appropriately, for example by putting pressure on the person interviewed to answer questions or tell the police what has happened.

It is important to understand that a support person is not the suspect's advocate or legal representative, but nevertheless that the support person ensures that the suspect understands her right to silence (i.e. the right not to answer police questions) and to discontinue the interview and leave if not arrested.

An example of the dire consequences that can follow if a search warrant is not properly completed is a case in which, although the application for the search warrant included the address of the place to be searched, that address was not inserted in the warrant itself.[3] This was an oversight on the part of the police officer seeking the warrant but it was not picked up by the justice of the peace who issued the warrant.

The warrant was not lawful and was a nullity. The search that was conducted was unlawful.

The trial judge also ruled that evidence seized as a result of the execution of the warrant was not admissible. The defendant in that case had pleaded not guilty to offences of assault occasioning bodily harm, sexual assault and robbery with personal violence.

The judge noted that the justice of the peace involved had been reckless, although the major culprit was the police officer who prepared the application and the warrant.

Fortunately, in that case, there was other evidence implicating the accused in the offending, and justice was ultimately done.

The lessons then, are to carefully read through any documentation and ensure everything has been filled in, and never succumb to any pressure you may feel from a police officer or because of the nature of the alleged offences.

Justices of the peace in our community play a very important role, and although you fulfil that role without financial compensation and often at significant inconvenience to yourselves, justice does depend on you carrying out that role in a professional and impartial manner. That's not always easy, but I'm sure you strive to do exactly that.

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[3] *R v Starr* [2010] QDC 350

Thank you for the valuable part you do play in the justice system and for inviting me to talk to you today.