

## A CONVERSATION WITH HER HONOUR DIANA BRYANT AO, CHIEF JUSTICE OF THE FAMILY COURT OF AUSTRALIA

*VULJ* Editors Niko Kordos, Hannah Cook-Tonkin, Josh Gibson and Angela Stanley interviewed the Chief Justice of the Family Court of Australia, her Honour Diana Bryant AO, on 25 September 2017 at the Family Court in Melbourne.

- VULJ:** When did you first realise that you might want to study law and become a lawyer?
- CJ:** When I was quite young. I'm a third generation lawyer so I grew up in a household where my mother had a legal practice. I originally thought I'd like to study medicine but I was hopeless at math and science so law was the default position.
- VULJ:** When you were studying law what was your favourite aspect of your studies? Did you participate in any extra-curricular activities?
- CJ:** I wasn't a particularly assiduous student. I did well enough, but I really enjoyed university life, so I made the most of it. I did lots of extra-curricular things, tried all the things I'd never done before and really enjoyed my time there.
- VULJ:** Any moots or anything like that?
- CJ:** Yes we did moots. They didn't have the same sort of mooting competitions as they have today. We had to do moots as part of our course at one point, so I mooted then. There wasn't anything like the sort of opportunities that there are now to do things at university. We didn't even have tutorials. They had cut back the budget so they didn't offer us any tutorials at any stage, certainly not after the first year. I became a non-resident at Janet Clark Hall just so I could do the tutorials there.
- VULJ:** Were there many women studying law at the time you were at university?
- CJ:** About ten percent were women in my year.
- VULJ:** You started practicing law around the time of the introduction of the *Family Law Act* and the Family Court. What was it like to practice in such a rapidly changing area of the law?
- CJ:** It was really exciting. I went to Western Australia in 1976 and it was even more interesting there because they'd just set up their Family Court. They had only been operating for six months and had quite a small profession. They had no separate family law Bar at all and only a small general Bar, so everybody was doing their own appearance work. I arrived to find that I had a little bit of experience and so had everybody else. All of the more experienced people had been appointed to the bench, or almost all of them. Most of the people were at my level with not much experience but they'd all done a bit of appearance work, which I hadn't, so I had to get into that, which was why I ended up specialising. I was going to do a variety of common law and then I found that it was challenging doing your own appearance work as well. I thought I'd better specialise.

It was really exciting because every case was potentially making law. If you had a point that hadn't been raised before, you ran it and it got reported and it was a very exciting time.

**VULJ:** Bearing that in mind you must have seen many influential cases throughout your time as a practitioner and a judge. Are there any cases that stand out to you in particular or anything special about any certain cases?

**CJ:** You always end up with cases that stick in your mind. One of the most satisfying things about my career was settling cases rather than running them, especially in Perth where I was Solicitor Advocate and knew the clients and the cases quite well. Being able to settle a case satisfactorily for a client is invariably better than going to trial – people will tell you that over and over again. Clients are amazingly grateful for helping them settle. You would get the most praise and often gifts from clients whose cases you'd settle, who you'd think 'It was quite an easy case and I didn't have to work too hard for that one, it was quite simple' and you would work really hard and fight a case right through and finally get a good result and generally clients are not happy because it's taken too long and they've had to pay too much money. Everyone finds that – it's the same today. I used to have the golden rule, 'If people can settle, they should'. You should only run cases that you absolutely have to run because you don't have a choice, and even then you should only run them if you think you're going to succeed, otherwise it's just not cost effective. I was always strong on reality testing with clients about the cost effectiveness of running things. We'd have this argument, 'What is it that you hope to achieve? Let's look at what it's going to cost you. Do you still want to do it?'

**VULJ:** Have you maintained that perspective as a judge as well?

**CJ:** I have tried to, yes. You don't have as much influence as a judge. You can a bit – it's a bit harder with the work we do these days in the Family Court – but certainly in the Federal Circuit Court you could do that still, from the bench. You could try and encourage people to settle and point out the realities to them.

**VULJ:** Family Law is quite a niche area. What special skills should a family lawyer possess and what is your advice for somebody considering entering that field?

**CJ:** A family lawyer has to be a really good all-round lawyer. The best family lawyer is the one who knows all of the areas of law. Family law, particularly in property proceedings, involves corporation's law, equity, trusts, and commercial law. These days with binding financial agreements you've got to know all about contracts, undue influence, all of that sort of thing. Sentencing, because with criminal law we do some sentencing. And property law of course. A good family lawyer will be a good all-round lawyer and I would always recommend that people get experience in all those other areas before they decide to specialise in family law.

**VULJ:** You've always been passionate about advocating for women in the profession. What do you think firms can still do today to further equality in the workplace?

**CJ:** There are two challenges now. One is for the Bar. Women are still unrepresented at the senior levels of the Bar and that's a particular problem because as soon as you get women being appointed as Queen's Counsel or getting to be senior at the Bar, the courts are appointing them. So you've got gender equality or near-equality across a number of courts. We've got gender equality in the Family Court, so has the ACT Supreme Court. Half the Chief Justices in Australia and New Zealand are women. Magistrates' courts have lots of women. It's not so

much a problem in courts anymore, but it is a problem at the Bar because senior women are being taken out of the profession, which is a pity. That has got to be addressed. Women are still not getting enough speaking parts in the High Court and in the other Supreme Courts, in Appellate Courts around the country. That again may be the reflection of the lack of numbers of senior counsel at the Bar.

The other area is in the firms. The profile of the legal profession now is more than half women, but we don't quite see that pushing through to numbers of partners, particularly in the larger firms. That is starting to change and with the force of numbers it will continue to change. Flexibility in the workplace for women is really important and you have to keep pressing for flexibility and encouraging firms to ensure that they have flexible workplaces – both for men and women. I can remember very early on when I was in Perth and we were taking on article clerks and one of the partners who organised the clerks said 'We have to be careful about taking on women because they'll leave. We'll put effort into training them and then they'll leave and go off and get married or have children'. I didn't think that was anecdotally right so I went back and did some research and I had a look at the last five years and I discovered that people did leave after two or three years, but in equal numbers of men and women. I was able to take the data back and say, 'No, it doesn't make any difference'.

**VULJ:** You've undertaken a master's degree as well as a bachelor's degree. What do you think about the current state of legal education?

**CJ:** That's a really difficult question. It's too difficult for me to answer. I went to the Australian Academy of Law Conference recently in Sydney, which was with the universities. It was the first conference they'd had like this in forty years looking at the future of legal education. It was a terrific conference and most of the universities were there discussing the future. It's difficult, there's that continued tension between trying to provide a broad education and then trying to train people to be lawyers, and who's responsible for the training to be lawyers and who's responsible for the broad education continues to be a subject of debate. In Australia we don't do too badly because we've got universities that do both, so you can choose where you go and having choices is a good thing. Technology is the next big thing and that's going to be really interesting. There was a lot of talk at the conference about technology and AI and how it's going to affect law and the teaching of law.

**VULJ:** Do they see it as a tipping point or it will evolve the same way emails have come in and fundamentally changed the day-to-day practice of law and the timeframes of things?

**CJ:** People are talking about a tipping point and then it's hard to know whether that's true or not but we're probably getting there. We look at what's been happening over the last twenty or thirty years – there's been talk about technology and paperless offices – but it's happening now. Now the Federal Court is driving our technology and we're having digital court files and it is becoming a reality. You look at what's happening with the major law firms, with the way they use AI for discovery. We're probably right to say we have got to the tipping point and it's going to really take off at some pace. We all have to be ready for that. It's scary actually.

**VULJ:** What do you think will be the biggest challenge to face the Family Court in coming years?

**CJ:** Our biggest challenge is financial and that's going to be the challenge for the Court and for government because government is responsible in the end. I don't think the Court's got much control about that. In a sense we just do our job, hear the cases and our fate is in the hands of

others as to how they fund the court. The Australian Law Reform Commission review next year will be really important as to the future of the court because they're going to look at the *Act* in terms of the structure and everybody agrees that it needs to be re-written. Sections that are supposed to be together are all over the place. It's a very difficult *Act* to read, particularly where you've got a lot of self-represented litigants. There's also debate about whether some of the parenting provisions are still appropriate, which will involve a huge gender debate about whether they should be changed or not. Then they're also going to have a look at the structure of the courts as well and decide whether the best system is really to have two courts exercising pretty much concurrent jurisdiction, which is what we've got at the moment, or whether you should have some other arrangement. So that's going to be very interesting and will probably define what happens to the Family Court for the next forty years, or for the next while to come anyway.

**VULJ:** Family violence is something that has come to the forefront of many political and legal discussions in recent years. During your time at the bar and at the bench, what changes have you noticed in how the court deals with family violence?

**CJ:** I have seen huge changes. Early on in my career I acted for a couple of people, which for me was quite enlightening about family violence. Early on I acted for a woman about a year after I got to Western Australia. The case was already listed and she came from South Australia to run this case in WA. She'd separated from her husband and left the child, quite a young child, with him. In those days we didn't have affidavits, probably happily for her as it turned out, but you just gave evidence in chief so you had a statement and gave evidence and was cross-examined, which was pretty tough for the cross examiners. She arrived and I didn't really know anything much about the story. She told me her story, and it was incredibly powerful. She'd been the subject of huge family violence and in the end she'd left. They'd been in the caravan park and he'd assaulted her quite badly and she just left, and left him with the child, and she'd not been able to see the child. She'd taken ages to get her life together and then he resisted any opportunity [for her] to see the child. So she told me this amazing story and quite well and I said to her 'Well, we're going into court and you're going to tell this story to the judge', which she did incredibly powerfully and she succeeded. I think the other side were horrified when this incredible story came out, and told in a very authentic way.

That was the start of me seeing what family violence was about because I didn't have a label for it, but it was clearly coercive and controlling violence – there was no doubt about it – it was nasty physical violence. I also did a case, and I saw it as my role at that stage too, to be educating the judge that this was family violence, though we didn't really use those terms, and that this was the reason that the child had to be with her.

I had another case a couple of years later where a woman had taken the child and gone to Canada. It must have been the early days of the Abduction Convention because it was the first case I'd ever seen under the Abduction Convention and she'd gone to get some advice in Canada from a Queen's Counsel who said to her 'You've got to go back, you've wrongfully removed the child' and she came back. She was recommended to come to me so I could act for her. The people in Canada had raised the issue of 'battered women's syndrome', which I had never heard of before. It was pretty novel in Australia because we're talking about the early 80s. They wanted to run battered women's syndrome, so we did without using the actual words, because I knew that the judge wouldn't be happy to hear sloganistic things, but ran the case in that way and succeeded and she was allowed to go back to Canada.

So these were my early experiences of family violence. I did become interested and attuned to it, which has followed me through in my career. Now the *Act* has been amended, there's a definition of family violence, which is very wide. In 2009 I decided that our family violence committee should produce a booklet about family violence. We produced the *Family Violence Best Practice Principles*, which we published and have updated since then, to set out the nature of violence so that litigants would understand – a bit for judges as well I suppose, a bit for the profession, so that everyone would be attuned to family violence. That's been one of the really good things that the Court has independently done. We've got a family violence plan, we have actually very good systems for people who come to court, they can identify concerns before they come and they get looked after and made sure they are separate and safe from the other party. That's a huge change, as all of those things are. It's very different – recognition that people need to be protected from the other party. And the recognition these days, though it probably wasn't happening as much then, that a self-represented litigant who is an alleged abuser can use the system to continue to abuse the other party.

**VULJ:** Do you think there are any reforms required to ensure the equitable treatment of self-represented litigants in court hearings?

**CJ:** Self-represented litigants are a real challenge for us and they come in different shapes and sizes. Some of them are simply self-represented because they can't afford representation. Some of them fall into the category of people who want to continue an almost controlling if not abusive relationship, and some of them are people with personality disorders who just keep litigating and litigating and ultimately get a vexatious proceedings order against them and keep litigating. There's unfortunately a relatively large enough cohort of that to take up a lot of our time. This may not be exactly right but it's a bit like the eighty–twenty rule: twenty percent of the litigants take up eighty percent of our time. If you looked at the list of appeals and applications, the same names come up over and over again.

**VULJ:** Is there any legal solution to that?

**CJ:** There isn't really. I've just been to my last judgment, which was one of those: a really bad one from a person who's smart. This man has a PhD so he's not stupid but he just will not give up and they just keep making applications. Making a vexatious proceedings order is certainly protecting the other party because they can't then proceed without leave but of course it doesn't protect the court. You still have to hear the application. So that's causing a lot of problems. And they find their way to the High Court as well; if you look at the special leave applications you'll see the same names there. It's a bit easier for them there because they can just dismiss it and not give special leave, without having to actually engage. It is quite a problem. So they're the problem group, the others have challenges rather than problems. Some of the problems are that it's difficult to run a case yourself and certainly there's the issue about cross-examination of a witness who's allegedly the subject of abuse. Now there's some draft legislation out at the moment and we'll see what happens with that.

**VULJ:** About cross-examination?

**CJ:** Yes. I mean they will bring something in. The debate at the moment is around who's going to do the cross examining because the government doesn't want to pay and it's very challenging to find some of the satisfactory ways. Our submission suggested to them that they ought to find legal aid, if not to provide a lawyer. At least provide a lawyer who can do the cross-examination

because that would be money well spent frankly, but we'll see. They don't seem inclined at this stage to put any money in.

**VULJ:** With your retirement coming up soon, do you have plans for your retirement?

**CJ:** Yes. I am going to be judge in residence at Melbourne University from the first semester of next year, so that will be good – do a little bit of teaching and just be part of their faculty. And then after that I've got some plans to do some research with an international group – we're looking at research into the Abduction Convention. There's no research at the moment about, worldwide frankly, about what happens to children when they're returned to the country of habitual residence. We make orders across the globe; judges make orders, sometimes try to make protective orders or directions before they return and when they've returned we don't know if they're complied with. We don't know how quickly they can get their cases on. We don't know if they do approach courts to apply for relocation and if they don't, what the impediments are, so we want to find out some of those things.

**VULJ:** And when you do find yourself with spare time outside of the law do you have hobbies?

**CJ:** I play golf. I am a bird watcher, so I go bird watching when I get a chance. What else do I do? I play tennis a bit. I'll keep busy. Oh skiing! I left out skiing. I do a lot of skiing. Yes, I think I'll keep quite busy.

**VULJ:** One final question. You were the Chief Federal Magistrate back when it was the Magistrates Court. How do the roles compare between what you are doing now and back then?

**CJ:** Some things are the same and some things are very different. The things that are different, setting up the court was really amazing, the opportunity to set up a new court was just a fantastic opportunity which very few people have the privilege of having. That was really exciting and I was able to have a say in who we selected, which again is pretty unusual. We had a selection process, certainly to start with, where they advertised for people and I was part of the selection process. The first group of people that we got, the first sixteen at least, I was able to have a group of like-minded people, who had the same vision, who had the same work ethic that we all wanted to sort of get in and do things and do it differently. We all had an idea about what we thought the Superior Courts were not doing so well and ideas about how we could do that better. It was a pretty exciting time so those first four years was really good and I really enjoyed having the opportunity to do some other areas of law that I hadn't done before – so administrative law, we had migration work, we didn't have the jurisdiction when I started but after about two years we got migration jurisdiction so I had a chance to do admin law which I had not done before. I had always done a bit of bankruptcy as part of family law so I enjoyed that as well. So the variety was quite good – a bit of human rights law as well.

What wasn't really different was you did get a good appreciation there about how courts run. I knew how courts run and how the Attorney General's department operates courts and the funding and so forth. I understood all that so when I was appointed to the Family Court none of that was new to me. And I was pretty confident that I knew all about family law because I'd been an advocate, I'd been Queen's Counsel, appeared before the Full Court almost all of my career so I was pretty confident about doing appeal work and was looking forward to sitting on the appeal benches which I did enjoy. But it was different. The work was different, the Court was different, being head of a Superior Court is different and the role of Chief Justice of the Family Court is a very different role. I mean you speak for the whole of the family law

profession a lot of the time; no one differentiates between the two courts, so when you talk about family law you do talk about it for the whole of the system. The responsibility was very different than being in a lower level court.

**VULJ:** Thank you very much.

**CJ:** A pleasure.