Behind the Bench

Associates in the High Court of Australia

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An analysis of the role, power and background of judges associates in Australia's highest court.

Since the inception of the High Court of Australia in 1903, associates have been an integral part of its work. Yet while the role and selection of the judges themselves has been a matter of intense scrutiny, relatively little attention has been given to the work of associates. The ignorance of most outsiders as to the workings of the Court, coupled with a tradition of secrecy by insiders, has meant that while most court watchers know that associates exist, they have only a hazy idea of what they do and where they are drawn from.

By contrast, recent years have seen a strong focus in the United States on the work of clerks to Justices of the Supreme Court. Contemporary writings have dealt in detail with the role of clerks on particular cases. Clerks, it is contended, exercise a significant influence over the US Supreme Court's work.[1] The demographic profile of clerks has also been analysed, showing that in terms of their gender, race and the university they attended, they constitute a highly homogenous group.[2]

Given the powerful function of the High Court in shaping Australian public policy, the role and composition of its associates should not be immune from scrutiny. This article deals with three issues — what associates do, the extent of their influence, and the diversity of their backgrounds. Where relevant, comparisons are drawn between High Court associates and their counterparts on America's highest court.

Evolution of the associate

By the late 19th century, the use of associates by courts in the Australian colonies was generally accepted,[3] and it was assumed that when the High Court was established, the judges would employ salaried associates. Today, High Court Judges are entitled to a personal assistant, plus two associates or tipstaves. This is more than Australian Federal and Supreme Court judges, who have only one associate/tipstaff — but less than the US Supreme Court, where each judge has four clerks. In addition to their personal staff, the High Court judges also share the services of a full-time court researcher.

During the 1980s, most High Court judges employed one tipstaff and one associate. The tipstaff (usually a former serviceman) would attend to the judge in court, maintain the chambers library and assist with administrative duties. The associate (a recent law graduate) would assist with the preparation of judgments. The former was employed on an ongoing basis, the latter usually for one year only. Now, however, only one judge of the High Court employs a permanent tipstaff. The others prefer to employ two people to perform the dual roles of associate and tipstaff.

Selection

The method through which High Court associates are selected varies from chamber to chamber. Some judges place advertisements with law

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schools, while others take the view that the right candidate should have sufficient initiative to make the approach without any prompting. Some select only for the following year — others for two or three years in advance. Unlike the US — where prospective Supreme Court clerks are often vetted by a panel of former associates, High Court judges do not tend to utilise their associates in the selection process. There is a high demand for the positions. Depending on how well known they are, and whether they advertise, each judge receives between 30 and 150 applications a year.

For most associates to High Court judges, this is their first associateship. In contrast, US Supreme Court clerks have almost invariably undertaken a clerkship in a lower court. Many have worked with known 'feeder' judges, a group of about 20 appellate judges whose clerks are known to often proceed to the Supreme Court.

Associates at the High Court of Australia tend to be in their mid-twenties, a few years younger than their US Supreme Court counterparts. Not only have US clerks done a clerkship already, but American law graduates are generally a little older than their Australian counterparts, having completed two separate degrees, and often spent some time in the workforce between their degrees.

Those selected as High Court associates are paid a salary of $41,000 a year — comparable to the starting rate at major Australian law firms. The most significant personal benefits, however, are the opportunity to observe the judicial process from behind the bench, developing the intellectual rigour required, and potentially developing an enduring bond with a High Court judge. Following their time at the High Court, the most common professions for ex-associates are academia and the legal profession, although some associates have gone on to become judges, politicians and public servants.

Duties

Formally, associates at the High Court perform a number of different tasks, not dissimilar to the roles carried out by US Supreme Court clerks. These may include:

- prior to the hearing of special leave applications, preparing a memorandum on the case;
- prior to chambers hearings, writing a memorandum on the case;
- prior to the hearing of an appeal, preparing a memorandum on the merits of the case, and on any new issues which may arise;
- after a case is heard, acting as a 'sounding board' for the judge's views, researching particular aspects, and occasionally writing a memorandum or draft judgment;
- after the judge has written his or her judgment, proofreading it — checking for legal accuracy, correctness of citations, and typographical errors;
- during the hearing of a case, acting as tipstaff in court; and
- assisting with other administrative duties, such as proofreading speeches, handling correspondence and booking flights.

Not all judges require their associates to carry out each of these duties. A variety of factors, including the judge's method of drafting, the speed with which he or she writes judgments and the amount of extra-judicial work he or she undertakes all affect the role of the associate.

In addition to these formal tasks, there is considerable interaction between associates, which very occasionally has involved them attempting to indirectly influence the opinions of other judges. Among US Supreme Court clerks, it has been claimed that this interaction developed into fierce lobbying during the 1980s and 1990s, as that court divided into conservative and liberal blocs.[4]

Such is not the case on the Australian High Court. Even in highly controversial cases, discussions between associates seldom become heated. This can perhaps be ascribed to fact that the High Court is both less political, and less deeply divided, than its US counterpart. Although lobbying by associates is not unheard of, it is not uncommon either for an associate, when arguing with another, to take the opposite stance from his or her judge.

Excessive influence?

In recent years, some United States academics have begun asking whether judges' clerks have too great an influence over the work of superior courts. A steady increase in the number of appeal applications to be sifted through, coupled with the growing complexity of appeals, undoubtedly increase the pressures on judges to delegate more of their work to their clerks.

On occasions, delegation can simply entail reliance on the research work of a clerk, as was acknowledged by Scalia J in *Conroy v Aniskoff*:[5]

> I confess that I have not personally investigated the entire legislative history — or even that portion of it which relates to the four statutes listed above. The excerpts I have examined and quoted were unearthed by a hapless law clerk to whom I assigned the task.

Yet on other occasions, delegation of judicial work may be of more significance. US Supreme Court clerks have particular influence over the process of selecting which cases the Court will hear. Each year, around 7000 applications for certiorari are received, of which 98–99% are rejected. Most of the scrutiny of applications is carried out by a 'pool' of clerks, one of whom writes an advisory memo for the judges. While not always followed, these memos carry significant weight.[6]

It is also commonplace for US Supreme Court clerks to draft opinions. According to Lazarus, the vast majority of opinions issued by the Supreme Court are drafted by clerks.[7] This practice is defended by Rehnquist CJ, who argues that drafting is a highly structured task, shaped and scrutinised by the judges.[8] Nonetheless, it has spurred complaints from those who believe that drafting should properly remain the exclusive domain of judges. It has been argued that drafting by clerks tends to engender needless dissents, complicated multiprong tests, discursiveness, prolixity, legal jargon and intra-footnote battles.[9]

Do associates at the High Court of Australia exercise a similar degree of influence over the selection of cases and the drafting of judgments? While a direct comparison is obviously difficult, there are several systemic factors that diminish the amount of power wielded by Australian associates compared to their US counterparts.

- *Fewer associates per judge:* Because each High Court judge has two associates, compared with the four that US Supreme Court judges have, the potential for delegation is lessened. Additional associates would not necessarily

mean an increase in the amount of work that is delegated, but it does make such an outcome more likely.

- *Fewer applications to be sifted:* The High Court of Australia receives substantially fewer applications than the US Supreme Court. While the US Supreme Court receives around 7000 applications each year, the High Court receives only about 600.[10] Thus while most High Court judges still ask their associates to prepare memos on special leave cases, they have far more time to personally scrutinise the file than do their US counterparts. The High Court also does not need to be as discriminating as the Supreme Court. Since both courts hear around 80–100 appeals each year, the Supreme Court must reject 98–99% of applications, while the High Court rejects only 85–90%.
- *Greater use of oral argument:* As has been pointed out, applications to the US Supreme Court are determined solely on the papers. In contrast, applicants for special leave to the High Court are permitted 20 minutes to put their case. The disparity also exists in appeals themselves. While US Supreme Court appeals are limited to one hour in total, no time limit is placed on High Court appeals. Most take a day (four to five hours of hearing time), though some can run for two or even three days. Oral argument requires each judge to directly engage with the competing arguments put by both sides, and precludes any form of delegation to the associate.
- *A different judicial culture:* In contrast to Rehnquist CJ's sanguine acceptance of clerks drafting judgments, those Australian judges who have commented publicly on the practice have generally sought to downplay it.[11] This is related, in part at least, to the fact that the US Supreme Court works through a system of 'assignment', whereby the senior judge in the majority chooses who will draft the judgment. In contrast, the High Court of Australia operates in a less formalised manner, through which judges will often write quite similar opinions concurrently. Australian judges, as Kirby J has pointed out, 'like to see their own opinions published'.[12]
- *A different attitude to delegation:* Finally, it is worth noting the parallels between delegation of work by judges and delegation of work by politicians. In the United States, legislative staff have a major role in the policy process — described by one writer as being 'major actors', 'important participants' and even sometimes 'leaders'.[13] This considerably exceeds the influence wielded by personal advisers to Australian politicians.[14] Whether for reasons of governmental structure, history or habit, it seems that public officials in Australia are generally more reluctant to cede power to their staff.

Although High Court associates clearly have a measure of influence over the work of that Court, the above factors make it difficult to argue, as has been suggested in the United States, that their influence is excessive. Nonetheless, as politicians are forced to delegate an increasing amount of work to their personal staff,[15] judges too will face the same demands. In the future, a steady increase in the High Court's caseload, coupled with growing complexity of litigation[16] and the increasing number of issues raised in each case,[17] will place more and more pressure on the judges to rely on their associates.

In addition to the more tangible avenues of influence, High Court associates also have the potential to influence the work of the Court through something far less tangible — the inherent nature of the position and the close relationship which judge and associate often develop. Due to the need to maintain confidentiality, judges cannot discuss reserved cases with anyone but their colleagues and their associates. The associate plays the role of researcher, drafter, proofreader and devil's advocate. While they are plainly shaped by their judges, the effect is not always unidirectional.

Diversity

As Callinan J has recently pointed out, the demographic data on US Supreme Court clerks shows a distinct lack of diversity.[18] Given the potential for associates to influence the work of the High Court, it is similarly pertinent to examine the demographics of those selected to work as associates at Australia's top appellate court. I have therefore compiled a list of all High Court associates appointed from 1993 to 2000.[19] This interval was chosen in order to arrive at a list of around 100 associates, from which some reasonable generalisations might be made.[20] Around two-thirds of the associates in this sample presently work, or have worked, for judges presently serving on the bench.

The gender breakdown of the associates is quite even — 47% women and 53% men. Although two members of the Court[21] have not thus far employed a female associate, most others have an even gender balance. Gaudron and Kirby JJ even go so far as to always appoint one woman and one man each year.

Only 9% of the associates in the sample speak a language other than English at home. This is substantially below the proportion in the population at large (15%), or in the 20–34 year-old age group (17%). It is probably, however, reflective of the proportion of those from a non-English speaking background who study law. To my knowledge, no Aboriginal person has ever worked as a High Court associate.

Just 38% of the associates sampled[22] completed their secondary education at a public school. Sixty-two percent were educated at a private school — 18% at a private Catholic school, and 44% at a private non-Catholic school. The proportion of Catholic school-educated associates is in line with the general population, but the figures for public and non-Catholic private schools differ substantially. Over the past few decades, 70–75% of all children have attended public schools, 15–20% have gone to private Catholic schools, and only 7–10% have studied at private non-Catholic schools. It is, however, probable that private school students are already over-represented among those studying law.

High Court associates tend to have studied at a very narrow group of universities. A majority (52%) completed their undergraduate law degrees at either the University of Sydney, the University of New South Wales or the Australian National University. This figure rises to 77% once two other 'sandstone' institutions — the University of Melbourne and the University of Queensland — are included.

Certainly, High Court associates are not so lacking in diversity as their American counterparts. Among the findings of *USA Today*'s study were that of the Supreme Court clerks who had been employed by the present justices, only a quarter were women, and just 2% were African-American.[23] Furthermore, in a country with many more law

schools than Australia, nearly 40% of US Supreme Court clerks had completed their law degrees at two institutions — Harvard and Yale. The US research did not ask what sorts of schools the clerks attended.

Yet for their part, High Court associates are not particularly representative of Australian law students, let alone of the population as a whole. People from non-English speaking backgrounds and public schools are under-represented. There is a heavy bias towards a narrow group of traditional universities, and two of the seven judges have not yet employed women as associates.

These are all factors which should cause concern. Associates play an important role in helping to assess applications and assisting with the preparation of judgments. As former US Supreme Court clerk Mark Brown has argued, 'People of different backgrounds bring in some different thinking for the Justices'.[24] If associates tend to be from the same demographic group, he points out, it simply perpetuates the dominance of that group in the legal profession. Moreover, associates gain a substantial personal benefit from their time at the High Court. An imbalance in the selection of associates will have a flow-on effect when ex-associates enter the legal profession, as most do.

Greater diversity is also important when the background of the judges themselves is considered. Only one is a woman. None are from non-English speaking backgrounds. Three attended private Catholic schools, three went to private non-Catholic schools and only one was educated at a public school. Four of the seven judges studied law at the University of Sydney.

Conclusion

Given the projected increase in the quantity and complexity of the High Court's caseload, the reliance placed on High Court associates may well increase in coming years. It is, therefore, more important than ever that these associates be drawn from a representative cross-section of Australian society. While the scope for Australian associates to influence the development of our law is not so great as in the United States, it exists nonetheless. Associates are not merely amanuenses for their judges — they can potentially affect Australian jurisprudence. The associate system has served the High Court well throughout its history. By maintaining diversity, it will continue to do so in the future.

References

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2. Mauro, 'Corps of Clerks Lacking in Diversity', *USA Today,* 5 June 1998. Four months after the release of this study, a large rally was held outside the Supreme Court in protest: Mauro, 'Protest Targets Lack of Minority Clerks', *USA Today,* 1 October 1998. See also Mauro, 'Congress Grills Justice on Clerks', *USA Today,* 11 March 1999; Mauro, 'High Court Hires more Minorities', *USA Today,* 9 September 1999.
3. By this time, US Supreme Court justices had also begun employing clerks: Baier, 'The Law Clerks: Profile of an Institution', (1973) 26 *Vanderbilt Law Review* 1125 at 1132. In the United Kingdom, however, associates were not employed until much later.
4. Lazarus, ref 1, above, pp.261–75. See also Woodward and Armstrong, *The Bretheren,* Simon & Schuster, 1979, pp.34–5.
5. 123 Ed 2d 229 at 243 (1993). Cited in Jamieson, 'Of Judges, Judgments and Judicial Assistants' (1998) 17 *Civil Justice Quarterly* 395 at 399–400.
6. Lazarus, ref 1, above, p.31.
7. Lazarus, ref 1, above, p.271. See also Biskupic, 'Making "The List": A Final Sifting of Appeals', *Washington Post,* 6 September 1999; Thomas, *Judicial Ethics in Australia,* Law Book Company, 1988.
8. Biskupic, ref 7, above.
9. Lazarus, ref 1, above, pp.271–2.
10. In 1998–99, 615 applications for special leave were filed with the High Court.
11. See, for example, Kirby, 'What Is it *Really* Like to Be a Justice of the High Court of Australia? A Conversation of Law Students with Justice Kirby', University of Sydney, 23 May 1997; Callinan, 'Courts: First and Final', Speakers' Forum, University of New South Wales, 17 August 1999.
12. Kirby, ref 11, above.
13. Hammond, 'Recent Research on Legislative Staffs', (1996) *Legislative Studies Quarterly* 543 at 548.
14. L'Estrange, 'The Roles of Opposition Staff' in Disney and Nethercote, *The House on Capital Hill: Parliament, Politics and Power in the National Capital* Federation Press, 1996, p.184.
15. Waterford, 'The Minister and the Minister's Private Office', (1997) 83 *Canberra Bulletin of Public Administration* 56 at 58.
16. Australian Law Reform Commission, 'Managing Justice: A Review of the Federal Civil Justice System', ALRC 89, 2000, p.102.
17. Hayne, 'Australian Law in the Twentieth Century', Keynote Address at the Judicial Conference of Australia, Melbourne, 13 November 1999.
18. Callinan, ref 11, above.
19. I am grateful to the many former associates who assisted me in compiling and checking this data, but take full responsibility for the conclusions that I have drawn from it.
20. The eventual sample was 97 associates.
21. Gummow and Callinan JJ.
22. Of the 97 associates sampled overall, I was only able to determine which type of school 71 of the associates attended.
23. Mauro, 5 June 1998, ref 2, above.
24. Quoted in Mauro, 5 June 1998, ref 2, above.

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2. Kift, S., 'Lawyering Skills: Finding their Place in Legal Education', (1997) 8 *Legal Education Review* 43. Kift provides a comprehensive review of the literature in this area.
3. Clark, E., 'Report: Australian Legal Education a Decade After the Pierce Report', (1997) 8 *Legal Education Review* 213, offers a pessimistic view of the difficulties facing law schools in the face of this cost cutting.
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5. Lustbader, P., 'Teach in Context: Responding to Diverse Student Voices Helps all Students Learn', (1998) 48 *Journal of Legal Education* 402 talks about both the challenges and the benefits of this increasing diversity.
6. Giddings, J., 'A Circle Game: Issues in Australian Clinical Legal Education', (1999) 10 *Legal Education Review* 33, 49–50.
7. Giddings, J., above, pp.47–50.