



JUDICIAL ASSOCIATES

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William Rehnquist served on the Supreme Court of the United States for 35 years. He was an agreeable gentleman, but although he had 4 clerks each year to help him with his work, he never once appointed a black person to the post. This fact was noticed in the media. Yet to his death in 2005, Rehnquist never changed his ways.

In Australia, judges mostly get by with one or two clerks, called associates or tipstaves. Exactly what they do varies from one judge to another. Many of them are young law graduates for whom a year working for a judge is a great opportunity to see the court from the inside. Appointment to these positions is quite prestigious. In the U.S., it is said to add \$80,000 or more to the commencing salary of the law graduate if they have 'clerked' for a Supreme Court justice. But in Australia, no-one has done the sums to put a monetary value on the appointment. Certainly, it is generally a good career move. It tends to help the young appointees to win scholarships for overseas study, to secure places in big legal firms, in prestigious bar chambers or with Crown law. Needless to say, there is a lot of competition to get selected. Some associates themselves go on to become leading lawyers and judges. Justice McTiernan, as a youth, clerked for Sir George Rich in the High Court. Justice Aickin, the first occupant of my old room in the High Court building in Canberra, had done so for Chief Justice Dixon.

The big change to come over the selection of judicial associates during my service was the huge increase in the appointment of females. This was very rare when I started out in the 1970s. At his farewell ceremony, Chief Justice Barwick paid tribute to the "young men" who had been his associates during

his 17 years as chief justice. Now, there are usually slightly more female associates than males. It is not unusual to see them turning up again in court as juniors to the senior barristers appearing there. A year in a court gives a young lawyer a rare insight into the psycho-dynamics of the judiciary. Presumably, this is a valuable commodity in the eyes of the hard-nosed professionals who do not believe that all outcomes in litigation are pre-ordained by formal legal requirements.

Early in my years in the Court of Appeal, a female applicant for the associate's position cleverly remarked, during her interview 'I know that your Honour does not usually engaged females'. She got the job. And I changed my appointment practice. Each year I recruited both a male and a female associate. Justice Gaudron used to tell me that this practice gave unfair advantages to men because, on their merits, they would not come up at 50%. Yet over time, it meant that equal opportunity was achieved.

I was the only High Court judge who advertised for my associates. Notices were placed in every law school. The result was more than 350 excellent applicants. This demanded an exhaustive selection process. As a young lawyer, despite excellent grades, I had found it hard to secure articles. In those days, grades mattered less than who was your daddy. I was determined to signal appointment strictly on merit. Other judges relied on word-of-mouth or recommendations from their old law deans or individual applications. Advertisements tend to bring forward greater variety. Those in the newer universities get the message that they are welcome too. If other things were equal, I would give preference to top students from non-sandstone universities. In my last years, my associates came from Bond, Newcastle, Wollongong, UTS, UWS and Murdoch.

Exactly what associates do for their judge depends on what the judges want. In the High Court, most are required to read the applications for special leave to appeal to the court, and to prepare a memo identifying the issues to be

considered. My clerks did not do this. Like one other judge, I felt that such memos would not be worth the effort. Anyway, my staff were always kept busy reading my draft reasons, commenting and criticising them. For me, this was the real value of engaging brilliant young lawyers. They critiqued my efforts. In the end, everyone knew, the last word belonged to me.

In the United States, judicial clerks reportedly draft most of the opinions, which are only finessed by the judge. Very occasionally, I would ask for drafts that I could adapt and incorporate if I was satisfied with them. In Australia, few judges delegate their substantive work to associates. It is not our tradition. The pressure is still as great. The judicial ego, honour and the sheer pleasure of decision-making restrains them. Then, just when the associate is getting very useful at their job, it is time for them to move on. But as with Barwick, they remain in touch. Last Tuesday a big collection of them took my partner, Johan and me to dinner – in one more celebration to remind me of the cruel fact that I had reached 70.

The days of judicial butlers, chosen from ex-servicemen who shine the judges' shoes, are well and truly gone in this country. So are the days when judges appointed their children to work for them. Long hours, a deal of tedium, lots of washing up and boring administrative tasks fill the average day. Yet court cases are sometimes important and occasionally dramatic and exciting. The judge does not have many people with whom to discuss the raw emotions and important choices that have to be made, save for the associates. It is necessarily a very personal relationship between the old and young, the worldly wise and the up-and-coming novice.

There must be a PhD student out there who could write an interesting treatise on whatever became of the judicial associates. Recently, the ANU has launched an oral history project to record the recollections of surviving High Court judges, so as to capture us before we all go on to our eternal rewards. It would be a good idea if this project were extended to associates. Their

memories are likely to be more reliable. And their recollections would portray the serious-minded officials who make up our judiciary, for the most part striving to be worthy of the high calling of being an independent and impartial judge in a country ruled by law not power.