

Entry on Associates, prepared for Tony Blackshield, Michael Coper and George Williams (eds) (2001) *The Oxford Companion to the High Court of Australia*, Oxford University Press, Sydney

When the High Court was established, each judge was assigned both a **tipstaff** and an associate (also known as a law clerk). The first three associates were Percy Griffith (Griffith's son), Thomas Bavin (Secretary to the Prime Minister and later NSW Premier and Supreme Court judge) and George Ernest Flannery (Secretary to the Representative of the Government in the Senate and later QC).

Prior to 1972, when the judges were allocated their own secretaries, associates were required to perform most of the administrative duties in the judges' **chambers**. Until the 1930s, when a pool of typists was made available in each registry, this included typing and distributing the judgments. In the early stages, associates were permitted to keep the proceeds from selling the judgments—a perquisite which ceased in 1924.

Given the substantial administrative duties that the associate was required to perform, it is not surprising that many judges chose to employ associates without legal qualifications, or with undistinguished academic records. Some associates were selected for their secretarial skills, whilst others were chosen simply because their judge sought to give them an early career boost. A few judges chose associates because they were the children of one of their friends. Like Griffith, a number of judges employed close relatives as their associates. These included Barton, O'Connor, Isaacs, Higgins, Gavan Duffy, Powers, Rich, Latham, Williams, Webb, Kitto and Jacobs.

Yet from the beginning, some members of the bench selected as their associates bright young lawyers who they felt might assist them in the process of writing their judgments. Fresh from university, such associates also have the potential to act as conduits between academia and the Court. By the 1970s, it had become the norm for the judges to choose young lawyers as associates.

The duration of service for associates has varied substantially, with one associate, Edward Best, serving from 1906 to 1950. In general, those without legal training have been employed for an indefinite period, whilst young lawyers have generally been appointed for one to two years. Most associates today serve for a single year, although some chambers have different arrangements in place.

During the 1980s, most of the judges came to question whether they needed a full-time tipstaff or whether they might be able to operate more efficiently with two associates. At present, nearly all of the judges employ two associates, who share the work of the tipstaff between them. The result has been more thoroughly footnoted judgments and more poorly maintained law reports.

Fewer associates are available to High Court judges than to their colleagues on the **United States Supreme Court** (four clerks per judge) and the Canadian Supreme Court (three clerks per judge). However, the allocation is well in excess of senior appellate courts in the UK, where several 'judicial assistants' are merely pooled between the judges.

High Court associates today perform a variety of duties. Before a case is heard, this may include preparing memoranda on the submissions by the parties, and undertaking additional research. Whilst a case is being heard, one of the judge's two associates acts as tipstaff (attending to him or her in court). Once the court rises, the associate may act as a 'sounding board' for the judge's views, carry out further research (see also **Research assistance**), and proofread the draft judgment. Proofreading requires the associate to check the draft for typographical and legal errors, and confirm that all **citations** are accurate. Occasionally, an associate may be asked by his or her judge to prepare a memorandum or draft judgment, but it is rare for this draft to be recognisable in the final judgment.

In 1984, it was determined that all appeals to the High Court would require the granting of special **leave**. This has meant that most associates now spend a substantial proportion of their time scrutinising applications for special leave, and preparing memoranda on these cases for their judges. Nonetheless, the volume of special leave applications is not so great that the judges are unable to personally scrutinise the papers. This contrasts with the United States Supreme Court, which receives around ten times as many applications for hearing as does the High Court. As a result, United States Supreme Court clerks (the equivalent of High Court associates) perform a much more substantial role in vetting the incoming applications.

Whilst each case is being heard, one of the associates who is not required to attend to his or her judge acts as clerk of the court. If a case is being handed down, this involves receiving copies of each of the judgments. During the hearing, the clerk sits at a table adjacent to the bench. He or she must record the names of the parties and counsel, and note the time at which each counsel commences and concludes speaking. The clerk is also responsible for passing up any material from the bar table to the judges.

Although they are technically court officers, associates hold office at the discretion of their judge, and work entirely at the direction of that judge. Most judges appoint their associates two to three years in advance. Generally, the positions are not advertised. Some judges rely on particular academics to recommend talented students, whilst others simply select from among the applicants who have written to them over the course of the previous year. Unlike the United States Supreme Court clerks, most High Court associates have not previously worked for a judge in a lower court.

In most years, there is a strong sense of collegiality among the associates, despite any differences that might exist between their judges. This is accentuated by **circuit** sittings, which provide a further opportunity for the associates to socialise with one another.

Whilst associates tend to be drawn from more diverse **backgrounds** than the judges themselves, the pool is still relatively narrow. Only in the past few decades have a representative proportion of **women** been employed (for example, on his **retirement** in 1981, **Barwick** thanked ‘all those young men who were my associates over the past seventeen years’). Those from non-English speaking backgrounds and public schools continue to be under-represented. A substantial majority of associates are drawn from just five universities—the University of Sydney, the University of New South Wales, the Australian National University, the University of Melbourne and the University of Queensland.

In the US, there has been some discussion in the law journals as to whether too much responsibility is delegated to Supreme Court clerks. The debate was fuelled by the publication in 1998 of *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*, written by Edward Lazarus, a former clerk to Justice Harry Blackmun. In Australia, the question of over-delegation to associates has seldom arisen. A number of systemic factors may help explain this. Compared to their US counterparts, High Court judges have fewer associates to supervise and fewer appeal applications to sift through. They also have the benefit of longer oral arguments, in which associates do not play any role. There is also a different judicial culture in Australia, which is less favourable to the notion of delegating judicial work to associates than that of the United States Supreme Court.

If one compares the High Court to the legislative arm of government, it is perhaps surprising that a greater proportion of the work of the judiciary has not been delegated to associates. Australian parliamentarians today employ much larger staffs than they did at the time of federation—allowing modern politicians to delegate many of the tasks that their predecessors did themselves. Yet today’s High Court judges continue to operate with a similar number of assistants to their predecessors of 1903. No doubt the constitutional principle that **judicial power** can be exercised only by the judges is a significant constraint

on delegation, at least as to the ultimate responsibility for decision-making and judgment writing.

Following their time at the High Court, many associates embark upon careers as barristers, solicitors or academics. They tend to remain in close contact with one another and with their judges. Many maintain an enduring interest in the institution itself. Two have even gone on to become High Court judges. **McTiernan**, who served as a judge from 1930–76, was **Rich**'s associate in 1916, and served with him as a judge from 1930 until Rich's **retirement** in 1949. **Aickin**, who served as a judge from 1976–82, was **Dixon**'s associate from 1939–41.

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FURTHER READING

Philip Jamieson, 'Of Judges, Judgments and Judicial Assistants' (1998) 17 *Civil Justice Quarterly* 395

Andrew Leigh, 'Behind the Bench: Associates in the High Court of Australia' (2000) 25(6) *Alternative Law Journal* 295