▼▼

Justices' Associates: Some Observations

Jonathan Horton* BA LLB(Hons) (Qld)

I. Introduction

Judges' associates are now established as an indispensable part of the Court system not only in this country, but also in the United States, and increasingly, in the United Kingdom. Increasing case loads, inadequate funding of the Courts by governments, the enlarged administrative role of Judges in case management, and the proliferation of published legal materials and judgments impose a burden upon the judiciary which can only be discharged with energetic, discreet and competent associates.

The rise of the associate and their relationship with Judges and the judicial process has attracted recent attention in journals and books. The most sensational addition to those materials is the book 'Closed Chambers' in which a former clerk to a Justice of the United States Supreme Court gives a keyhole insider's view of the associate's role, in the context of a much grander surrounding topic — the internal operation of the Supreme Court of the United States.[1]

The books can be compared with those regular breathless tabloid-commissioned pot boilers by staff who have worked for the Royal Family for five minutes and then claim to know and tell it all.

The publication of Closed Chambers immediately sparked a heated public debate about the appropriateness of the author's revelations and the degree of clerks' (associates')[2] influence upon their judicial masters. Despite an intuitive scepticism, such books do arouse interest.

Much of their fascination lies in the unique and confidential nature of the position of the author. The relationship between Judge and associate has been compared to a 'love-affair,'[3] described as being 'based upon trust and faith'[4] and 'professional only in part.'[5] Judge and associate, one US Judge thinks, become tethered together by an invisible cord for the rest of their mutual careers.[6] Judges work both in court and out of it. Nothing could be more public than the former and private than the latter and it is this about which litigants, lawyers and the media most speculate. In Australia, the associate can be the Judge's other public face while the Judge presides and ponders.[7] Judges use associates to varying degrees on cases, they share proximate offices, and are involved, although at different levels, in

* Former associate to a Justice of the High Court. The author acknowledges the particularly helpful published paper of Justice Callinan. See Callinan J, 'Courts: First and Final,' Speakers' Forum, University of New South Wales, 17 August 1999 <http://www.hcourt.gov.au/speeches/callinanj/callinanj_Unswsp1.htm.>

1 Lazarus E, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*, Times Books, New York, 1998.

2 In Australia, the term 'associate' is generally used to describe the member of the Judge's personal staff who is legally qualified. In the United States, the equivalent position is a 'clerk'. There are some differences in terminology between the various jurisdictions (sometimes 'tipstaff' is used), and although subtle differences exist, the positions are sufficiently comparable for the purposes of this analysis.

3 Wald P, 'Selecting Law Clerks' (1990) 89 *Michigan Law Review* 152–163 at 153.

4 *Sheppard v Beerman* 94 F3d 823 at 829 (2nd Cir, 1996).

5 Kozinski A, 'Confessions of a Bad Apple' (1991) 100 *Yale Law Journal* 1707–1730 at 1708.

6 Kozinski A, 'Confessions of a Bad Apple' (1991) 100 *Yale Law Journal* 1707–1730 at 1709.

7 *Re Altman and the Family Court of Australia* (1992) 27 ALD 369 at 374 (Administrative Appeals Tribunal, President O'Connor J).

similar tasks. Associates are the 'noncommissioned officers in the army of the judiciary,'[8] the Judge's personal and confidential assistant and companion[9].

Little has so far been written on the role of the associate in this country.[10] The scarcity of information may suggest insignificance. The available definitions are so dry and lifeless they imply something more exciting must exist behind them.[11] 'Assisting the Judge both clerically and administratively, [setting] the case list, [empanelling] the jury, [calling] on cases and [accepting] the tender of documents and real evidence and [liaising] with practitioners on the Judge's behalf' — and assisting with legal research: they are the formal descriptions of their tasks.

The country is, I believe, all the better for those dry descriptions and absence of written speculation about them. There have been no Closed Chambers-style revelations and none therefore of the inappropriateness and hyperbole for which its author was trenchantly and persuasively criticised.[12] Nothing emanating from former associates has brought into question the impartiality and independence of Australian Judges.

I certainly do not want to alter that position. This article briefly explores the institution of associate in the Australian court system, with particular emphasis on the nation's highest court, the High Court of Australia and makes some observations about the degree of involvement of associates in Australia and the US in judicial work and from that, draws some conclusions about appropriateness.

II. The Australian Associate

In almost every instance, High Court Justices have two legally qualified associates. This is a departure from traditional practice when each Justice had one tipstaff (usually former service personnel) who attended the Judge in Court, maintained the chambers library and so forth and was rather like an estate manager or the senior butler. While the reason for the alteration of that tradition is not apparent, it can be safely assumed that a relevant factor was the greater efficiency to be gained in employing staff who could perform both the functions of tipstaves and could assist the Judge in a legal professional sense.

In the Federal Court of Australia and the State Supreme Courts, each puisne Judge has one associate. It is not uncommon, however, for the associate to lack legal qualifications, although normally, particularly in modern times, the associates are, at the very least, in the process of completing their studies. In some cases, the associate is a close family member of the Judge; often a son or daughter. There is, regrettably, no requirement that associates have completed their course of study, nor is employment of close family members proscribed. For reasons which will become apparent, it is suggested that it is important that the selection process not become tainted by family involvement (although the loneliness of the job and the discretion required of the position may justify the employment of family, if suitably qualified, in some circumstances). Associateships are positions of responsibility and therefore prestige, providing young lawyers with benefits that endure long after the associateship ends. It is essential that the positions go to deserving people who will properly utilise the experience and learning they have gained.

8 Oakley JB & Thompson RS, Law Clerks and the Judicial Process: Perceptions of the Qualities and Functions of Law Clerks in the American Courts, *University of California Press*, 1980 at 2.
9 Lawn EW, *Manual for Judges' Associates*, Law Book Company, Melbourne, 1973 at v.
10 *Hurley v McDonald's Australia Ltd* (2000) 101 FCR 570 at [88].
11 See the definition of 'Associate:' Nygh PE & Butt P (eds), *Butterworths Australian Legal Dictionary*, Butterworths, Sydney, 1997
12 An excellent example is Kozinski's demolition: see Kozinski A, 'Conduct Unbecoming' (1999) 108(4) *Yale Law Journal* 835–878.

There has been some recent media criticism of the Queensland Supreme Court and District Court for the continuing practice of employing close family members.[13] This criticism was undoubtedly one of the catalysts for the adoption by the Queensland Supreme Court of a protocol which states principles of appointment on merit and equal opportunity in the employment of associates.[14]

A much more recent phenomenon in Australian courts is the employment of legal researchers who are generally well qualified for their tasks. The services of the researcher in the High Court of Australia, and, for example, in the Queensland Court of Appeal, are available for use by each of the Justices.

The levels of staffing of legally qualified professionals are in stark contrast to the American position. There, Courts of Appeals Judges and Supreme Court Justices often have four clerks to assist them. Each is legally qualified. Supreme Court clerks almost invariably have previously been a clerk in a lower court, mostly with a 'feeder' Judge: that is, a Judge respected by those more senior, for providing high quality training and having rigorous selection methods. It is now widely accepted that the US clerk is involved to a far greater degree in the process than their Australian counterparts. Furthermore, the burden upon US Judges can be almost crippling. Much of most appeals is done on the papers. Appeal courts hear several appeals daily. The preparation for them of accurate, informed precis is essential.

III. The Associate Conceived

The position of law clerk first emerged in the United States Supreme Court in 1882 as a 'protective response' to the Supreme Court's increasing caseload and the flood of new work.[15] Justice Gray was the initiator, having used clerks as Chief Justice of the Massachusetts Supreme Court from 1875, when he hired a recent Harvard Graduate. Interestingly, for some time, Justice Gray paid the associate out of his own funds. In 1886, provision was made for funding the positions from public revenue.

In Australia, the history stretches further back. The first Judge assigned to the Moreton Bay post, in the Colony of New South Wales (later, Queensland), brought with him, a 'clerk-associate'.[16] The next associate was, incidentally, later suspended for being drunk on duty, a fact that was discovered from his failure to number the exhibits properly. As the Judge later told a Select Committee:[17]

> He [the associate] had to initial and number a large number of documents, upon the tracing of which depended the whole case for the Crown; and, when I requested him to mark them, I had to wait for a quarter of an hour before it was done; I had to desire him to hand the papers up to me: some were not marked at all, some were marked double, and some exceeded the number of the papers altogether, so that it was impossible for me to proceed with the business of the Court. I had to suspend him on the spot.

In Sydney, associates were certainly engaged from 1828, but probably earlier.[18] The early practice indicates that the role of the associate was derived from the English Clerk or Marshall. In 1856 this statement was made about the duties of an associate:[19]

13 See for example Humphries D, 'Judges Warned Over Family Staff' *Sydney Morning Herald*, 11 February, 2000 at 7.

14 See 'Protocol — Supreme Court Judges' Associates' 13 June 200 <http://www.courts.qld.gov.au/practice/associates.htm> (3/10/00)

15 Rehnquist WH, *The Supreme Court*, Morrow, New York, 1987 at 26–30; Hall KL (ed), *Oxford Companion to the Supreme Court of the United States*, Oxford University Press, New York, 1992 at 159–160; Baier PR, 'The Law Clerks: Profile of an Institution' (1973) 26 *Vanderbilt Law Review* 1125–1177 at 1132.

16 McPherson B, *The Supreme Court of Queensland 1859–1860*, Butterworths, Sydney, 1989 at 77.

17 Select Committee on Administration of Justice In the Superior Courts (1869) (1) *Votes and Proceedings of the Legislative Assembly* at 581, Minutes of Evidence Taken from Lutwyche AJP, 7 July 1869.

18 Bennett JM, *A History of the Supreme Court of New South Wales*, Law Book Co, Sydney, 1974 at 91.

19 Note 18.

> In addition to their ordinary duties as such, shall discharge all the duties appertaining to Clerks in Chambers, or in attendance for Chamber Business; and shall sit, severally, as Clerks of Arraigns, and of Assize and Nisi Prius, in Sydney, as well as on Circuit. They shall prepare also the Criminal Calendars and Returns, and all Estreats and Jury Precepts.

Although it was quickly established that associates were responsible exclusively to their own Judge, it was not an easy process. There were serious attempts by the executive to intrude into the courts' and Judges' right to dictate matters of administration.[20] While it is now quite clear that the associate is neither an officer of the court[21] nor subject to the Registrar[22] and to some extent independent of the Government,[23] vestiges of the past remain. Queensland associates are presently appointed by the Governor-in-Council, on the advice or recommendation of the Judge concerned.[24] It seems incompatible with judicial independence to have a Judge's closest personal advisor and assistant operating under a system of tenure which, at least theoretically, could be terminated by the executive government. It is a similarly worrying state of affairs that Federal Court associates appear to be subject to the *Public Service Act* 1999 (Cth)[25] and that tenure, at least theoretically, is subject to termination by, of all bodies, the Court Registry.[26] It is surely a case of the stream rising above its source.

Interestingly, in Queensland at least, Supreme Court associates are appointed additionally as Deputy Sheriffs, which very much reflects the English origins of the position.

I have not attempted to survey the terms of employment across the various jurisdictions. However, the Federal Court and Queensland Supreme Court examples do suggest there may be cause for concern elsewhere.

From the time the High Court was established in 1903, it was assumed there would be associates to the Justices. Care was taken to ensure that associates, like the Justices, would be independent of the executive government[27]. The associate's sole responsibility was to be to the Judge: appointed by the Judge, terminated by the Judge. Unlike the United States Supreme Court at the time of its establishment, provision was made for allocation of funds for Justices' associates.[28] It is that independence and remoteness from any external

20 McPherson B, *The Supreme Court of Queensland 1859–1860*, Butterworths, Sydney, 1989 at 78.

21 *Beecham (Australia) Pty Ltd v Roque Pty Ltd* (1987) 11 NSWLR 1 at 10 (NSW CA) per Rogers A-JA (Kirby P and McHugh JA agreeing); Starke QC 'Filing of Court documents with a Judge's Associate' Practice Note, (1988) 68 *Australian Law Journal* 1052.

22 Select Committee on Administration of Justice In the Superior Courts (1869) (1) *Votes and Proceedings of the Legislative Assembly*, at 589, Minutes of Evidence Taken from Lilley C, (Attorney General) on 9 July 1869, where Lilley says, in effect, Associates are not 'under' the Registrar.

23 Select Committee on the Judicial Establishment (1860) *Votes and Proceedings of the Legislative Assembly*, at 492, Minutes of Evidence Taken from Darvall FO (Supreme Court Registrar) on 6 July 1860, where Darvall says 'he (the Associate) is appointed by the Judge, and is to a certain extent independent of the Government.'

24 McPherson B, *The Supreme Court of Queensland 1859–1860*, Butterworths, Sydney, 1989 at 78–79.

25 The Registrar and Australian Public Service employees assisting the Registrar are a Statutory Agency of which the Registrar is the head: *Federal Court of Australia Act* 1976 (Cth) s 18Q. Section 18N of that Act provides for registry personnel which appears (incorrectly, in my opinion) to have been taken to include Judges' personal staff: see for example Federal Court of Australia, *Annual Report 2000–2001*, para 1.7, 'Staff of the Court' and para 4.8. See also *Public Service Act 1999* (Cth) s 7 (meaning of 'Agency') and s 9 (Constitution of the Australian Public Service).

26 The *Public Service Act 1996* (Qld) s 11(2) expressly excludes associates to Judges of the Supreme and District Courts.

27 It is quite clear from the lengthy debate concerning the Judiciary Bill that neither Judges nor their associates were to be subject to the Public Service Bill, at that time also being debated. See for example House of Representatives, *Parliamentary Debates* (Hansard), 17 June 1903 at 1058–1059.

28 Mr. A Deakin, House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1903; Mr. A Deakin, House of Representatives, *Parliamentary Debates* (Hansard), 9 June 1903 at 605; Mr. VL Solomon, House of Representatives, *Parliamentary Debates* (Hansard), 10 June 1903 at 709; Sir John Quick, House of Representatives, *Parliamentary Debates* (Hansard), 17 June 1903 at 1040, Mr. Wilks, House of Representatives, *Parliamentary Debates* (Hansard), 17 June 1903 at 1058.

organisational structure which today characterises the position of associate in the High Court. It is a model which, it is suggested, is optimal for all courts. The implications extend further than at first might be thought. First, it is the Judge alone who can direct and control the associate on a day to day basis. Not even a fellow Judge, or even a more senior fellow Judge, has that power. No other division of the court (including a Registry) can legitimately interfere. That is consistent with the view of an associate as merely a Judge's mouthpiece, an extension of the Judge, a controlled alter ego of the Judge. Similarly, the associate is not an officer of the court; nor is their office an office of the Court.[29] It is odd, therefore, that in Queensland, Supreme Court associates are not appointed by the Judge they serve and that in the Federal Court, their employment is terminable by a subordinate body. The formality of appointment or termination by a person or body other than the Judge does give rise to potential for compromise of the Judge's independence.

Secondly, a Judge can (and must be able to) rely on the associate to give undivided and direct loyalty. For interrelated reasons, the terms of the associate's employment must not be structured. The tasks are not readily reducible to writing on a duty sheet. There is a general acceptance that an associate will assist the Judge personally and professionally in any lawful task. There is no duty statement so broad, no employment relationship so unregulated. Further, no control may be exerted from outside the Court. The Judge is reliant both personally and professionally on just one or two staff members. They must be loyal, discreet, supportive and in all senses, trustworthy. These features are essential facets of the Judge's obligation to decide cases and in all respects to act independently, conformably with the law and with his or her own conscience.

Whether or not it is accepted that associates assist their Judges in more than the most routine of tasks, it must be accepted that if judicial independence is to have any real meaning, the principle must extend to the associate, to give them some protection from external interference and control.

But the question which really excites interest is the extent to which an associate in practice provides professional assistance; more than mere research and thereby influences, however subtly, decision making.

IV. Functions

It is an accurate summary of the role of associates to say that they are subject to 'detailed direction in the performance of their work'[30] and that the work undertaken depends not only on the personal attributes of the associate, but also upon the willingness of the Judge to involve his or her staff. But as with all summaries, content is necessary.

It is now well established that clerks in superior courts in the United States are involved to a greater degree than their counterparts in many other countries in what is properly classed as judicial work. By judicial work, it is meant, decision-making on the merits of competing arguments, the responsibility of deciding the outcomes of even minor matters and possibly, more significant ones. If works such as *The Brethren*[31] or *Closed Chambers* are any reliable guide, (and they should be treated with caution), then it is clear that the role of the associate extends not only to decision-making, but also to lobbying other chambers' staff to arrive at similar conclusions, and promoting or dissuading an agreement with another Justice. The extent of apparent involvement of the clerks in the judicial work of the United States Supreme Court is reflected also in public concern about the nature of

29 Note 21.
30 *Re Altman and the Family Court of Australia* (1992) 27 ALD 369 at 374 (Administrative Appeals Tribunal, President O'Connor J).
31 Woodward B & Armstrong S, *The Brethren — Inside the Supreme Court*, Simon and Schuster, New York, 1979.

the appointments made. Only last year, a demonstration was held outside the Supreme Court building to decry the minuscule number of people in minority groups hired as clerks each year by the Justices.[32] Leaving aside the issue of equality, it is an indication of the power clerks are thought to wield, that 1000 people protest over the backgrounds of the people appointed. The Washington Post observed:[33]

> Supreme Court clerks play a crucial role in shaping American law. They recommend which appeals should be heard, develop questions for justices to use in oral arguments and often write first draft opinions supporting the justices' position on cases.

It is no wonder that concern has been expressed. The perceived North American position astounds those in the Australian legal profession. The experience in this country is so different. In the US, it is, as the above shows, taken as being almost routine for clerks to be involved in the Judge's decision-making functions. Jamieson recently noted some astounding examples of very public recognition of clerk delegation.[34] Justice Scalia said in *Conroy v Aniskoff*:[35]

> 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.

There is also a highly unusual Alabama case in which the Court gave one clerk a very public role:[36]

> This Memorandum of Opinion was prepared by William G Somerville III Law Clerk, in which the Court fully concurs.

How can such reliance be justified? The present Chief Justice of the United States gave this response to a suggestion put to him that the extent of clerks' involvement in determining which cases the court would hear resulted in an abandonment of the justices' responsibilities to an internal bureaucracy:[37]

> I certainly do not think so. The individual Justices are of course free to disregard whatever recommendation is made.

That does not sound like a very convincing response. The public is entitled to expect detailed consideration by the Judges and not their unappointed, inexperienced delegates.

It does not necessarily follow, however, that public concern over the nature of appointments stems solely from the power associates are thought to exercise. Associates, in the ultimate courts at least, often go on to hold glittering positions later in their careers, as Judges, lawyers, politicians, academics and bureaucrats. An associateship often acts as a life-long imprimatur. It also can act as a life-long stigma, linking the associate eternally to the politics, views and opinions of his or her Judge. In the United States, it is not uncommon for a group of trusted former associates to be members of a panel which selects associates for the Judge.

The public suspects that the associate of today may be the Judge of tomorrow. It is perhaps not so unfair that associates become linked inextricably to the Judge. The period of the associateship acts very much as an apprenticeship, the junior picking up as many stories, lessons and rules as the time with the Judge will permit. And to some extent the associate is locked away with someone who is, by definition, a persuasive advocate — and skilled at persuading those not able to be easily persuaded. Yes, it is easy to see why

32 Fletcher M, 'As Term Opens Lacks of Diversity is Decried' *Washington Post*, October 6, 1998 at A3.
33 Note 32.
34 Jamieson P, 'Of Judges, Judgments and Judicial Assistants' (1998) 17 *Civil Justice Quarterly* 395.
35 123 L Ed 2d 229 at 243 (1993).
36 *Acceptance and Insurance Company v Schafner* 651 F Supp 776 at 778 (ND Ala 1986).
37 Biskupic J, 'Making "The List": A Final Sifting of Appeals' *Washington Post*, September 6, 1999 at A25.

the vast majority of associates come to hold views almost coterminous with those of their Judge. And it continues beyond the term of the associateship — normally as long as it takes for the effect of the Judge's spell to wane.

But even when all these factors are taken into consideration, it seems likely that US associates do have a significant input into judicial decision-making. It has become rare, Justice Thomas notes, for Judges in the appellate courts of the United States to fully prepare their own opinions.[38]

Can this be said of the Australian situation? There are several reasons why this degree of associate discretion is practically non-existent in Australia. First, caseloads here tend to be lower. The High Court in 2000-2001 heard 71 appeals and 15 matters commenced by constitutional writs,[39] and 329 applications for special leave to appeal[40] in addition to 170 single Justice applications.[41] Matters filed totaled 688.[42] The figure of cases filed (on the Justices' 'docket') in the United States Supreme Court is about 7,000.[43] The workload of the courts in the United States, through sheer necessity, forces decision makers to rely more heavily and delegate more discretion to associates. While caseloads in courts below the High Court are no doubt greater, they do not approach US levels.

Add to that the more extensive use of oral argument in Australia. In the few cases in the Supreme Court of the United States which actually involve oral argument, the time is strictly limited. Applications for cert. (leave to appeal) almost never involve oral argument. In contrast, in Australia, special leave applications, as a rule, do. And the time for oral submissions is the same as for full appeals in the US Supreme Court. Of some State courts in the US, it has been said that oral argument is now the exception rather than the rule.[44] In many federal circuits, the percentage of cases in which oral argument was delivered is 25-35 per cent.

Oral argument is one, perhaps the only, way of a party to the litigation putting their case directly, without the go-between of the associate, without the risk of documents not reaching the Judge, of being summarised in some erroneous way, or of crucial information simply being 'buried in the briefs or missing entirely from written submissions.'[45] It is the only time the Judge can question the parties about the case and the law. In oral argument, the associate has no role to play.

At least one member of the current High Court Bench, Justice Callinan, has spoken in favour of the retention of oral submissions which allow submissions to be probed and their ramifications explored:[46]

> What I have found particularly helpful are the testing and questions asked by the other Justices of the High Court. One justice will sometimes ask a question which counsel are unable to answer but another justice, anxious to look at the case from all angles will answer it for that counsel. Thus there can take place a stimulating debate as the case develops, of a kind which would simply not occur if the Court were left to consider written materials only, either alone in their chambers, or even in conference.

38 Thomas JB, *Judicial Ethics in Australia*, LBC Information Services, Sydney, 1997 at 45.
39 High Court of Australia, *Annual Report 2000–2001*, Canberra, Ausinfo, 2001, Table 8.
40 Note 39.
41 High Court of Australia, *Annual Report 2000–2001*, Canberra, Ausinfo, 2001, Table 30.
42 High Court of Australia, *Annual Report 2000–2001*, Canberra, Ausinfo, 2001, Table 2.
43 See the US Supreme Court website: <http://a257.g.akamaitech.net/7/257/2422/14mar20010800/www.supremecourtus.gov/about/justicecaseload.pdf.>
44 Smith WC, 'Advocates for a Mute Court' (1999) 85 *ABA Journal* 20; Denlow M, 'Justice Should Emphasise People, Not Paper,' (1999) 83(2) *Judicature* 50.
45 Smith WC, 'Advocates for a Mute Court' (1999) 85 *ABA Journal* 20.
46 Callinan J, 'Courts: First and Final', Speakers' Forum, University of New South Wales, 17 August 1999 <http://www.hcourt.gov.au/speeches/callinanj/callinanj_Unswsp1.htm.>

The greater reliance in Australia on oral argument and lower caseloads combine with one other important factor: the tradition of independence of Australian Judges. This feature has often been overlooked or at least understated. Justice Kirby has stated publicly:

> My associates don't write my judgments. I've never had staff write my judgments. I gather that does happen a lot in the United States, if you can believe *The Brethren*. I'm far too egocentric and idiosyncratic to allow anybody to write my peerless prose. So I do it myself. My associates are kept very busy just keeping up with my output.[47]

The significance of the associate's duties, knowledge and involvement were considered in the recent Australian case of *Hurley v McDonald's Australia Ltd*.[48] There, the Judge's associate had resigned in the middle of a high profile class action being heard at trial level by the Judge. The associate's new employer was, at least ultimately, the solicitors for McDonald's. The applicants requested that the trial be set aside on the grounds that the fairness of the trial had been compromised.

In refusing the application, the Judge noted the associate's position of confidence and the fact that the associate may have knowledge of the Judge's views of the case. Of particular significance was the claim made in the associate's resume that he had drafted reasons for judgment in the matter (although the Judge appeared to discretely dismiss that claim).[49] Central to the Judge's reasons to refuse the application was the associate's duty not to communicate confidential information even after resignation.

There is a strong view in Australia that excessive reliance on associates is dangerous. Justice Thomas of the Queensland Court of Appeal, in his book, *Judicial Ethics in Australia*, warns of over delegation — that 'facile adoption of the work of another fails to discharge the Judge's primary duty of personally deciding the case, on fact and law, to the best of his or her ability.'[50] His Honour claimed that one can sometimes discern that the Judge has adopted the work of a research assistant. Not only is there the obvious concern about competence and judgment of the duties being performed by the far less experienced and knowledgable associate, but also the concern that the associate is accountable only to the Judge. It could be argued that excessive associate involvement in judgment drafting in the United States results in discursive opinion writing, needless dissents and footnote battles as clerks struggle for their place in the lawbooks. The 'highly literate, information age whiz-kids' have also been blamed for burgeoning footnotes and text in decisions of the Court.[51]

There are obvious constitutional problems with excessive associate involvement. The associate was not appointed by the democratically elected government, the associate is not entitled to put his or her name to the reasons for judgment, the work does not withstand public scrutiny or the rigours of appellate court review in the name of the associate. Further, and perhaps most significantly, as Justice Thomas observes, the public has a legitimate expectation that their cases will be considered by Judges, not clerks.

Perhaps one of the less explored opportunities for influence arises from something far less tangible than many of the usual reasons: the inherent nature of the position and the close relationship that Judge and associate often develop.

The associate is the only person on whom a Judge can rely for legal assistance, beyond submissions made by the parties. They are the only proper source of research, of viewpoint and of general assistance. Many Judges have come from the interactive, energetic and

47 Kirby J, 'What is it Really Like to be a Justice of the High Court of Australia? A Conversation between Law Students and Justice Kirby' (1997) 19 *Sydney Law Review* 514 at 520 (footnote omitted).

48 (2000) 101 FCR 570.

49 *Hurley v McDonald's Australia Ltd* (2000) 101 FCR 570 at [84].

50 Note 38.

51 Orr G, 'Verbosity and Richness: Current Trends in the Craft of the High Court' (1998) 6 *Torts Law Journal* 291 at 297.

quite social life of the Bar. They are surrounded with colleagues, confer with experts and witnesses, perhaps occupy positions on company boards and pursue businesses of their own. The shift occasioned by the change of occupation is more significant than many appointees realise.

Judicial life does not always involve frequent and close contact with colleagues, and even less with witnesses and parties to litigation. Most contact is through the associate or in the sterile and formal atmosphere of the courtroom.

It is this characteristic which gives the associate some control over the flow of information: in deciding what information the Judge should see and what matters are best dealt with by the associate without requiring the Judge's intimate supervision of routine tasks. No doubt some associates do not find it necessary to burden Judges with some matters.

The associates' network is an underrated source of information for its members. In some Courts it provides a good flow of information, some important and accurate, some highly misleading and incorrect. The Chief Justice of the US Supreme Court became aware of the network there. He was convinced that something had to be done about it. He began by attacking the underground inter-chambers communications system by issuing a memorandum on confidentiality. The Chief wrote:[52]

> Clerks at times have a tendency to develop a collective 'Law Clerks' decision to resolve cases on the merits before the Justices themselves have worked out the answers. Of special importance in this regard is the conversation which takes place in the Law Clerk Dining Room. Law Clerks generally view the lunch period as a unique period to exchange insights and stories about their justices. It has been customary for Law Clerks to discuss with one another the most intimate of matters relating to their Justices with the understanding that none of what is said shall go beyond the four walls of the Dining Room. While such conversation can be both educational and entertaining for the Law Clerks, the extent to which such information is not carried beyond the Dining Room is questionable.

Any ability for the associate to exercise power in controlling information must be weighed against two factors which provide an effective counterbalance. The first is that the Judge is always a competent legal receptacle in his or her own right; their need for information is not so great; further, there is considerable written and oral argument on which the Judge primarily relies.

Another aspect of the inherent nature of the position is the personal relationship often formed between Judge and associate. It seems the experience of most associates is that a close relationship of mutual respect develops which continues long after the associateship ends. For many, the Judge fulfils the function of mentor and adviser.

The close proximity to Judges of course requires discretion and complete confidentiality even after the term of the associateship ends. In New South Wales recently a former associate deposed to having overheard private conversation between Judges which were allegedly derogatory of a well-known litigant. The record of the conversation was sought to be adduced into evidence by that litigant in aid of an application by her to have one of the Judges removed from hearing a case in which she was involved.

The Court ruled that the evidence was inadmissible, relying on the established position that evidence dealing with any aspect of a Judge's decision-making process is not admissible.[53]

Taking into consideration the various aspects discussed earlier, it must be concluded that any opportunity which the associate has to influence, or, indeed, decide, the outcome or the content of Australian judicial decisions, is extremely limited if not non-existent.

52 Woodward B & Armstrong S, *The Brethren — Inside the Supreme Court*, Simon and Schuster, New York, 1979 at 34–35.

53 *Wentworth v Rogers* [2000] NSWCA 368.

This demonstrates that the associate system is alive and well and functioning in a way which assists the judicial process rather than interfering improperly with it.

There is no sign, either, that the role of associate will see a decline. The trend is very much the other way. The system is destined, it seems, to continue, if not expand dramatically. As Governments see the courts more as interest groups which are troublesome inhibitors of parliamentary and executive power, funding may be destined to remain at painfully inadequate levels. Courts may have little option but to expand the numbers of staff who assist judicial members in the exercise of their functions. And rather than appoint more Judges, who are seen as expensive, there will be an incentive to encourage courts to deal with their increasing caseloads by using judicial assistants and researchers.[54] At the Federal level at least, having regard to *Kable's case*[55] and Chapter III of the Commonwealth Constitution, however, the impediments to this course will prevent the Australian Executive from going too far down this path.[56]

Because associates assist the Judges in the execution of their duties and therefore relieve them of what would otherwise be work which would take the decision maker away from core judicial work, they are financially alluring. It is this view no doubt which led Fitzgerald P to advocate the idea of fewer Judges and more staff lawyers in recent years.

In the Old World also there is movement. As recently as 1997, the English Court of Appeal established positions of 'Judicial Assistant'; for recently qualified lawyers to assist the Lords of Appeal in checking the Court's work load. Many of the appointments are made from practising lawyers who attend on a part-time basis. Obvious complications must inevitably arise from the exposure to highly confidential material such as draft judgments during the course of the demands of an active practice.[57] But that is another matter.

There is also just emerging, a view that Judges may employ specially trained law clerks to assist them in deciding highly technical scientific cases[58]. Where that will lead it is too soon to say.

V. Conclusion

The response courts may have to make in coming years to increasing case loads and inadequate government funding may be the appointment, not of more Judges, but of more administrative staff, and particularly associates and researchers. Within these and Constitutional constraints, the associate system is a reasonable solution given that this country has maintained its tradition of highly independent judging and that the associate model seems here to enjoy the proper balance between assisting the Judge as competently, extensively and non-intrusively as possible and leaving to the decision maker issues properly requiring the attention of the experienced, senior and competent Judicial Officer actually appointed to do that work. With that said, it is crucial that if the system is to function properly Judges and courts must keep, and take back if they have lost it, control of the appointment, instruction and termination of their personal staff from others who may, in some circumstances, exercise their power contrary to the Judge's interests.

54 Baier PR, 'The Law Clerks: Profile of an Institution' (1973) 26 *Vanderbilt Law Review* 1125–1177 at 1132.
55 *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.
56 Cf *Harris v Caladine* (1991) 172 CLR 84.
57 Note 34 at 407.
58 Breyer J, 'Judicial Education and Judicial Independence', Speech to the Hemispheric Judicial Schools Conference, San Juan, Puerto Rico, 27 October 1998 at 6: <http://www.afr.com.au/content/981113/verbatim/ verbatim5.htm> (13/10/98).