

Marriott Hotel, Brisbane
Friday, 21 August 2009

QUOTALS ANNUAL DINNER

**The Hon Justice Kiefel
High Court of Australia**

Professor the Honourable Michael Lavarch, Executive Dean of the Law School, members of the Queensland University of Technology Association of Law and Justice Students, representatives of Mallesons Stephen Jacques, sponsors of the dinner, ladies and gentlemen. I am pleased to be here this evening and to have this opportunity to speak to you.

Legal dinners have a long history. On such occasions older lawyers often make speeches sprinkled with stories from the past. This is a well-known method of maintaining history in a tribal society.

Before Queensland became a colony, a judge from the Supreme Court of New South Wales in Sydney travelled to the settlement of Moreton Bay and held circuit sittings. The judge undertaking the first circuit in May 1850 was Justice Therry. On his first Sitting he delivered an address in which he encouraged temperance among the citizens of Brisbane. Bruce McPherson, in his excellent history of the Supreme Court of Queensland says that "[t]he evils of excessive drinking were a recurring theme in the exhortations of judges visiting Brisbane, which at that time had a not unjustified reputation for drunkenness"¹. Justice Therry attended a dinner that night in Brisbane. It is not recorded, so far as I can ascertain, whether alcohol was served.

In addition to the circuits to Moreton Bay, a New South Wales judge would also travel to penal settlements such as Norfolk Island with their staff and court officers. Whilst I was on the Federal Court I was also a judge of the Supreme Court of the Island and I travelled with staff to the Island to hear a murder trial. Many of the buildings from that earlier time remain, but fortunately the practices do not. In September 1833 Mr Justice Dowling, his staff and court officers arrived to hear charges against some of the prisoners. Twelve days later eight men were hanged. The hangman was one of the judge's party, in fact the Sheriff's assistant, but for a time I had my associate convinced that this task used to be part of an associate's duties.

You may know something about the role of an associate in the courts. These days the judges of the State District and Supreme Courts, the Federal and Family Courts and the justices of the High Court all have associates, in addition to personal secretarial staff. The role of the associate differs according to the work of the particular court and the

¹ B McPherson, *The Supreme Court of Queensland 1859-1960: History, Jurisdiction, Procedure*, (1989) at 8.

requirements of the judge they work for. The role is quite different from that undertaken by members of a judge's staff in earlier times.

Judges in the New South Wales Supreme Court in about 1830 had a tipstaff, as had English and Irish judges, and a clerk. The tipstaff would run messages, bring the judge refreshments, and fetch his cloak and carriage. They might also be employed in the judge's household². I do not think my associates would be very impressed with this kind of multi-skilling.

In Queensland the position of clerk to a judge evolved into that of an associate. The associate attended to correspondence and acted as the judge's personal secretary as well as attending in court and performing functions such as arraigning an accused, recording proceedings and marking and taking custody of exhibits at trials³. Many of these functions are still performed by Supreme Court associates today. Associates were not officers of the Court nor were they public servants. They were responsible exclusively to their own judge⁴. This remains the case.

When the High Court of Australia first sat in 1903 each justice was assigned a tipstaff and a clerk, or an associate as I shall continue to call them. Neither member of the judge's staff was legally qualified. The tipstaves were usually former military men or members of the police force who would perform the job for years on end⁵. Initially the role of an associate in the High Court was mainly administrative, since the justices in the High Court were not given a personal secretary until 1972. Indeed before the 1930s, when a pool of typists was made available to the justices, it was the task of the associate to type and distribute the judgments. They were originally entitled to sell the judgments and keep the proceeds⁶. This practice ceased in 1924. My associates would not mind its reintroduction.

These early associates could stay in the position indefinitely. One served from 1906 to 1950⁷. These days an associate is usually employed for a year; but then there are now many more law graduates who seek the experience of being an associate.

² Stephen CJ of the New South Wales Supreme Court, Memorandum of 30 March 1846, NSW 4/6653, 340-341; cited in Bennett, *A History of the Supreme Court of New South Wales*, (1974) at 91-92.

³ B McPherson, *The Supreme Court of Queensland 1859-1960: History, Jurisdiction, Procedure*, (1989) at 77-78.

⁴ B McPherson, *The Supreme Court of Queensland 1859-1960: History, Jurisdiction, Procedure*, (1989) at 78.

⁵ Craske and Jones, "Tipstaves", in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia*, (2001) at 673.

⁶ Leigh, "Associates", in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia*, (2001) 34 at 34.

⁷ Edward Best, who was associate to Barton, Isaacs and Rich JJ successively; see Leigh, "Associates", in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia*, (2001) 34 at 34.

The justices of the High Court have two associates. Most of the justices have one based in Canberra and one in their home State. My associates spend six months in each place. Both associates are present in Canberra when the Court sits. The matters coming on for hearing will be shared between the associates. The associate having responsibility for a matter will assemble all the necessary documents, the parties' submissions and the cases and materials to be referred to. Their judge will expect them to be across the issues and the submissions when the matter comes on for hearing. That associate also performs the role of a "tipstaff" in Court, sitting behind the judge and providing cases and materials as required.

In former times judges used to hear some simple matters in their own rooms, called their chambers. Barristers would sit in front of the judge's desk and present their submissions. The judge's associate would go to the bookshelves and get cases as needed. Many years ago an associate of a Supreme Court judge in Queensland, who had been with the judge a long time, was sent up the ladder to the top of the bookshelves to fetch a book. Shoe stores at that time used to stack shoes in this way and salespersons had to climb ladders to access them. The associate was told by the judge to fetch [1937] 2 KB. It was missing, so he called out to the judge: "Your Honour, we don't have that one; but we have a very nice [1936] 2 KB".

These days an associate having responsibility for a particular matter in the High Court will usually be given specific research tasks by their judge. The role of researcher is central to the position of an associate. Justice Gummow has recently written⁸ that the Federal judiciary in the United States were the first to use law graduates from the major law schools in this role. Indeed it came to be accepted that many clerks, as they were called, would draft a judgment. That is not the case in the High Court. It is the justices who write the judgment, although in that process they may discuss aspects of the matter with the associate. Obviously this is a great opportunity for a young lawyer to learn about the process of legal problem solving and legal writing.

I have mentioned that the role of an associate is different depending upon the nature of the work of the court and of the judge's requirements. Associates in courts which have a criminal jurisdiction have quite a lot to do. A new associate is invariably nervous on the first day of their first criminal trial. Chief Justice Brennan, on the occasion of his appointment as Chief Justice, recounted his experience as an associate⁹. He was required to arraign the accused, that is to read out the charge and call upon the accused to plead. He picked up the indictment and in his clearest voice read out the name of the prosecutor on the document, instead of the name of the accused. He charged the prosecutor with the crime of rape. Such is the camaraderie of the Bar that counsel for the accused leapt to his feet and pleaded not guilty on behalf of the prosecutor.

My experience with one of my first associates, in the Supreme Court of Queensland, was not quite so dramatic. The Crown was tendering photographs as exhibits.

⁸ Australian Law Students' Association, *Judge's Associate Guide*, (2009).

⁹ *Ceremonial Sitting – swearing-in of Brennan CJ* [1995] HCA Trans 118.

An associate would look at them, turn them over, stamp them with an exhibit mark and fill in a description of them. However these photographs were of the deceased in a rather grisly murder and my associate was unable to stand the sight of blood. I think they were described in a fairly general way.

Justice Lutwyche, the second of the judges resident in Brisbane, had an altogether different problem with his associate and exhibits. His associate at the Ipswich circuit sittings in 1869 was so drunk that some exhibits were marked double, some not at all, and others were completely misdescribed¹⁰. He suspended the associate. One of my current associates suggests that this means that justice should be blind, not the associate.

In the past it may have helped to have been related to a judge, or be the child of a friend of a judge, to obtain an appointment as an associate. Sir Samuel Griffith appointed his son, for example¹¹. You would not expect this to occur today. A person applying for the position of associate competes with others and may, if they pass the first stage of assessment, be subjected to an interview. A judge looks for a person who will be able to do the best job and of course be pleasant to work with. In the High Court an associate would be expected to have well-developed research skills and to be able to think for themselves. They would obviously need a sense of responsibility and of course it is of importance to a judge that the person be utterly trustworthy, in particular with respect to confidential information.

The position of an associate in any court is highly sought after. If you do apply for such a position you must expect the competition to be tough. But if you do obtain such a position, I am sure that it will be an invaluable experience. It provides a working knowledge of court processes and practices and seeing counsel in action. It has the advantage of the companionship of other associates. I have had 17 associates. I have enjoyed watching them develop in their knowledge of the law and choosing their own path as you will all do in the near future.

¹⁰ SCAJ 1869 (1) V&P 582; cited in McPherson, *The Supreme Court of Queensland 1859-1960: History, Jurisdiction, Procedure*, (1989) at 77.

¹¹ Leigh, "Associates", in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia*, (2001) 34 at 34.