

THE USE OF JUDICIAL ASSISTANTS IN THE JUDICIAL PROCESS

Dr Philip Jamieson recently returned from an appointment as a Judicial Assistant in the English Court of Appeal, Royal Courts of Justice, London, from May-July 2000 (Easter and Trinity Terms). He provided *Balance* with this article reflecting on his experiences.

It is not only in Australia that courts have been attempting to grapple with ever increasing caseloads and the growing number of litigants in person. Amongst the many reforms which have sought to address these developments, many jurisdictions, including Australia, have been experiencing a growth in the use of legally qualified professionals to provide research and other assistance to the judiciary.¹ Indeed, in the United States, their use has been described as “the invariable, now deliberate, response to the growth of appellate case loads”.² In 1997, a scheme for the appointment of Judicial Assistants in the Civil Division of the English Court of Appeal was established to assist in addressing its backlog of applications.³

As advertised on the internet at the time of my application for appointment, applicants were required to be legal practitioners who as a minimum had completed 12 months pupillage/traineeship, although I found appointees with considerably more experience. Indeed, the standard was such that appointments have been made of applicants from jurisdictions such as Australia, Canada and New Zealand, resulting in a valuable cross-fertilisation of legal experience and culture. Appointments are for one, two or three law terms and may be on either a full-time or part-time basis. During the period of my appointment, there were nine Judicial Assistants, four of whom were appointed part-time.

The nature of the appointment was unlike either the research officer or associate functions which I have on occasion undertaken in Australia, although it reflected certain elements of both. Each Judicial Assistant was assigned to one or more Lord or Lady Justices and

would provide assistance to the Judge/s as required. Although the nature of a Judicial Assistant's role will therefore vary according to the requirements and expectations of the Judge/s to whom he or she is assigned, that role might involve:

- Pre-reading and precis of forthcoming cases, highlighting important issues;
- Carrying out legal research and writing opinions on issues in pending and outstanding cases before the Court (including research as to the position in other jurisdictions, and in particular European community and human rights law); and
- Proofreading draft judgments and other materials, such as speeches or articles, written by the Judge/s.

There was no obligation to attend the court proceedings themselves or to undertake any of the many associated administrative functions which characterise the role of an associate in Australia.

Quite separate from the work undertaken for the Judge/s to whom you are assigned, Judicial Assistants work with the Civil Appeals Office,⁴ writing bench memoranda for the Court in litigant in person appeals. These “normally consisted of a summary of the facts involved in a particular appeal, a history of the proceedings in the lower courts, an indication of the issues on the appeal and any opinion which the judicial assistant had on the merits of the appeal”, and are “provided to each member of the court hearing an application or appeal ... often ... supplemented by discussions between members of the court and the judicial assistant”.⁵ Lord Woolf, while Master of the Rolls, described this contribution in assisting the Court to understand what are the issues on an appeal as “especially helpful in cases involving litigants in person where the litigant in person frequently would not have prepared a skeleton argument”.⁶ Indeed, the scheme has been described as having been established with this focus,⁷ and may be contrasted with the approach taken, for example, in criminal matters in Western Australia where practitioners appear



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before the Court of Criminal Appeal on a pro bono basis on a brief prepared by senior students at the University of Western Australia Law School settled under the supervision of the Supervising Solicitor under the Scheme.⁸

The role of Judicial Assistants has become valued as of great benefit to the Court⁹, and the scheme continues to both evolve and expand.¹⁰ On the other hand, although acknowledging that there is clearly much to be said for this development, various concerns were quickly expressed about the Court of Appeal's recent foray into this field,¹¹ and in 1998 in *Parker v The Law Society*,¹² the Court addressed a challenge to its use of bench memoranda prepared by Judicial Assistants, the contents of which are not disclosed to the parties. The Court concluded that “there was no danger that the present practice of not disclosing bench memoranda would prejudice an appellant or would-be appellant”,¹³ noting amongst a range of considerations supporting non-disclosure that disclosure would be inconsistent with the relationship between Judicial Assistants and members of the Court and would inhibit Judicial Assistants from expressing their opinions. This reflects a similar concern expressed by Eichelbaum CJ in the New Zealand Court of Appeal in *Nicholls v Registrar of the Court of Appeal* that the “relationship between the Judge and the [Judge's] clerk is a confidential one, and the communications between

them, whether written or oral, are part of that confidential relationship” which must be protected “in order to maintain the proper independence of the judiciary from Executive influence or control”.¹⁴

A corollary of protection of the confidentiality of communications between the Judge and a Judicial Assistant is that this confidentiality is also to be preserved by the Judicial Assistant during and following the period of his or her appointment with the Judge. A great deal of debate, for example, surrounded the recent publication by Edward Lazarus (a former law clerk in the US Supreme Court) of *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*.¹⁵ Concern about the possibility of disclosure of confidential information was also recently addressed in Australia in the context of judges’ associates in *Hurley v McDonald’s Australia Ltd* [2000] FCA 961.

A former judge’s associate accepted employment after the completion of that person’s associateship with a firm of solicitors representing the respondent in proceedings still ongoing before the Judge. The applicant was concerned about the possibility of disclosure by the former associate of confidential information which might be influential to the firm and to the outcome of the trial. However, the applicant was unsuccessful in seeking relief that the trial be set aside and the solicitors for the respondent be disqualified from further acting for the respondent in the proceedings.

Dowsett J gave some detailed consideration to the substance of the allegations, recognising that “the duties of an associate are not often considered” (par 88); indeed it has been judicially suggested that the role may not be well understood.¹⁶

Militating against the applicant’s suspicions, his Honour referred to a number of considerations, in particular that the former associate had a moral (if not legal) duty to maintain the confidentiality of information derived in the course of the employment and the community understanding of this (par 85). However, other considerations included that (par 85):

- the respondent’s case having been very substantially disclosed in advance

of trial in affidavit form, there was little opportunity for any change of direction without it being obvious to the applicant;

- it was difficult to identify any area in which a practical advantage might be derived from knowledge available to the former associate;
- his Honour had had wide-ranging discussion with the parties in court concerning the strengths and weaknesses of the case: he doubted “very much whether there is any thought, other than the most transient, which has not been so ventilated” (par 58); and
- the former associate had advised his Honour of the appointment very shortly after it was made, and the firm had not taken any active step to conceal the fact of the contact between it and the former associate and had intended to “quarantine” the person from those having carriage of the litigation.

Dowsett J concluded that a fair assessment of all of the circumstances would lead inevitably to the conclusion that there was no basis to suspect that there had been any unfairness, let alone a miscarriage of justice (par 87). His Honour also observed that “[i]f the applicant’s case [were] taken at its highest, an associate could not take employment with any solicitor retained in a case on the Judge’s docket at the time of the termination of the associate’s employment” (par 74).

- 1 A recent and more detailed consideration of these developments, with particular reference to the Australian experience, appears in Jamieson, P., “Court Proceedings, Adversarial Process and the Role of the Judicial Assistant” (1999) 9 *Journal of Judicial Administration* 81-93.
- 2 Baier, P., “The Law Clerks: Profile of an Institution” (1973) 26 *Vanderbilt Law Review* 1125-1177 at 1132.
- 3 A detailed consideration of the scheme appears in Jamieson, P., “Of Judges, Judgments and Judicial Assistants” (1998) 17 *Civil Justice Quarterly* 395-408.
- 4 The related role of the Civil Appeals Office Lawyers is discussed in Jacob, J., “The Bowman Review of the Court of Appeal” (1998) 61 *Modern Law Review* 390-400 at 392.

- 5 As described by Lord Woolf MR (Hutchison and Tuckey LJ agreeing) in *Parker v The Law Society* (1998) *The Times*, 8 December, CA.
- 6 *Parker v The Law Society* (1998) *The Times*, 8 December, CA.
- 7 *The Court of Appeal Civil Division Review of the Legal Year 1998 – 1999: The Judicial Assistants Scheme* ([http://www.courtservice.gov.uk/notices/civil/report.htm#The Judicial Assistants Scheme](http://www.courtservice.gov.uk/notices/civil/report.htm#The%20Judicial%20Assistants%20Scheme)).
- 8 Malcolm, D., 1999 *Annual Review of Western Australian Courts* at 3.
- 9 *Parker v The Law Society* (1998) *The Times*, 8 December, CA.
- 10 *The Court of Appeal Civil Division Review of the Legal Year 1998 – 1999: The Judicial Assistants Scheme* ([http://www.courtservice.gov.uk/notices/civil/report.htm#The Judicial Assistants Scheme](http://www.courtservice.gov.uk/notices/civil/report.htm#The%20Judicial%20Assistants%20Scheme)). It is worth noting that the House of Lords has this year introduced Legal Assistants to the Law Lords; applications for appointment were sought by advertisement in *The Times*, 11 April 2000.
- 11 An analysis of these concerns appears in Jamieson, P., “Of Judges, Judgments and Judicial Assistants” (1998) 17 *Civil Justice Quarterly* 395-408.
- 12 *The Times*, 8 December 1998.
- 13 Lord Woolf MR, with whom the other members of the Court agreed.
- 14 [1998] 2 NZLR 385 at 419, NZ CA.
- 15 New York, Times Books, 1998.
- 16 *Lynch v Trustees of the Sisters of Charity of Australia* (1997) 76 IR 239 at 241.

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Contributions are welcome and should be sent to the Editor: skilvert@lawsocnt.asn.au