

The Role of a Judge’s Clerk at the Supreme Court of New Zealand: A ‘Worm’s-Eye View’

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There is now a considerably body of literature in the United States of America on the role of a judge’s clerk (or ‘law clerk’ in the American parlance) – and there is increasing analysis of this topic in other jurisdictions, such as Australia and Canada.¹ In New Zealand, however, there is very little writing (according to my research) on the position.

That is perhaps how it should be. Clerks generally play a junior role in New Zealand courts, are employed for short periods of time,² and are – in my opinion – subject to an ongoing “duty of diligence, loyalty, and confidentiality”, which is owed not only to the judges for whom they work, but also to other judges and employees in their court, and fellow clerks.³ That duty properly constrains what clerks should write or say about their work. In addition, there are risks associated with clerks writing about their work. Clerks may overstate their importance when only judges can authoritatively settle how influential their clerk has been; in the memorable words of Chief Justice Rehnquist (penned before he was a Justice of the US Supreme Court), clerks can only ever provide a “worm’s-eye view” of judicial adjudication.⁴ As well, clerks may have an overly positive perspective on the judges for whom they work.

Notwithstanding these considerations, there seems to me to be some value in throwing light on the role of a judge’s clerk at the Supreme Court of New Zealand/Te Koti Mana Nui (hereafter “the Supreme Court”). Clerks have been employed at the Court since its establishment in 2004. They form a significant proportion of the Court’s employees. And their function is little-known and often misunderstood, as I will explain. An account of the role of a judge’s clerk at the Supreme Court therefore adds texture to the portrait of the Court on its tenth anniversary, and may be informative for commentators and prospective clerks.

That said, what follows is only *an account* of the role. It cannot be a more definitive or comprehensive description for several reasons. First, every clerk-judge relationship is unique, and I am cautious about generalising over-confidently based on my personal experience of a mere twenty months working at the Supreme Court. Secondly, a fuller explanation of a clerk’s

* Fellow at All Souls College, Oxford. Thanks to Alix Boberg, Ryan Manton, and David Bullock for comments on this paper. Thanks also to my fellow 2011 and 2012 Supreme Court clerks, and the Judges of the Supreme Court who served during that time (in particular Chief Justice Elias), who made clerking at the Supreme Court one of the most enjoyable experiences of my (short) life so far.

¹ Add further references in later draft: see the work of Miller, Kozinski, Toobin, Perry, and many others in the US; the writing of Leigh and Kirby in Australia; and Sossin and others in Canada.

² There are some exceptions to this. In some lower courts and tribunals, clerks have extended their working arrangements beyond the two year period by agreement with the judge for whom they work.

³ This formulation is taken from: Alex Kozinski, “Conduct Unbecoming: Review of *Closed Chambers: The First Eyewitness Account of the Epic Struggles inside the Supreme Court* by Edward P. Lazarus (1999) 108(4) Yale Law Journal 835 at 875. While Kozinski was writing about US Supreme Court clerks, my view is that the same duties apply in New Zealand.

⁴ William H. Rehnquist, “Who Writes Decisions of the Supreme Court?” (13 December 1957) *US News and World Report* 74 at 74.

role would require empirical or at least rigorously collected evidence, but there are gaps in information about past clerks that prevent this evidence from being collected.⁵ Accordingly, my hope is that the discussion below is helpful and illuminating, but readers should be slow to draw firm conclusions from it about the wider practice of clerks.

The account is split into three parts. In Part One, I outline my experience as a clerk at the Supreme Court for Chief Justice Elias, discussing the interview and preparation for the role, as well as the typical tasks undertaken as a clerk. I then make some tentative observations about the skills of a successful clerk. This narrative offers a flavour of what it was like to work at the Supreme Court in 2011–2012. Part Two is more analytical than anecdotal, and focuses on the future of the judge’s clerk role in the Supreme Court. I argue for the ongoing existence of the role, in the face of Professor Smillie’s argument that the position should be abolished. I then consider three reform proposals, relating to the length of a clerk’s term at the Supreme Court, whether clerks should have greater legal experience before being employed, and whether clerks should work for multiple judges as opposed to a single judge. My perhaps conservative conclusion is that none of these reforms is worth implementing – and that the current model of clerking facilitates fruitful cooperation amongst clerks, ensures a privileged experience for law school graduates, and avoids complications that might arise from employing older clerks or allowing clerks to work for multiple judges. Attention turns, finally, in Part Three to the future of the Supreme Court more broadly. I leave judgements about the legal performance of the Court to those at this conference with greater judicial and academic credentials. However, I make two institutional points in closing that arise out of my experience at the Court: first, that the Court may benefit from greater dissemination of extra-judicial speeches and comment; and second, that the public would gain from a well-resourced expansion in the Court’s outreach and education programmes. Both changes may seem prosaic, but in my view would help to boost the cultural standing of the Supreme Court of New Zealand, and allow it to fulfil its potential as an exponent of the values and principles that undergird the law and society of Aotearoa New Zealand.

Part One: A Clerk’s Experience

Prospective clerks are interviewed by a panel of judges for positions at the Supreme Court and Court of Appeal – at least this was the process at the time of writing this article.⁶ Around half of the clerking positions at the Supreme Court become available each year. In most law schools, students with good grades in their final year of undergraduate study are encouraged to apply, and deans of the law schools put forward students to be considered for clerkships. Whilst more fine-grained data is not currently available, Supreme Court clerks have been selected from all of the country’s major law schools: Otago, Canterbury, Victoria, Waikato, and Auckland. The Auckland University of Technology’s law school, only recently established, has not yet produced a Supreme Court clerk as of 2014. Clerks at the Supreme Court work for an assigned judge,

⁵ A complete list of the names and contact details for past Supreme Court clerks is not currently held at the Supreme Court (correspondence between Gordon Thatcher and the author).

⁶ The process in recent years has been for interviews for High Court clerking positions to be held several weeks after these initial interviews.

usually for two years. The Chief Justice employs two clerks; all of the other judges employ one clerk each. (It may be useful in future, in my view, for data to be compiled on the secondary schools attended by Supreme Court clerks, including whether they were public or private; the sexual and ethnic diversity of these clerks; and the law schools that they attended. But that may be just a personal interest of mine.)

I was fortunate to be employed as clerk to Chief Justice Elias from January 2011 until September 2012, when I left to begin my studies at the University of Oxford.⁷ My path towards taking up the position was likely similar to many others', but it may be useful to recount aspects of the experience to add colour to this account.

My experience of being interviewed was – as you might expect – intimidating, although the judges and staff of the Supreme Court did their best to make the environment as calming and reassuring as possible. After compiling an application, which I sent to the Dean of the University of Auckland Faculty of Law (as was required), I was informed by letter that I had been shortlisted for an interview for positions at the Supreme Court and Court of Appeal in late April 2010.⁸ I recall, having flown down to Wellington, waiting in an austere, dark room behind the Supreme Court's courtroom – a room I later found out was Lord Cooke's chambers. I was eventually led in to a large, better-lit meeting room, where at least five judges (from memory) sat either side of a gleaming wooden table, staring at me at the head of the table. (I should underscore that I have been told that the process may have changed since 2010.) In many respects, the qualities of each judge that I would later observe as a clerk were apparent during the interview. Justice McGrath, who was then coordinating the interviews, exuded humility and respect in the way that he nodded and took notes. The late Justice Chambers was jovial, perhaps even a little mischievous, in his comments and inquiries – when I made a passing reference to international treaties, he smiled and quipped that New Zealand was keeping busy with “DRIPs at the moment” (it being the same week in which New Zealand had endorsed UNDRIP: the United Nations Declaration on the Rights of Indigenous Peoples). And the Chief Justice was warm but critical in her questioning; at one point, perhaps when I had made an overly bold statement about wanting to contribute to the work of New Zealand's highest court, I recall her smiling and saying, “You do know that clerks don't write the judgments, don't you?” The interview ranged over broad topics, although most questions related to my experiences and legal interests, and before long, time was up, and I was ushered out onto Lambton Quay to get my return flight back to Auckland.

The next day, I was called by Justice McGrath and was lucky enough to be offered the job of clerk to the Chief Justice (who, thereafter, I would refer to simply in this way, as “the Chief Justice”). Six months on, in October 2010, I met the Chief Justice in Auckland to discuss the role, where she emphasised the importance of both precision and perspective on the law as a whole – skills that I would aspire to cultivate in my later work as a clerk. Then, three months later, in January 2011, I had my first working day in Wellington as a Supreme Court clerk.

⁷ I left early because of age requirements relating to applications for the Rhodes Scholarship.

⁸ At the time of my interview, the practice was for deans of the various New Zealand law schools to select the top applications and to forward these to the Judges of the Supreme Court. This may no longer remain the practice. However, if it is, this “filtering” process is arguably opaque as well as unnecessary.

In that first week at the Court, some time was spent (by the Court’s friendly and no-nonsense manager, Gordon Thatcher, and by other clerks) going over typical clerking activities – and indeed, the tasks proved varied over the following 20 months at the Supreme Court. The nature of each clerk’s workload will differ depending, amongst other things, on the judge’s personality, how busy the judge is, the judge’s habits when working with clerks (certain judges were known as more or less “heavy users” of clerks), and the judge-clerk relationship. But my work for the Chief Justice involved working closely with the other clerk for the Chief Justice (Alix Boberg in 2011, David Bullock in 2012) to prepare pre-hearing memoranda on cases being heard at the Court, offer comments on draft judgments, proofread and cite-check draft judgments, contribute to the writing of press releases, review transcripts of hearings at the Supreme Court, and research specific points of law for judgments or speeches given by the Chief Justice.⁹

Sitting on Court hearings was another highlight of my time at the Court. I had inferred that the role of the clerk in these circumstances was to follow the broad sweep and direction of the submissions, to note down significant points that might require further research, to form an independent assessment of the strengths of arguments, and to observe the judges’ preliminary positions on various issues. But watching hearings also provided a wonderful opportunity to learn about effective advocacy and different areas of law. It is probably true that clerks at the Supreme Court will always be privy to cases that are interesting and/or controversial, because of the Court’s leave criteria, but it is worth adding that the 2011–2012 period seemed to be a time of especially contentious and fascinating cases: including *Morse* (on flag-burning and freedom of expression under the Bill of Rights), *Penny and Hooper* (tax avoidance), *Attorney-General v Leigh* (parliamentary privilege), *Chapman* (*Baigent* damages for breach of the Bill of Rights), *Field* (bribery by a former MP), *Abdula* (the right to an interpreter), *Tannadyce* (ouster clauses and judicial review), *Hamed* (evidence collected by police in the ‘Uruwera raids’), *Allenby* (whether a pregnancy can be a personal injury when following a failed sterilisation for the purposes of accident compensation), *Paki* (ownership of riverbeds), *Right to Life* (powers of the Abortion Supervisory Committee), and *Hickman* (regulation of the securities market).¹⁰ A wide range of subject matter was explored in cases over this period, but there appeared – from my lowly vantage point – to be some clusters of cases: on the interpretation of the Evidence Act (*Hudson*, *Mahomed*, *Harney*), the Bill of Rights (*Morse*, *Abdula*, *Chapman*, and *Hamed*), and leaky buildings (*McNamara*, the *Building Industry Authority* case, and *Spencer on Byron*).¹¹ Whether these patterns were a product of chance or other legal or sociological factors is a matter I leave to more learned commentators.

The clerks also served a range of other, more miscellaneous roles during my 20 months at the Supreme Court. We helped out at functions, including swearings-in and special sittings; occasionally rushed documents to the judges during hearings (when we heard by email that certain cases or statutes were needed); supported the judges in work relating to the administration of the Court; sometimes attended judicial education seminars; met with visiting scholars, public servants, politicians, and foreign judges; and organised an annual conference for

⁹ Other past clerks have worked on applications for leave, but this was not a major part of my work at the Court. My thanks to Alix Boberg for helping to ensure that tasks were not left off this list.

¹⁰ No doubt other observers might pick out different standout cases from this period. This list reflects, of course, my own prejudices and interests. (Fuller references to be inserted in a later draft.)

¹¹ Full references to the reported versions of these cases to come in final draft.

clerks at the higher courts, which allowed clerks to build camaraderie and encouraged us to consider our future plans. The clerks met daily over morning tea (with the judges' associates, too) over the course of my time at the Court, and sometimes socialised in the evenings; we interacted with all the judges on occasion, as well, when invited to their weekly drinks or during farewell events.¹²

One of my more memorable attempts to help out the judges in a miscellaneous way occurred during my first year at the Court, when on one evening I received a call from the late Justice Chambers, as I was preparing to leave for the day. Justice Chambers was then on the Court of Appeal, but had been at a meeting at the Supreme Court earlier in the day – and he realised that he had left his bag at the Court. He asked me, in his usual very friendly way, whether I might to go down to the large meeting room (where I had been interviewed a year previously) and retrieve the bag for him. I raced downstairs, and thinking that the room would be empty (since it was, I think, nearing 6.00pm), I swiped my security card, and opened the high wooden doors wide – only to find not just the Chief Justice, but also the President of the Court of Appeal, the Chief High Court Judge, the Chief District Court Judge, and others all sitting intently around the table. I stared blankly at all of them for a moment, probably looking quite dazed, and then I quickly shut the doors. It was a Heads of Bench meeting! I stood, dumbly, outside the door for a second, and then heard the Chief Justice's voice. "Uh ... Max? Did you want something?" I clumsily swiped my card again, opened the doors a second time, and mumbled: "Ah, yes, Judge. Justice Chambers thinks that he has left his bag in this room. Do you know if it's in here?" The judges around the table looked around, slightly bemused, and then stood up and checked to see whether the bag was under their chairs or under the table. After an excruciating thirty seconds of awkwardness, I stammered: "Ah, don't worry! It's probably somewhere else! Thanks ..." I recall then scanning all the other rooms in the Court for Justice Chambers' bag with another clerk, Janet Dick, which led to our being locked into one other part of the Court – only for Justice Chambers to call me some minutes later, to say that he had found his bag somewhere else after all! My evening adventure around the Court, interrupting a Heads of Bench meeting, was drawn to a close.

On a more substantive note, it is worth noting that – in sketching an image of the clerk's role – it is almost as important to highlight tasks I did not carry out as a clerk, in addition to the tasks with which I did assist. I played no role in drafting judgments, in contrast to what has been said by US Supreme Court clerks about their drafting practices. I did not sit in on judicial conferences (where the Judges of the Supreme Court met to discuss cases) and so can offer no comment on the discussions that occurred amongst the judges. And unlike clerks in the High Court of Australia, known as 'associates', New Zealand Supreme Court clerks did not (at least during my time at the Court) sit behind the judges in court, retrieving materials for judges and opening doors for judges as they entered and exited the courtroom. In sum, then, Supreme Court clerks' role in New Zealand is one of general legal assistance and support – but the assistance, in my experience, is neither as extensive as the assistance allegedly offered by US Supreme Court clerks to their Justices, nor as physical and practical as the support provided by High Court of Australia associates.

¹² Before retiring, Justice Tipping was particularly keen to speak to clerks and often hosted what became known as "tea with Tipping".

It is possible, on the basis of my experience, to make some tentative observations about the skills of a good clerk – though the necessary skills will depend on each judge’s temperament, and the judges themselves are the best authority on this point. Some of these skills are easy to predict: a good clerk must be meticulous (especially in proofreading) and accurate in representing the law (as far as that is possible); knowledgeable about areas of law, especially recent developments with which judges might not be as familiar; and able to strike a balance between being appropriately deferential in discussions with judges and sufficiently critical that the clerk can provide some feedback. But certain other skills that I would suggest as important, based on my impressions, are less obvious. Because a clerk may have to offer an opinion on the suitability of dissent or the approach to precedent or the correct orientation to a lower court (though some of these matters may be constrained by law), it would appear to be helpful for a clerk to have at least partially developed positions on broader questions of legal philosophy, in particular relating to the role of an appellate court and the proper scope of judicial power. Moreover, given the precedent-setting nature of Supreme Court decisions, it seemed useful during my time at the Court for a clerk to be attentive to choice of words and *framing*, and somewhat far-sighted in being able to predict or at least speculate how future courts might interpret particular statements. In this sense the role of a clerk may be akin to the role of a political advisor, sensitive to the words used by politicians, although readers should be slow to interpret this statement as confirmation of the Supreme Court’s status as a political body. Finally, as well as legal nous, it seems to me that a good clerk should have emotional intelligence and the ability to relate well to other people: such qualities are important for cooperation between clerks and for appropriate interactions with judges. This laundry-list of skills and qualities is quite long and demanding, and I do not mean to suggest either that a clerk must possess all of these skills and qualities or that I had possessed all of them in my time as a clerk; I have only reflected on these skills and qualities for the first time some years after my clerking experience. The skills and qualities merely help to shed light on the role of a clerk at the Supreme Court.

Through an intimidating interview, then, and numerous tasks, fascinating hearings, miscellaneous duties (including interrupting Heads of Bench meetings to retrieve bags!), and attempts to cultivate skills and qualities, my time at the Supreme Court as a clerk for Chief Justice Elias was a wonderful privilege. The Court was at times cerebral and monastic; at other times frenzied and excited. 2011–2012 was also a fantastic time to work there, not only because of the cases heard during that period, but also because the clerks at the time were able to get to know Justices Tipping and Blanchard as they retired (and to witness the famous Tipping-Blanchard pincer in hearings!),¹³ as well as a new group of judges that took shape upon Justices Tipping and Blanchard’s retirement. With this breezy overview of the role complete, I turn now to consider possible changes – to the clerking position, and the Supreme Court more generally.

Part Two: Reforming the Judges’ Clerking Role

Just as it is worthwhile on occasion to pause, review, and assess the work of the Supreme Court in particular areas of law, so too it is worthwhile to pause, review, and assess the clerking system in operation at the Court. This Part of the paper reflects on four proposals that might alter the

¹³ Referred to in the speeches at Justice Tipping’s final sitting at the Supreme Court in 2012.

role of a Supreme Court clerk, and hopes to spark further discussion on improvements to the clerking process. Such discussion will help to ensure that the clerking system is best designed for the needs of judges and others at the Supreme Court.

(a) Should judges' clerks be abolished?

It is worth beginning with the more radical proposals about clerking – and to move from the radical to the more incremental. One sweeping suggestion made by Professor Smillie of the University of Otago is that the position of clerks should be removed altogether. In a 2006 paper on judicial power generally, Professor Smillie – with characteristic gusto, and in an article in which he also calls for the repeal of the New Zealand Bill of Rights Act 1990 and the abolition of the Supreme Court, amongst other things – lays out three reasons why clerks have no place in a well-ordered judicial system.¹⁴ Each deserves consideration, but ultimately the arguments neither on their own nor taken together constitute a convincing case for abolition of the clerking role.

First, Professor Smillie says that the position of a clerk “is a relatively recent import from the United States, where it has done untold harm for generations”.¹⁵ Unfortunately, Professor Smillie provides no specific examples of the “untold harm” caused by clerks in the United States; the harm alleged by Professor Smillie is, quite literally, “untold”. But even if we accepted that clerks have done significant harm in that country – perhaps through removing from judges the responsibility of writing judgments, or through violating natural justice by introducing arguments not considered in court – Professor Smillie seems to overlook the possibility that clerks might have different functions in New Zealand courts, which minimise (or render irrelevant) the harm purportedly caused in the United States. As well, Professor Smillie overstates how recently clerks were introduced into courts in New Zealand. Correspondence on this point suggests that clerks have been employed since at least the late 1970s, if not earlier.¹⁶ There has, therefore, been considerable experience with clerks in New Zealand, and opportunities for the clerking role to be refined and modified over time.

Secondly, Professor Smillie argues that clerks distort the judicial role: their presence means that judges are not “required to do all their own research and judgment-writing”. And without clerks, Professor Smillie says, judges will be encouraged to “rely more on the submissions of counsel and less on their own ‘independent’ research”. This may have the knock-on – bonus – effect of “shorter”, “clearer” judgments that take “less time” to be produced.¹⁷ Again, whilst Professor Smillie’s ideals here are laudable (clarity, concision, speed in judgment-writing), the basis of his claims is unclear. Moreover, if what Professor Smillie really seeks is short, clear, timely judgments – in which arguments are drawn from the submissions of counsel – there would seem to be far more direct ways of achieving this goal than through abolishing the position of a judge’s clerk. Further training of judges in judgment-writing, or additional emphasis placed on the need for

¹⁴ See John Smillie, “Who Wants Juristocracy?” (2006) 11(2) Otago Law Review 183.

¹⁵ *Ibid*, at 192.

¹⁶ Correspondence between Rick Bigwood and the author.

¹⁷ Smillie, above n 14, at 192.

concision in counsel submissions,¹⁸ may be two steps that could be taken. But it is far from obvious that shorter, clearer, faster judgments are always preferable, contrary to Professor Smillie's suggestions. Shorter and quicker judgments may simplify complex points of law, while clarity is an ideal that might be best served in some instances by comprehensive research and a lengthy explanation of reasoning.¹⁹ And it seems rash to reject the value of "independent research" by judges in all cases. Whilst, of course, any research should be grounded in the submissions of the parties and the points raised in a case (to ensure that the parties have an opportunity to respond to new arguments raised), independent research would appear to be valuable to ensure that judges understand the background to points of law.²⁰ As well, judges will invariably draw in their judgments – to a greater or lesser extent – on the work done by others, whether those others are academics, other judges, or clerks. To require judges to be confined to their own reading and the submissions in court is unrealistic in practice and may result in unduly narrow legal reasoning. It may even lead to judgments that take longer to write and deliver – quite the opposite of what Professor Smillie wants!

Thirdly, Professor Smillie says that abolishing the position of the clerk would be beneficial for clerks themselves, who are currently "lured by the artificial prestige" of clerking into "wasting their time ... when they could be setting about learning the craft of lawyering at the sharp end of the profession."²¹ While Professor Smillie's comments here are well-meaning – the gist of his message is that clerking is not helpful training for lawyering, and does not warrant the prestige associated with it – they seem a little assertive and condescending in posture. Clerks, on Professor Smillie's view, are dazed into entering the glow of the clerking world, and should be held back from this choice to avert the regret that will come later when they realise, inevitably, that the experience was an entire waste of time. This view does not square with my (admittedly limited) experience of how prospective clerks apply for the clerking position. Many have thought carefully and consulted widely about the value of the role; some law students choose not to apply after such consideration and consultation. Further, whilst I do not have the experience and wisdom of Professor Smillie in determining what is needed for "the craft of lawyering", I would suggest that certain core legal skills can be learned – sometimes even exclusively, perhaps – through clerking for a judge.²² In my brief 20 months as a clerk, I learned: the importance of

¹⁸ My thanks to Ryan Manton for suggesting this point.

¹⁹ The writer Adam Gopnik has some useful observations on lucidity in his book *Angels and Ages: A Short Book About Darwin, Lincoln, and Modern Life* (Quercus, London, 2010) at 32: "In describing the style that [Lincoln] absorbed from all that reading and writing, we always talk about 'clarity' and 'simplicity'. ... But *every* prose style is thought to be lucid by the stylist; even fancy poetic manners are thought to give the gift of clarifying metaphor. Both Dr. Johnson's 'nodosities' and E.B. White's faux-naïf appeal to clarity and simplicity. (Clarity and simplicity are like naturalness and the return to the classical that return every year in women's fashion – every mode, however outlandish, appeals to them. ...) All good styles are lucid, but each is lucid in its own way, and in a way shaped by the sounds of its time."

²⁰ Of course, when genuinely new points emerge from such research after oral hearing, courts can always call for further submissions – as occurred at the Supreme Court, for example in the case of *Paki v Attorney-General* [2012] NZSC 50 when further submissions were sought on an on-point US Supreme Court decision handed down between hearing and the date of judgment: see fn 99 of the Supreme Court judgment.

²¹ Smillie, above n 14, at 192.

²² Clerking for a judge is sometimes stereotyped by some in the New Zealand legal world as comprising rather academic work. That does not square with my experience and there are a number of other practicing lawyers in New Zealand who have mentioned to me that clerking has prepared them well for the cut-and-thrust of legal practice. Whilst this evidence is only anecdotal and far from comprehensive, it is nonetheless relevant. (My thanks to Ryan Manton and David Bullock for discussions of this point.)

facts in litigation for determining relevant legal principles; the relevance of finding a legal pivot in a case on which all other matters might turn; the need to read and reread statutes regularly; the value of providing not only criticisms of a legal position but also constructive alternative solutions; and many other lessons. While I have no doubt that I have a long way to go in developing my lawyering abilities, and while there is certainly benefit in being tested at what Professor Smillie calls the “sharp end of the profession” (by which he presumably means firms and chambers), I do not believe that two years of clerking hindered my or others’ skill development – although Professor Smillie could of course contend that I am merely resorting to the human habit of rationalising my own past life decisions, and that I am conflicted in my judgements on this point.

Observers and readers can draw their own conclusions about Professor Smillie’s arguments, and about the broader point. But my view is that he presents most of the relevant arguments that might be mounted against having clerks in the New Zealand Supreme Court (or, indeed, in any New Zealand courts), and that – despite his customary rhetorical flair – these arguments do not survive critical scrutiny. The upshot is that there remains a case for having judges’ clerks operate in the Supreme Court. Clerks appear to offer some measure of support for judges seeking to be comprehensive and careful in their reasoning and research; and for clerks, the position is an extraordinary privilege – and a learning opportunity, which produces unique insights into advocacy, judging, and the law at large.

That clerks should continue to be employed does not mean, however, that the system needs to continue operating exactly as it does at present – and it is to more granular proposals about changes to Supreme Court clerking to which I now turn.

(b) Should Supreme Court clerks be employed after clerking at another court, be drawn from a pool of more experienced lawyers, or work for multiple judges?

From time to time there are suggestions by observers that the length of judicial clerkships in New Zealand is excessive. Two years clerking for a single judge does seem a long time, especially if there is a possibility that a judge-clerk relationship might become frayed (although I came across no examples of this in any court during my time as a clerk), and given that a clerk will generally be in their early 20s and may be eager to move into what Professor Smillie calls the “sharp end of the legal profession” or further study. Moreover, clerks are often selected based on academic ability generally and other criteria, and there is always a chance that clerks may be adept in performing in examinations but less effective in a clerking environment – where they will then have to spend two years with a judge. It is arguable, then, that it would be useful both for clerks and judges if clerks had some specific clerking experience before working in the appellate courts.

To address these concerns, some have informally mooted that clerking in New Zealand should follow the American model, in which clerks could be chosen for the Supreme Court (and, perhaps, the Court of Appeal and High Court) only after serving as a clerk in another court for a year. In the United States, it is common for Supreme Court law clerks to have worked in a US Circuit Court of Appeals before being selected for Supreme Court work, and the clerks often

work for “feeder judges” who know Justices of the US Supreme Court and recommend clerks for work in the highest appellate court.²³ If this model were applied to New Zealand, clerks might be selected initially to work at the District Court (and perhaps the High Court) along with other tribunals and specialist courts (such as the Employment Court) for a single year. At the end of that year, clerks would apply for positions in higher courts, being selected partly on the basis of their performance as a clerk in their first year. They could then serve as clerks in higher courts for a single further year.

There are some attractions to this model. Clerks would serve only a single year in each court, which might allow varied experiences with multiple judges across two years. As well, clerks for appellate courts would be chosen with specific reference to their clerking skills. Appellate clerks would gain some understanding of trial courts, too, which could prove useful for their clerking activities as well as for their own legal futures.

However, it is not clear that the putative problems in the present system really exist – or that the new model could escape additional difficulties. There is little evidence of any real dissatisfaction amongst judges or clerks regarding two-year clerkship appointments; nor is it the case, from my limited knowledge, that academic training and interview performance have proven to be inadequate proxies for clerking ability. To be sure, these proxies may be imperfect, but some sense of a clerk’s demeanour, social skills, and legal ability can be gleaned from transcripts, referee consultations, and answers to questions in interviews. In addition, introducing a US-style system could introduce fresh complications. It may be hard for clerks to be compared, especially where they have worked for different judges (with different requirements) – although this is arguably also a difficulty under the current system, where clerks come out of different law schools. More importantly, a selection-based system could create undesirable competition amongst clerks working in lower courts, as they jockey and jostle to showcase their abilities in an effort to increase the likelihood that they are employed at higher appellate courts. There is, in most circumstances, healthy cooperation between clerks working in New Zealand courts, which is necessary for general knowledge-sharing and skill acquisition; it would be quite damaging if this cooperative ethos were to be eroded. The US-style model might also entrench hierarchies between clerks in a detrimental manner. Overall, the model produces more risks than benefits, and addresses apparent weaknesses with the current clerking system that may, on closer reflection, not exist. It should not, in my view, be taken up.

If the US model is not congenial to New Zealand methods and norms, might we learn something instead from the United Kingdom? In the United Kingdom clerks are known as ‘judicial assistants’ and serve in the Supreme Court for just one year. One key difference in approach in the United Kingdom (or, more correctly, England and Wales) is that judicial assistants have a little more legal experience than clerks in New Zealand. At minimum, judicial assistants must have completed a training contract at a firm or pupillage (a period of training for barristers) before applying for a position at the Supreme Court.²⁴ This raises the question:

²³ See Mark C. Miller “Law Clerks and their Influence at the US Supreme Court: Comments on Recent Works By Pepper and Ward” (2014) 39(3) *Law and Social Inquiry* 741 at 742.

²⁴ See the call for applications, posted online at, inter alia, <http://inspirationalyou.org/2013/02/23/job-uk-supreme-court/>.

should New Zealand clerks be selected not directly out of universities, but rather out of firms and chambers? Rules for selecting clerks might be changed to ensure, say, that those applying for New Zealand Supreme Court positions can be selected if they have up to five years of legal experience following the completion of a legal degree.

Such a shift would widen the pool from which New Zealand Supreme Court clerks might be selected, arguably therefore improving the quality of the clerks eventually selected. Clerks with a few years' legal experience might also have greater practical nous, allowing them to be more informed when considering legal arguments or less unduly abstract in their work for judges. The change might result in a greater variation in age amongst clerks, allowing clerks to learn more from each other when working collaboratively.

Once more, however, in the absence of further evidence, there appears to be no existing imperative for change – and there is a danger that this change could create significant complications. There already is potential for clerks to be of different ages, since law students finish their studies at different points in their lives; in my year of clerking, one Supreme Court clerk was to start while in his late 30s (although he unfortunately had to pull out due to events outside of his control). As well, any reduced practical nous amongst clerks may be offset by the enthusiasm for, and interest in, law that clerks show having so recently finished their university studies – and can be corrected in conversation by judges' own practical experiences.

One challenge of this shift in recruitment practices is that, with New Zealand's small legal environment, conflicts of interest would have to be carefully managed. It would be possible that clerks might begin at the Court having worked in a firm or chambers on a case being heard – or could leave the Court to work on a matter that (in some way) had been dealt with at the Court. To be sure, it could be said that management of such conflicts is the stuff of lawyering, and that these dangers are (apparently) avoided in the United Kingdom, where older judicial assistants are employed. But greater risks of breaches of confidentiality would arise, and it may be that these risks are not worth any benefits that might be accrued. Under the UK-style system, clerks may also be less capable of updating judges on emerging areas of law: whilst practicing lawyers do keep abreast of developments, they may not be as immersed in new case law or statute law as clerks fresh out of law school. On the whole, then, this proposal is in my opinion not worth implementing.

A final possible reform is even more minor still, and could involve a simple change: clerks at the Supreme Court might work not for a single judge, but for multiple judges. In the United Kingdom, at the time of writing, judicial assistants work for multiple judges – whereas in the United States, Australia, South Africa, and Canada, clerks work for a single judge. It could be argued that clerks might learn more about judicial personalities, philosophies, and approach by working for several judges. Clerks might also develop a more independent perspective – and become less defensive about, or protective of, their judge's opinion – were they to work for multiple judges. Judges, meanwhile, could allocate work to clerks based on the clerks' specialisations and specific skills. The Court as a whole might save resources by needing to employ fewer clerks.

There is not, however, an abundant number of clerks employed at the Supreme Court at present. And this proposal runs the risk of losing sight of the primary purpose of clerks. They are employed to support the work and practice of judges; the clerkship system should not be designed in the main with the advancement of clerks in mind. More troublingly, clerks might be drawn into revealing judges' positions on cases to other judges were they to be employed by multiple judges. The fact that the New Zealand Supreme Court has produced all manner of majority and minority decisions, with judges not at all falling into settled ideological groupings, makes this problem even more difficult to manage. Finally, the current system allows for a special relationship to develop between judge and clerk. There are few jobs in today's world where a young person can serve as a true apprentice, learning through observation and conversation. Clerking is one of them. Spreading clerks across several judges would make it harder for judge-clerk bonds to develop, and would hinder the unique type of learning – through sustained observation and support – that is possible for a clerk under current arrangements. My suggestion, then, would be that this proposal also ought to be jettisoned.

Are all of these conclusions overly conservative – and does my approach to these proposals merely perpetuate the laconic, but not always positive, New Zealand constitutional tradition of “muddling through” pragmatically in the face of major challenges?²⁵ I hope not. Reform of the system of judges' clerking is not one of New Zealand's major constitutional challenges, but I nevertheless hope that the foregoing analysis reflects a sober assessment of possible changes to the current clerking system. These proposals ought to be further considered; new proposals should continue to be mooted (for example, should the Supreme Court explicitly allow foreign clerks, as is the case at the South African Constitutional Court?); and at some point, a more wide-ranging review of clerking (which might address higher-level questions, such as whether clerks' employment should be recognised in legislation, in either the Supreme Court Act 2003 or the Supreme Court Rules 2004) may be appropriate. But for now, and notwithstanding qualifications repeated in this paper regarding my limited experience, it is my view that the contemporary clerking system operates effectively for clerks, judges, and others. Put another way, clerking practices – as they are currently designed – instantiate values such as cooperation, passion for the law, and learning, and these are just the sort of values that we ought to associate with the Supreme Court of New Zealand.

Part Three: Broader Changes to the Supreme Court's Practice and Policies

I have reflected on whether it would be appropriate and helpful to offer some opinion on the hearings and judgments of the Supreme Court: for example, on the frequency of citation of foreign judgments (in advocacy and decisions), the merits of multiple judgments in contentious cases, or the Court's procedural flexibility. But these substantive views seem somewhat independent from my work as a clerk, and the academics and judges at this conference will almost certainly have better informed view on such topics – so I leave my own opinions on these matters for another paper and another day. Instead, in this Part I seek to make two simple

²⁵ See David Hackett Fischer, *Fairness and Freedom: A History of Two Open Societies – New Zealand and the United States* (Oxford University Press, Oxford, 2012) at 462.

observations arising more directly out of my experiences at the Court, which relate to the dissemination of extra-judicial comment and the Court's outreach and education work.

(a) Raising the profile of extra-judicial activity by judges on the Supreme Court

One of the great privileges of my work at the Supreme Court was my engagement with extra-judicial work being done by judges. The Chief Justice's public speech material is, in my view, without peer in New Zealand: ranging widely across topics (from religion to identity, constitutional theory to private law), her writing in public offerings is lucid, direct, original, and humane. While I was at the Court, Justice Tipping delivered a very thoughtful speech on landmarks in Maori law for a University of Canterbury lecture. And Justice William Young, alongside his prolific judgment-writing, found time, too, to reflect on areas of insurance law, criminal law, and negligence. Other judges also engaged in various extra-judicial activity.

But only a small fraction of this work – and other extra-judicial comment by Supreme Court judges – is disseminated to the general public. Some speeches are made available on the Courts of New Zealand website (with Justice Glazebrook, another judge who gives very thoughtful speeches, making good use of this tool). And lucky members of the public can hear the speeches delivered at conferences and community events. Yet the messages rarely reach a wider audience. This is for a variety of reasons. In some cases, it is a condition of conferences (for example, where the conference involves a meeting of judges from different jurisdictions) that papers or speeches are not shared beyond the conference participants. In other cases, judges are reticent to make speeches and papers publicly available, perhaps (and here I am speculating) because of past political backlash and concerns that they might be perceived to be over-stepping their judicial role.

This is a great shame. New Zealand lacks informed public debate on long-term issues regarding the state of the country – there are few public actors willing to engage with such matters, especially from a philosophical or ethical perspective. The judges of the Supreme Court could help to enrich this debate and be public actors playing that role, alongside others, such as academics, public intellectuals, and the Governor-General. The judges' expertise is in matters of principle; they have led eventful and varied lives that give them deep reserves of human experience to draw upon; their adjudicatory responsibilities involve being farsighted about the consequences of certain courses of action; and they invariably are eloquent and forceful in final expression of ideas. To play this role, however, the judges themselves would have to be more willing to share their ideas to diverse audiences and to post speeches and other materials online. As one prominent commentator put it in the 2012 Bruce Jesson Lecture:²⁶

In an age where sound information is crucial to democratic politics, but where PR people far outnumber journalists, we can't leave the job [of democratic renewal] just to the existing media. ... More of us need to be bothered to be spokespeople and commentators in the public interest, and not leave the space to the paid voices.

²⁶ Nicky Hager, "Investigative Journalism in the Age of Media Meltdown", 2012 Bruce Jesson Lecture, available online at <http://www.brucejesson.com/?p=394>.

But this may suggest that extra-judicial comment is just a matter of willpower and initiative. What is even more important is for other branches of government to give judges room to play this expansive deliberative role. Politicians, including the Attorney-General and Minister of Justice, could encourage contributions to public deliberation from different constitutional actors, and defend those actors' right to articulate contentious and thought-provoking views.

Of course, there are counter-arguments that must be considered, but most of these are overblown. Lord Kilmuir, author of the 1955 so-called Kilmuir Rules on extra-judicial comment, said that "so long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable"²⁷ – and it might be said that too much extra-judicial comment would dent public confidence in the New Zealand judiciary. But far from undermining perceptions, it seems more likely that carefully considered extra-judicial comment will improve public understanding of the courts and civics generally. Judges, too, can be trusted to exercise care in their remarks: they do, after all, occupy a "profession in which carefulness in speech of every type is a watchword", in the words of Beverley Smith.²⁸ At the same time, judges need not shy away from the controversial, given that "it is the unpopular or unfashionable view that may be most deserving of being ventilated and tested with a view to rebuttal or adoption".²⁹ As for worries about judicial impartiality being imperilled by extra-judicial comment, these can be managed through judges being open to recusal where this is appropriate, as well as an acknowledgment that no judge brings an entirely neutral mind to any hearing. All in all, there are strong arguments in favour of greater dissemination of extra-judicial comment by judges on the Supreme Court. It is an idea at least worthy of further discussion.

(b) Outreach and education regarding the Supreme Court

Current attempts to educate the public about the Supreme Court are laudable. The public are welcomed into the Supreme Court with a continuously playing video of Chief Justice Elias explaining some background to the building, followed by a short video. Tours can be arranged of the Supreme Court, in general with a volunteer guide. Visits can be made to the Old High Court (including cells attached to that Court), behind the Supreme Court courtroom. And the Courts of New Zealand website provides valuable information about how cases come to the Court, the complex, the judges, and cases being heard.

However, more could be done to ensure that the public appreciates the role and place of the highest court in the land – and there is much unrealised potential. Nowhere in the Court can one find the informative exhibits that are visible in other nations' highest courts. It is remarkable that, during my time as a clerk, the main guide for visits to the Supreme Court was a volunteer (who was nevertheless extremely enthusiastic and friendly). And the memorable Old High Court, along with its cells, are not well sign-posted or preserved. Over the 2011–2012 period, I led a number of school visits through the Court – because an old teacher of mine got in contact with me, and was passionate about raising students' awareness of the Court. Students were surprised to learn about parliamentary sovereignty, interested in New Zealand's approach to the

²⁷ David Pannick *Judges* (Oxford University Press, Oxford, 1988) at 174.

²⁸ Beverley Smith "Judicial Free Speech in Canada" (1996) 45 UNBLJ 161 at 162.

²⁹ Keith Mason "Should Judges Speak Out?" (JCA Colloquium, Uluru, 9 April 2001).

death penalty, and eager to hear more about the judges. There was considerable curiosity, but that curiosity could have been much better satisfied than through my somewhat amateur tour.

This is a responsibility not only for the Court. To be sure, the Court could commit to greater outreach into schools (perhaps using judges' clerks) and could work within its existing budget to focus on producing further more comprehensive visitor information. But ultimately this is also a matter of resourcing: there must be a political commitment to the project of expanding public understanding of the Supreme Court. And ideally this commitment should be realised through ringfenced funds that the judiciary is able to manage – to avoid the scope for political interference and to maintain the separation of powers.³⁰ Such actions would help to advance, in the minds of the general public, one of the purposes of the Supreme Court Act 2003: namely, recognition “that New Zealand is an independent nation with its own history and traditions.”³¹

Conclusion

To recapitulate, then, this paper has offered a personal account of what it is like to clerk at the New Zealand Supreme Court. The slightly intimidating interview process was recounted, along with an outline of typical clerking tasks, and some suggestions about the skills of a good clerk. The ongoing existence of judges' clerks was argued for in the face of Professor Smillie's criticisms, and the current model of clerking was also defended against proposals to change the clerk recruitment process, widen the pool of prospective clerks, and spread clerks across multiple judges. Finally, two small points were made about the possibility of encouraging further extra-judicial comment and the value of expanded outreach and public education about the Supreme Court.

This has, ultimately, only been a “worm's eye view”³² of the Court's practices. But it is hoped that when supplemented with the bird's eye view of a judge, and the other perspectives presented at this conference, this worm's eye view helps to construct a more three-dimensional picture of the activities and habits of the Supreme Court of New Zealand. The picture that emerges, I think, on this tenth anniversary (at least from that worm's eye view!) is of a Court on fertile soil – a Court that has done well to create the conditions for ongoing growth and development, and that now must harness those conditions in order to fortify its global standing as an institution of intellectual heft and humanity. I, like you all I'm sure, am excited about following the Court's developments in the years to come.

³⁰ This is a general point about resourcing made in many of Chief Justice Elias's speeches.

³¹ Supreme Court Act 2003, s 3(a)(i).

³² See Rehnquist, above n 4.