Appointment of Australian judges

The debate continues but will change ever happen?

By Arthur R Moses

In her address to the Anglo-Australasian Society of Lawyers on 3 May 2006, the Hon Justice Ruth McColl AO considered recent changes in the United Kingdom to the process by which judges are appointed there and called for an examination of whether a judicial appointments process 'similar to that adopted in the United Kingdom can be adopted in Australia'.[1] Her Honour commended the English reforms and called for an appointment process that is transparent and accountable and which is able to accommodate diversity.[2]

A recent analysis of the English model was presented in a paper by Dr Evans and Professor Williams, 'Appointing Australian Judges: A New Model' to the Tenth Colloquim of the Judicial Conference of Australia in October 2006.[3] Those authors also argue for a new approach to the appointment of judicial officers in Australia, at state and federal levels, and propose reform along the lines of the English system introduced under the *Constitution Reform Act 2005* (UK).

In summary, Evans and Williams recommend a process which out-sources the selection process for Australian judges to independent state and federal commissions. Such commissions would be responsible for the selection process (including identifying the necessary competencies) and ultimately recommending to the relevant state or federal attorney-general three suitable candidates from whom the attorney general is to make the final appointment.[4]

As with the English model, the Evans and Williams model would require Australian commissions to apply three overriding principles in the selection process. First, selection would be solely based on merit. Secondly, a person would not be selected unless they are of good character. Thirdly, in performing its functions, the commission would have to have 'regard to the need to encourage diversity in the range of persons available for selection for appointments'.[5]

The need for reform in the appointment process arises out of a perceived need to change the face of the judiciary to reflect the community from which the judiciary is drawn. As has been argued, a judiciary which is not representative of the community from which it is drawn will ultimately lose public confidence in it.[6] The question then, is whether the proposed reforms can deliver a competent and diverse judiciary.

Clearly the community wants capable judges. The community expects that the best candidate for judicial office will be appointed when a vacancy arises. Merit must be the underpinning factor. But we also want judges to be reflective of the community. How can these two concepts realistically co-exist? As Justice McColl pointed out in her address, merit can be used as a means of ensuring that those who are appointed simply reflect established notions of what a judge looks and sounds like.[7] In other words, there is a risk that the notion of getting the best person for the job means looking for qualities which draw from traditional notions of what makes a good judge, such as a successful and well regarded practice at the Bar. Traditional notions of what makes a good judge may of themselves restrict the type of candidate who is being put forward, as for example, women and ethnic groups are not well represented in traditional legal practice.

Both the English model and the model proposed by Evans and Williams, seek to draw the merit and diversity principles together in a hopeful manner. The Australian model proposes deconstruction of the merit concept by charging the commissions to 'disaggregate the concept of merit into its constituent elements and ensure that recommendations for appointments [are] made on the basis of evidence that demonstrate[d] the candidate's possession of those constituent elements'.[8] The underlying concept is a transparent process where applicants are assessed against well defined criteria.[9] At the same time, the diversity principle looks to the achievement of diversity by a process which involves the commission actively targeting under-represented groups and encouraging them to apply to become judicial officers.[10] This would be achieved via numerous outreach programs.[11] In other words, the aim of diversity is sought to be achieved by widening the range of applicants who are available for selection.

This is a commendable long term approach. One has to question its immediate usefulness in the face of systemic and cultural impediments which for example, prevent the retention/promotion of women graduates in the profession and impede or hinder ethnic minorities from entering the profession in the first place.

The model proposed by Evans and Williams introduces no real process by which to address the existing imbalances and under-representation. Addressing gender and ethnic imbalance requires more than opening up the range of candidates for selection, when the range itself is very limited to begin with. There must be a recognition that unless a more radical approach is taken, change at best will be in the long term and dependent on a wide range of factors which extend beyond the immediate control of a selection process. If true change is to be achieved, it may well involve the application of diversity as specific criteria for selection or the use of a quota system[12], approaches which understandably are expressly rejected in these models.[13] What is needed is an analysis to assess how such mechanisms could be introduced alongside a merit based appointment system. It is clear that true change will also involve significant cultural change.[14]

Ultimately, whether or not there is any change rests with the executive.

Federal governments of both political persuasions have been reluctant for any fetters to be placed on the sole discretion of the executive to appoint judges. An attempt to set up a commission for the appointment of Federal Court and Family Court judges in 1994 by former federal attorney-general Michael Lavarch in the Keating government was rejected by the cabinet[15]. The current federal attorney-general, Philip Ruddock, has already said that the Evans and Williams model is unnecessary because the current system is working, and in his view, provides public accountability.[16]

It seems clear that the executive (regardless of the political party in power) will not readily give up an unfettered discretion to appoint judges.[17] It can only be assumed that the executive will be even more reluctant to make changes which are

necessary to redress the imbalance in a more immediate manner. Nevertheless, it is imperative that these more radical approaches be investigated. If there is to be significant change, then all options should be properly explored and evaluated by the Australian Law Reform Commission and the NSW Law Reform Commission so that an informed decision may be made.

[1] McColl JA, 'Women in the Law', Address to the Anglo-Australasian Society of Lawyers, delivered in Sydney on 3 May 2006, http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mccoll030506 at p6.

[2] ibid., p3.

[3] Evans, S & Williams, J., 'Appointing Australian Judges: A New Model', Judicial Conference of Australia Colloquium, 7-9 October 2006, http://www.jac.asn.au/pubs/coll10.html

[4] ibid., pp4-5.

[5] ibid., at p21.

[6] ibid., p9.

[7] McColl JA, op.cit., pp4-6 and generally.

[8] Evans & Williams, op.cit., p5.

[9] ibid., p5, pp21-22.

[10] ibid., pp22-23.

[11] ibid., p23.

[12] The writer does not agree with a quota system but does support the application of diversity as a specific criterion for selection.

[13] Evans & Williams, op.cit.,p22.

[14] McCol JA, op.cit, p6.

[15] Lavarch, M, 'Judicious Section Needed', *The Australian Financial Review*, Friday 20 October 2006, p59.

[16] Priest, M, 'Ruddock to Condemn Elitist Judges', *The Australian Financial Review*, Friday 27 October 2006, p27.

[17] Although it is to be noted that Nicola Roxan MP, Shadow Federal Attorney-General has expressed her personal support for the general thrust of the Evans & Williams model: see Roxan, N, 'Comment on Proposal for Judicial Appointments Commission', Judicial Conference of Australia Colloquim, 7-9 October, 2006, http://www.jca.asn.au/pubs/coll10.html .