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A REPRESENTATIVE JUDICIARY – TIME FOR GAY JUDGES?

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Abstract

In this article, the author describes the changes that have occurred in the Australian judiciary over the past five decades. The changes have affected the composition of the judiciary in terms of race, ethnicity and gender. But what about sexuality? By reference to the distinguished career of Justice Terence Etherton in England, and his own life in Australia, the author describes the reality and challenges presented to the judiciary by those of minority sexual orientation and gender identity.

When I was at law school in the 1960s, and long after, the judiciary in Australia was very monochrome. No female judges. No judges of Asian ethnicity. And certainly no openly gay judges. The composition of the bench was uniformly male, Caucasian and heterosexual – at least that is how things seemed. This situation persisted for many decades. But then things started to change.

The first woman judge in NSW was my friend from law school days, Jane Matthews. She was first appointed to be a judge in 1980. She presided in many big murder trials. She was brilliant and fair, with few appeals taken against her decisions. She showed that women could be judges, doing as well as (or better than) men.

Although the latest Australian census records that people who identify as of Asian ethnicity now number about 10% of the population, their numbers in the judiciary are only 2%. I helped to organise a body, Asian Australian Lawyers Association, to call the disparity in career advancement of minority ethnicities to the notice of politicians and the community. The judiciary should be a general reflection of the society that comes before the courts. This does not mean appointments have to be exactly proportionate. But it does mean that we should be concerned if there are no Aboriginal judges; or no judges from established ethnic communities; or other minorities in our society.

But what about gay judges? Now that Australia has abolished the criminal laws that previously punished gay people for adult, consenting sexual activity, and has agreed to recognition of marriage for same-sex couples and what do we feel about openly gay judges? If the bench should be blind to skin colour and gender, should it also permit no discrimination on the grounds of sexual orientation or gender identity?

This was the issue raised in England a few months ago when the third highest judge in the land, Sir Terence Etherton, Master of the Rolls, spoke at his retirement ceremony in London on 17 December 2020. After the usual

remarks about his long and distinguished service as a judge, both in trial and appeal courts, Justice Etherton turned to a highly personal issue.

He described how, after he became senior counsel (QC), a usual stepping stone to possible appointment as a judge, he began to think about life on the bench. But he did not think long about it because he knew that it was effectively barred to him because he was an openly gay man, living for many years with his partner, Andrew. He knew that the appointing authority in England still continued to follow the rule laid down by Lord Hailsham in 1970. Gay men would not be appointed because it could supposedly lead to the danger of them being blackmailed for trying to cover up to avoid shame. Lord Hailsham's rule had continued to apply in England, notwithstanding the abolition of the medieval criminal offences in England in 1967. Justice Etherton pointed out that if an openly gay man was, or is, open to blackmail, it was only because of the very prejudices of people like Hailsham who gave weight to such concerns. Gay men, like women or lawyers from minority ethnic communities would be no more liable to blackmail than heterosexual lawyers. If they were competent and experienced enough to be judges, they should be appointed on their merits. They should not deprived of judicial office because of other people's peers or suspicions about them.

Justice Etherton described how, after he was finally appointed following the end of the Hailsham rule, he found that his sexuality made no difference to his judicial performance. He reported that the biggest challenge was that of occasional boredom: 'falling asleep on the bench'. One colleague told him to get a packet of smelling salts, containing a strong ammonia, so that he would not drop off at embarrassing moments. Long days sitting in the same

position with obligations of unbroken concentration present challenges to judges. But very rarely do they involve challenges because of their sexual orientation or gender identity.

Justice Etherton's farewell remarks included the story of one incident that followed when he became the first openly gay senior judge in England. At what he described as a "rather grand dinner", attended by top judges, the wife of one of them turned to his partner and asked why he was present. When this was explained, the wife of the senior judge simply turned her back on him and did not address a single word to him during the next of the meal. Even in the upper classes and amongst educated people, prejudice and dislike of gay people can sometimes rear their ugly head.

Justice Etherton's story of his life reminded me of my own journey in Australia 20 years earlier. By then, I had been living with my partner Johan for 20 years. At first he did not answer the home telephone unless it rang twice. We never went shopping together. When I gave an annual end of year party at our home for my colleagues and staff all evidence of Johan was removed from sight. People probably knew and gossiped. But silence was the rule. "Don't ask, don't tell". One very senior Australian judge said in my presence, intending me to hear him: "These gays will never be happy until they have total equality". At that stage, I made no reply.

Later, it was Johan who persuaded me nothing would change in securing equality for gays, including in the judiciary, unless we stood up and were open about our lives. So we did. As with Justice Etherton, I believe that this

was a contribution not only to our own dignity and equality. But also to the enlightenment of other lawyers, judges and fellow citizens.

However, Australia, even more than England, is a complex, multicultural and multi-religious society. Its population contains citizens of many different religious beliefs as well as people of no religious convictions. It includes people of 'conservative' cultural and historical traditions. Some of them have been raised to despise gay people and to regard their conduct as forbidden by religious texts.

If such people do not like the idea of gay people standing for parliament, they can vote against them. They can also make representations to officials about their right to maintain their religious and cultural traditions. They can send their children to schools organised by their own religious communities. They can demand "religious freedom" in adhere to 'traditional' beliefs antagonistic to gay, lesbian, bisexual and transgender people.

Given that we all now have a lot of scientific knowledge about the origins and features of sexual orientation and gender identity that were not available in earlier days, should it be possible to exclude such minorities from religious institutions, including churches and schools? Is this part of what we mean by 'religious freedom'? Is it necessary for gay people in such institutions (teachers and students) to hold their tongue and pretend that they are heterosexual. This is what Justice Etherton and I had to do when we were young. Until we realised that we were thereby contributing in our own inequality.

Reconciling the rights of gays and other minorities to enjoy full equality, at the same time as respecting minority religious and cultural beliefs, and the right to express them, is not simple. Observing traditions in a temple or church may be one thing. Preserving it in a school or public institution, may be another. Upholding religious and cultural sensitivities in commercial bodies, like companies and shops selling goods or offering services may be another thing. Drawing the line between one person's claim to equality and human dignity and another person's entitlement to preach and uphold their religious views about gays illustrates the problem many modern societies now face. In most societies these issues are decided by elected parliaments. In many others, they are decided by judges determining cases that are brought to them by people affected.

Questions

1. Should judges keep silent on their personal lives, so as not to offend the various communities in our country that disagree with homosexuality, including in some cases on religious or cultural grounds?

2. Is there, as Lord Hailsham thought, a risk that openly gay people, appointed to be judges, may be blackmailed? Or may discriminate against people of different religious, ethnic or cultural backgrounds coming before them in court?

3. Should a school, organised by particular religious or cultural communities be entitled to exclude gay teachers and students from the school? Should the fact that they receive and rely on government funds alter the

answer to this question? Should a different rule apply in the church or temple concerned and if so why?

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Biography

The Honourable Michael Kirby AC CMG was a Justice of the High Court of Australia (1996-2009); President of the Court of Appeal of NSW and Solomon Island (1984-96); Judge of the Federal Court of Australia (1983-84); Chairman of the Australian Law Reform Commission (1975-84) and President of the International Commission of Jurists (1995-8). He presently serves as Co-Chair of the Human Rights Institute of the International Bar Association (2017-21).