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**THE UNIVERSITY OF NEW SOUTH WALES  
FACULTY OF LAW  
ABORIGINAL EDUCATION PROGRAM  
INDIGENOUS PRE-LAW PROGRAM**

**FRIDAY 31 JANUARY 2003**

**MORE INDIGENOUS LAWYERS - MAKING A DIFFERENCE**

**The Hon Justice Michael Kirby AC CMG**

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**The Hon Justice Michael Kirby AC CMG\*\***

I feel privileged to take part in this graduation ceremony. It marks the completion of the Ninth Indigenous Pre-Law Program. The aim of the Program is to provide a number of indigenous students with the necessary skills, exposure and support facilities to enable a successful transition to their university studies.

I congratulate the graduates and their families. I also congratulate the University of New South Wales, its Faculty of Law and its Aboriginal Education Program. This is a worthy, indeed noble, endeavour. In all truth Australia, its people and its universities, cannot boast of enough achievements in the field of education of the indigenous people of the Commonwealth, although

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\*\* Justice of the High Court of Australia.

many programs are now in place. This is a small but important and well established contribution to help the righting of a national wrong. As the tenth Program approaches, it would be timely to perform an audit of this initiative - to discover where its graduates are and where they are going.

The issues involved in the contemporary practice of law, especially in aspects of the law that affect indigenous peoples, deserve the best of lawyering. To perform that task it is necessary to reflect upon the way Australian law has dealt in the past with people at the margins. A consideration of that issue raises the question of whether Australia is really an inclusive society for all of its inhabitants as it often boasts. For the good health of the rule of law in our country, this is a most important question. It is one which must be squarely faced at a ceremony such as this.

In 1995, in her Boyer Lectures, Eva Cox said that "Australia has the potential to be a very inclusive society". However, she cautioned that "we must learn to travel hopefully in a discomfort of contradictions, a concordance of contraries and a conjunction of opportunities"<sup>1</sup>.

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<sup>1</sup> E Cox, *A Truly Civil Society*, Boyer Lectures, ABC, 1995.

Looking back on it, no Australian today could call the nation an inclusive society at the time of its birth as a modern society - whether you take the date of that birth to be 1788 or 1901. Unless you were a man who shared the privileged position of a settler from Britain (or a descendant of such a settler), at those times, you could not fully share in the kingdom of Australian mateship.

Take the indigenous people as the first example - the Aboriginal and Torres Strait Islanders who were the forebears of the graduates whose selection and achievement we honour today. Consider their position in Australia.

Not until 1967 was the constitutional discrimination against them removed by a referendum<sup>2</sup>. Not until 1983 were all remaining discriminatory provisions removed from Australia's electoral laws<sup>3</sup>. Not until 1992, in the *Mabo*<sup>4</sup> decision, was the law that denied indigenous land rights swept away by the High Court. In housing, healthcare, drug and alcohol dependence, imprisonment rates, youth unemployment and communal violence, and especially education, the challenge of full inclusion of Australia's Aborigines is still before us.

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<sup>2</sup> Amendment of s 51(xxvi) (special laws) and deletion of s 127 (census) by *Constitution Alteration (Aboriginals)* 1967 [No 55 of 1977] assented to 10 August 1967.

<sup>3</sup> Discussed J Norberry and G Williams, *Voters and the Franchise: The Federal Story* (Parliament and the Constitution: Paper No 16) (2002).

<sup>4</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

Good will in abundance exists under successive governments. But we still have a long way to go. Lawyers have a part to play in bridging the gap. That is why I hope that today's graduates will be encouraged by their participation in this program to pursue university studies in law. Law is the key to unlocking a great deal of power in a society such as ours. If well used, it is a means of helping people, protecting citizens and, in some cases, advancing the rights of individuals under the law.

Not a single woman participated in the Conventions that led to the adoption of the Australian Constitution in 1900<sup>5</sup>. Attempts to include female suffrage explicitly in the Constitution failed<sup>6</sup>. It took a long while for women to become eligible for election to Parliament in all parts of Australia on the same terms as men. Longer still for women to be elected to Parliament (1922), to be appointed as Ministers and to take office as a head of State Government. We have had one woman High Court Justice (Justice Mary Gaudron). She will retire on 10 February 2003. We will then be seven men again. We have never had a woman Prime Minister or a woman Governor-General.

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<sup>5</sup> Norberry and Williams, above n 5.

<sup>6</sup> Effectively, female suffrage was secured, and extended because of the terms of ss 8 and 30 of the Constitution.

One of the biggest debates at the outset of Australia's nationhood concerned the White Australia policy. It was the very antithesis of inclusion<sup>7</sup>.

It was not until 1958 that the infamous dictation test was dropped and the basis for a non-racial immigration policy gradually introduced. It was Mr Malcolm Fraser's government, in the 1980s, that dismantled the lingering legal requirements of racial assimilation. Australia embraced the multicultural idea that acknowledges that those who make up the population have their origins in a diverse range of cultures, races, religions and political systems which they need not, and should not, deny.

In recent months Australians have witnessed images, hurtful to the Islamic minority in Australia, based on overseas events or atypical incidents at home. Politicians of all parties have expressed alarm at these trends. Such events and some of the recent attacks on foreigners, represent the contemporary voices of exclusion. They reflect an unfortunate reversion to racial stereotyping that lawyers must play a part in arresting. Indigenous Australians should be in the forefront of resisting such discrimination. Many of the disadvantages they have suffered over two centuries had their origins in feelings of "white" superiority, and "black" inferiority.

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<sup>7</sup> See eg the *Constitution*, s 25 (Provision as to races disqualified from voting).

Most Australians are members of some minority or other. In my own case the source of discrimination affecting me was sexuality. I grew up in a society that criminalised homosexuals, entrapped and imprisoned them, denigrated and humiliated them and tolerated them only if they were thoroughly ashamed of themselves and kept their big dark secret locked away in the closet.

Thanks to some fine Australians, heterosexual and homosexual, the old discriminatory criminal laws were gradually repealed. The foundation for this prejudice is irrational and unscientific. It is gradually crumbling away. But discrimination still remains in federal and State laws and in some social and religious attitudes<sup>8</sup>.

Lawyers must be leaders in combating all forms of irrational discrimination based on ignorant stereotypes. They should not accept its manifestations from clients, from litigants or from the Bench. The presence of increasing numbers of women and lawyers from different ethnic backgrounds on the bench, and in the law, can help to change the culture of law in Australia. It can help to ensure that the diverse values of Australia's multicultural society are reflected in the daily practice of law. Already we have distinguished

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<sup>8</sup> M D Kirby, "Same-Sex Relationships: Some Australian Legal Developments: in *ibid*, *Through the World's Eye* (2000), 64.

Aboriginal Australians in the judiciary - including His Honour Judge Robert Bellear and Magistrate Pat O'Shane. In years to come we will have more. Perhaps some of those in the graduating class today will take a seat on the Bench in years to come. They will play a part in the time honoured, creative role of the law in bringing equal justice under law closer to reality than it is today.

Yet it is in civil society, more than in politics or courts, that common objectives are identified that we can work together, as fellow citizens, to achieve. It is there that we discover points of difference that we can resolve in a multitude of low key venues; and we can recognise injustices that we can set about correcting.

Robert Putnam is Professor of International Affairs at Harvard University. His belief is that the best indicator of liberty in any society is the extent to which citizens join together - in clubs and associations - whether for politics, for community service, football or choral practice<sup>9</sup>. In recent years, he has been concerned by the evidence of the "decline of social capital and civic engagement" in America. The same trends are probably reflected in Australia and other like countries. For Putnam, the chief culprit for these developments is what he calls civic passivity. To some extent he blames the fall off in membership of community associations on

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<sup>9</sup> Professor Putnam's books include *Making Democracy Work* and *Bowling Alone*.

television. Now a later generation of students takes its mind into the World Wide Web. It will be superbly informed. But will it be wise? Will it have enough emotion and involvement to be concerned? Will virtual reality breed actual indifference? Lawyers and law students especially are well equipped to take part in civic bodies. They must, as in the past, be active citizens, engaged in their profession, in their community and in the world.

The importance of civil society is not confined to Australia's needs. It is an international phenomenon. It is made all the more significant on a global level because of the threat of war and the dangers of weapons of mass destruction, terrorism, famine, water scarcity, religious fundamentalism, HIV/AIDS and other problems.

The divisions and exclusions that we have witnessed in Australia are also reflected in the international community but in more acute and dangerous forms. The tensions of a "bifurcated world" present grave risks for our species and for the global environment. The only effective answer to such global exclusion is an attempt somehow to restore civic involvement, at home and abroad<sup>10</sup>. That is why lawyers today, of every background, indeed all Australians, must be citizens of the world. They must lift their sights from their own society. They must be engaged in the struggle

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<sup>10</sup> *Policy*, Vol 12, No 1 [Autumn 1996], 3.

for constitutionalism, the rule of law and basic human rights throughout the world. They can do this by joining their professional bodies, like the Law Society and the Bar Association - a sponsor of this Program - and other bodies like the Australian Section of the International Commission of Jurists, Amnesty International, Australia and other like organisations. I hope that all of you will consider doing this.

It would be natural, and indeed desirable, that all of the students of indigenous background who graduate from this course, would want to contribute to the raising of the economic, social, health and educational standards of the Aboriginal and other indigenous people of Australia. It would be natural, and indeed desirable, that they should have a high sense of urgency, even impatience. A feeling of frustration, sometimes anger, would be understandable. The ambitions to which the graduates have given voice are laudable. But let me give a word of advice born of long experience in the law.

To be successful in the law in Australia - and in community groups - it is essential to learn the ways our institutions actually work. For success in the legal profession it is critical to learn the language and techniques of law. Nothing is so discouraging as seeing a person whose *heart* is in the right place, but who lacks the legal *skills* necessary to be engaged effectively in the community's institutions and in the civil society of all Australians. Nothing is so

discouraging as seeing minorities who stick exclusively to the comforting world of their own kind of community - Gays to Gay groups; Women to Women's groups. Ethnic Australians only to ethnic groups. Aboriginals only to Aboriginal groups. Protesting and demonstrating on the outside.

To be truly effective, members of minorities must have those groups and draw strength from them. But they must also be joiners and doers with the majority of society. They must be engaged in politics. They must be leaders of civic groups. They must become leaders of their professions. They must find common cause. They must become experts in communication and persuasion for their interests.

If this can be done, the institutions of our society - including the law - will become useful instruments for justice and for an end to every form of irrational discrimination. If this can be attained we will build a truly inclusive society in Australia - so that it lives up to its chosen name as a *Commonwealth*. And so that all of us - man and woman, Aboriginal and non indigenous, Anglo Celtic and other ethnicities, straight and gay can proudly proclaim together our national motto: *Advance Australia Fair*.