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EQUITY AND SKILLS FOR A BETTER AUSTRALIA

Victorian TAFE Association
Melbourne
April 2011

The Hon. Michael Kirby AC CMG

VICTORIAN TAFE ASSOCIATION

STATE CONFERENCE

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EARLY ENCOUNTERS WITH EQUITY

I pay respects to the indigenous custodians of the land. And to all of you who contribute, directly and indirectly, to education and tertiary education, technical and further education. It is a tremendous thing that you do. Never doubt that your beneficiaries, if they get to my age, think often of their teachers and educators, and the role that they played in their lives.

You have heard my introduction. I have not been directly associated with the tertiary and further education sector. So I want to begin my remarks with a reflection on the big changes I have seen in my life, regarding equity and justice to all people in our society. That, together with the huge changes in technology, is really the context in which the future of the tertiary education sector, and the future of the TAFE sector, will be charted in this country.

When I was aged 10, my grandmother had remarried. Her new husband turned out to be the Treasurer of the Australian Communist Party. At the time, that wasn't the best career move my grandmother could have made! This man was a sort of 'terrorist' in the eyes of the media and of the government of the day. So I grew up as a little boy with this man who was originally a New Zealander, who fought at Gallipoli, received the military medal from King George V, but who had been thrown the medals away because of an ideal and what would become a sort of religion for him. The idea of a better world with economic justice and fairness for all.

Learning about the Menzies government and their proposal to ban the Communist Party and impose civil restrictions on communists and looking at this man who held high office in the Communist party, it taught me some important lessons. First, to be very suspicious of the media in demonising people. Secondly, to be suspicious of politicians who sometimes endeavour to demonise fellow citizens for electoral advantage. Thirdly, to appreciate that the law of this country stands there for everybody, not just for the popular majority.

The first time I heard about the High Court of Australia, which I later served on, was when I knew that an institution that I didn't quite understand - I was only 10 - had struck down the legislation which had been enacted by the Federal Parliament to ban the Communist Party. That institution was the High Court of Australia. Then there was the referendum to change the Constitution. That

referendum was rejected by the people of Australia in September 1951. I was 11 years of age.

That was the beginning of the emergence in my mind of the notion of equity and a notion that everyone is entitled to their beliefs, however foolish they may be. Essentially, the High Court said in that case that if you want to do anything about people, do it for what they do – their actions - not for what they believe. Don't enter into their brains and try to change their beliefs. Their beliefs may be absurd. But the way to tackle these is by persuasion and getting people to agree with your point of view. That is the way that generally we do that in Australia, by the electoral process.

STUDENTS WITH NEW PERCEPTIONS OF EQUITY

As I continued my career in law, I became associated with the student council at the University of Sydney. It's amazing how many student politicians - all those troublemakers - end up in positions of significance. The Prime Minister and the Leader of the Opposition in the Federal Parliament both had significant histories in student politics. So it is today. So it was then. I remember the first time I came to Melbourne was for a meeting of the National Union of Students. Gareth Evans was the President of the Melbourne SRC. So you have to watch those students in positions of influence today because you never know where they might end up!

Amongst those students in the 1950s and 1960s, the big issues were well in advance of the thinking of society. For example, there was a recognition of how much we had neglected our indigenous

population of Australia. Even Britain and its other colonies had graduated indigenous people of this land. But in Australia and in Papua New Guinea, we were very neglectful of the education of the people of the land. The importance of Aboriginals in society was perceived by the society in my day. They focused on getting the Aboriginal scholarships to encourage Aboriginal students to come to university. Charles Perkins was one of the beneficiaries of that. He did marvellous things contributing to the Aboriginal people, being a mentor.

Another issue at the time was the issue of Asian Australians. I am so old that I grew up in the era of 'White Australia'. At Fort Street High School in Sydney, in the whole school there were only about 10 Asian Australians. One of them was a boy who became a professor of paediatrics and later Australian of the Year – John Yu. I asked him what it was like growing up in a society that said he had no real place in our country and community. He said it wasn't very nice to feel that you were and felt excluded.

Whenever I go back to Fort Street High School, I now see that about 45% or 50% of the pupils are Asian Australians. They are speaking with Aussie accents. They are ambitious, keen to succeed. They are the future of this country. It is such a huge change to witness.

Looking at this audience today, it really isn't reflective of the Australia of today. Certainly if I look at the judiciary, it is not reflective of the Australia of today. The Australia of today and the

Australia of tomorrow will increasingly be more racially diverse. This will be a great strength for this country.

The students in the 1960s got there first. They saw this and became involved and campaigned for various endeavours to improve and increase the numbers of Asian Australians coming to university. Later I myself became involved in the cause. I learned how important it was that the law should stand up for all and be a guardian of all; not just for the majority. This is the weakness of democratic electoral systems. They look after the majority. In minorities, you sometimes have to depend on the courts to defend you. This the Aboriginals learnt with the *Mabo* case in 1992. That decision was condemned by many legal conservatives at the time as a shocking intrusion by the court into an area that should have been left to Parliament. I wasn't a member of the High Court at the time of the *Mabo* decision. So I can't take the credit or the blame. But, by inference, the court had decided that waiting 150 years was long enough and that the time had come to declare a different common law. To re-express the common law in non-racial terms. That then was followed up by the *Wik* case, which was also attacked by and out of Parliament. In *Mabo* and *Wik*, the principle emerged that we do not discriminate against people in their entitlement to land and legal rights. We don't discriminate on the basis of Aboriginality, their indigenous status. I think that was a wise decision by the High Court. Certainly, it was a principle of equity for our society.

COURTS PROTECTING EQUITY: ACCUSED, PRISONERS, YOUTH

Many of the decisions were made, both before and after I came onto the High Court in 1996 involved equity. One of them related to the representation of people accused of serious crimes. A decision called *McInnes* was decided in 1970. The High Court had held there that there was no right to legal counsel, even if you were facing a serious criminal charge. Yet, in a later case, the High Court said that in our courts we were conducting something that was not a charade. If someone was unable to afford a lawyer to represent them in a serious criminal trial, the state had to provide them with such representation. That was the *Dietrich* case. Such decisions sometimes become the playthings of the afternoon tabloids. They can easily whip up the public into feelings of animosity for these people; for minorities. Yet they too are citizens, residents and human beings. They should have equality and protection of the law.

Just before I left the High Court, a decision was made concerning another group of the unloved in Australia. This was prisoners. In 2006 an amendment was made to the Commonwealth Electoral Act to exclude all prisoners from a right to vote in federal elections. People said the amendment was electorally inspired. Previously, prisoners who were serving shorter sentences enjoyed the vote. The case was argued in the High Court. The court held that the provision that excluded all prisoners from the right to vote was disproportionate. Many people are in prison simply because they cannot afford to pay a fine. It's amazing when you get the figures. A large cohort of our prisoners are people incarcerated for very

short periods of time because they can't pay their fines. The High Court, by majority, struck down the 2006 legislation. Prisoners in prison can vote, and must vote, in federal elections in Australia.

So this is the principle of equity and how it has worked out in important decisions in Australia's courts.

After my departure from the High Court in 2009, another case in the same line occurred. An interesting case concerning young people. This was brought by Get Up! – a civil society organisation. The then law excluded anyone who was not on the electoral roll when the prime minister called an election.

The rule had been long established, however The High Court said that a law which closed the ballot on the day which the election was called - even if there had been some publicity before, urging people to get on the roll - was not a law that was proportionate and in accordance with the text of the Constitution. So the electoral roll was reopened and young people were able to vote. There was a follow-up application to the Federal Court by Get Up! saying that young people should be able to register online, because (as you know) young people don't believe it exists if they can do it online! This application was also upheld by the Federal Court.

All of these decisions, from the Aboriginal ones to the Legal Representation ones, through to the decisions concerning prisoners and refugees and young people, they are all part of an idea of what it is to be an Australian. That idea is the notion, probably traced back to our constitutional concept of electoral

democracy, that all of us must be treated equally and fairly in fundamental civic and legal rights.

EQUITY AND MAKING AUSTRALIANS EMPLOYABLE

On my journey down here from Sydney, I saw in the *Sydney Morning Herald* today an article which I commend to you. It is not reproduced in *The Age*. It is an article by Ross Gittings titled 'Making People Employable Is the Key'. Australia is sitting pretty, he says. We avoided the worst of the financial crisis and the return of the resources boom is beneficial for us. He goes on to say that the challenge is to make sure we end up with something to show for all the good fortune of "digging a fortune out of the ground". The one thing we need to do is to make sure we save a fair bit of the extra income coming our way. He contends that to do this, it is necessary to "invest in human capital in education and training our people". I accept this as the text for my remaining remarks to your conference today. I agreed with every word Ross Gittings expressed. When I was a little boy, I said I would end up as a judge or a bishop. If I were a bishop, I would have had to have had a text. Gittings says, "It worries me a lot that digging stuff out of the ground and flogging it on to foreigners is an unsustainable way to make a living." We don't delude ourselves, he went on, that we can get back into manufacturing. If the Germans - with their high-tech populations in high standard of population are having troubles - and low-cost countries like China have sewed up that market - that particular game is over.

He says, "Yesterday, Chris Evans the Minister of Skills, issued a report from Skills Australia '*Skills for Prosperity*'. That report says

Australia will need an additional 2.4 million skilled workers by 2015 to meet the growing needs of business to replace retired baby boomers. By 2025 we will need 5.2 million. Many will have to be trained in the VOC-ED system. Many believe that this funding should be increased by 3% every year. He suggests VOC-ED is part of the education system. It is positioned to be for those who are missing out. Part of our effort is to make sure we have lasting gains from the resources boom. We should be doing more to enhance our skills.

In this morning's *Age*, a further statement appears which is online, about the marvellous educational resources we, in Australia, have had. Especially in Victoria. Nine universities, 18 TAFE colleges plus hybrids. A quarter of a million students in the state in university education. These are excellent and admirable results. There is also an article from Professor Glynn Davis saying that the "Melbourne University model" obliging postgraduate degrees, means you have to have done a generalist degree first. This, he asserts, is pitching Melbourne University as a special place with a special role in tertiary education.

EQUITY AND THE SOMALI AUSTRALIAN TAXI DRIVER

It is very important that the lesson that Ross Gittings has suggested is not lost as we talk about the top of the pile. We need to talk about all portions of the education sector in our society. All portions without exception must have an investment made in them. In the work of VTA, the issues which have been stressed all seem to me to be consistent with the principle that Ross Giddings has presented. Not compromising quality. Dealing resolutely with fly-

by-night enterprises in the sector. Unifying the tertiary sector in those matters which they hold in common. Finding the common ground both in the federal and state level. Achieving social inclusion by applying the principles of equity which are being upheld in the courts and in our education sector as well. The fine Australian principles of equity that extend to the poorer members of society. Those who are in lower socio-economic groups. Indigenous students. Students from different cultural backgrounds. Students of different ages. Students with non disqualifying physical and intellectual capacities. The concentration by the VTA on the puzzles of apprenticeship is another obvious priority for our community. A big dropout rate in this section is such a big curiosity. Why is that so? Is it so because of poor attention by employers?

I remember when I was an articled law clerk in the 1950s and 60s, it was kind of an apprenticeship system. Six pounds a week in my first year. Nine pounds a week in my second year. And £12 a week in my third year. The work I undertook did not involve any all-round training in the art of being a lawyer. I had to get on my feet in a court on my very first day in that job when I was asked to mention cases. I was doing what was good for my employer. Essentially, I was a very low paid slave labour for the employer! Of course, I had the golden chalice waiting for me at the end of my road. So I knew I had to hold on to that. But today some people will not hold on.

The sustainability of green technology is a more modern issue with new implications. And then there is the issue of governance. We need to increase the numbers for outreach of TAFE education to

more deserving individuals. Even as I come to this conference this morning, I was brought here by a taxi driver who was, I think, from Somalia. He spoke excellent English. He was obviously extremely intelligent. So I asked him, "Why are you driving a cab? Have you had any education?" He said, "Yes, I had education in a TAFE college. I went on to secure a degree in La Trobe University. I did the degree in economics. My TAFE training has been in the economic sector." So I said to him, "You have a duty" - this is the judge speaking, you see - "You have a duty to use your training." I said, "This is a tragedy. Why don't you do other education?" He said that if he were to return to education he would have to become a full fee paying student. If you have taken a specialty which is too narrow or does not attract you when you get to the end of it, there is a real burden. There is a great problem in switching your courses.

EQUITY AND THE IMPORTANCE OF FLEXIBILITY

One can perhaps understand this burden for overseas students. Maybe one can understand that they need to pay more - I'm not saying I agree with that. But it is a view that I can understand that governments would take. However, to say that of citizens or permanent residents, and to lock them in to vocations that repel them is very unwise. Nowadays, above all, flexibility in education and employment is the name of the game.

A few years ago, a very clever boy won a prize for legal studies at my old school, Fort Street High in Sydney. He was brought in to see me. I asked him to keep me informed as to what he was going to do. He later went into the Faculty of Computing Science at the

University of Technology, Sydney. His parents told him to go into computing because there would be a lot of money in it. He started with that. But after six weeks computing he hated it. Fortunately, he didn't just sit there and do it as most dutiful students and children will do if they have a particular ethnic background. They will do what their parents say. He came to me and asked how he could transfer. The Dean had said it was too late. I got in touch with the Dean of Law at the University. I told him that the one great law in life is the law of discretion: the capacity to adapt rigid rules for new circumstances. The Dean, his heart melted (he was crying by the time I finished speaking) consented to put the student into law. The young man got a brilliant degree and is working in the top end of town in a law firm in Sydney. He has a great future in law. I have even written an essay suggesting that in the year 2030, Andrew Ta will be Chief Justice in Australia. Time will tell.

We all need to understand that human beings are not automatons. You knew this. Your endeavours are designed to ensure that citizens and permanent residents are not disadvantaged but are helped to flourish. Clearly, this is to be applauded.

Basically, I have come to this conference to give you solidarity. I am a strong supporter of public education. I am the beneficiary of all those things. I have never forgotten my teachers and those who got me on my way. So I therefore want to come and say I think you are all wonderful change agents. I agree with what the VTA is doing. I think these are good policies but you should look at this article by Ross Gittings because it gives the fundamental economic rationale for how important your sector is to the nation. It

gives a message that has to be communicated to the politicians distracted by so many things. Investment with you and your sector is good for Australia. But it is also good for the economy. It helps to get people into a higher income level. There they pay more tax and therefore end up paying back what they cost, generally (like me) many times over.
