**THE 2019 ANNA McPHEE MEMORIAL ORATION ON DIVERSITY AND INCLUSION**

**29 May 2019, Melbourne – delivered by The Hon Michael Kirby AC CMG**

Thank you for the invitation to take part in this luncheon, honouring Anna McPhee.

I begin, as has become traditional in our country, with respect to the Indigenous people of this region and right across our vast continental land. It is especially appropriate that we do so at this occasion because of the injustices that were done and have been done and are being done to our Indigenous people.

We're getting better at acknowledging the Indigenous people. We are still not up to the New Zealand standard but we are more understanding of the great injustices that have been done and that we, the citizens of Australia, must work to correct.

I thank Aunty Georgina for her Welcome to Country. The position of the Indigenous people is very much in my mind as I give this oration today.

Also in my mind is the memory of Anna McPhee. I had the great pleasure of meeting Anna's mother and sisters and reflecting on her life. What a wonderful speech was given last year by Julia Gillard, in which she paid tribute to Anna McPhee.

She picked up on the fact that like Senator Dean Smith, Liberal, Western Australia, she, Julia, had a hidden love of Neil Diamond. And that she couldn't interest any members of the ALP in Neil Diamond's music.

But she came to the conclusion that the only way she would be able to get the Neil Diamond thing out of her would be if the Young Liberals would invite to one of their functions so she could really display her love of Neil.

So if there are any Young Liberals here today, that was a hint given last year. And a wonderful address on that occasion on mental health issues, beyondblue, and the fantastic work Julia Gillard has been doing in that particular area as Mr Kennett did before her assuming the office as patron.

I want to tell you three little stories. And they arise, in a sense, out of the fact that yesterday morning I returned to Australia from Budapest. I went to Budapest because of the fact that now most of my work in human rights is connected with international work. And most recently, I chaired the commission of enquiry of the Human Rights Council of the United Nations on the terrible situation of human rights in North Korea, which is unaddressed and has gone off the radar but must be restored to the radar, because, though terribly important, the issues of nuclear weapons are not the only issue which has to be repaired in North Korea.

But this was for a meeting of the International Bar Association – the biggest association of lawyers in the world – and its Human Rights Institute, of which I am currently senior co-chair. And that body was examining a number of issues of human rights which are relevant to us in Australia, and in fact, one of them relating to discrimination against women and the bullying of women and the sexual harassment of women in law firms, hit the headlines in Australia only a week ago.

And the object of the Human Rights Institute is to do largely what the DCA does in the Australian context. Not just to argue from point to principle, not just to talk in generalities, but to get the data, the actual data, that exists in the areas of bullying and sexual harassment. And it was on the basis of that data that I think it is fair to say, the conference in Budapest acknowledged that we in the legal profession have a real issue to address in dealing with discrimination against women and sexual harassment and disadvantage suffered by women.

But one of the other issues that was frankly made clear by being in that part of Eastern Europe was the change in the mood of the international community and in the levels of discrimination against minorities, arising by the shift in nationalism and populism in many countries. Even in the United States and in the United Kingdom. But particularly in countries of Eastern Europe.

And that discrimination, of course, brings back reminiscences of the still recent memories of the great injustices that were done to the minorities in Budapest.

In Australia, a real source of our discrimination was race. And we can't ignore or fail to recognise this, particularly when we acknowledge at the beginning of all public events now, the Indigenous people.

The British had a fairly strong principle, that if they took over a country, they would negotiate a treaty with the people of that country. But there was one exception which they allowed to that obligation, which arose when it was judged that the country was not occupied by a civilised people, but by nomads and uncivilised people.

In those circumstances, the law said, well, you can't formulate a treaty with such people, therefore you don't have to. And this was fought out, interestingly enough, in the courts in Australia, very early in the colonial life of our country.

And in the Supreme Court of NSW in the colony in the early 1800s a case came up where that theory was challenged in respect of the land rights of Indigenous people. But the court upheld the contention that there was no legal necessity to recognise the land of the Indigenous people. And so the Aboriginal people lost out.

The consequence of that, of course, was that settlers and convicts and their descendants could gradually seize, take and claim the land of this continental country, and the Indigenous people, who claimed links to that land going back millennia, were denied those links.

And the result of that was that the Indigenous people lost the economic wherewithal by which to defend their housing, their health, their education. And when we Australians of the modern age look at the Indigenous people, we have to understand that what has been done to them is a consequence of both a legal and factual mistake.

The factual mistake was the belief of the early colonial administrators that the Aboriginal people were purely nomadic and therefore not interested in land, they had no links to land. They didn't build towns, they didn't build institutions, they didn't have a written language and therefore they had no claim to land.

That was a factual mistake, as has been pointed out, in the 1960s and 70s by Professor Reynolds, because the Aboriginal people may not have had written language but they had song lines, particular links to their land. The land was at the core and centre of their civilisation.

And this was becoming more and more known in the 1970s, '80s, '90s, by lawyers. And a very fine lawyer from the city, Ron Castan, urged on by his wife, because they had gone to Papua New Guinea to claim Native Title in Papua New Guinea, his wife said, "Why don't we recognise it in Australia?"

And just as my partner Johan constantly asks me these common sense questions, Ron Castan started to think about it. He took the case of Mabo to the High Court of Australia.

The legal mistake was the mistake that by reason of this factual element we could legally ignore the rights of the Indigenous people. And that legal mistake was difficult for a court to fix up. It was difficult. At the time I was sitting as President of the Court of Appeal of NSW and I knew this case was coming to the High Court and it came up for decision early in 1992.

And when the decision came down by a majority of 6-1 judges upholding the rights to Indigenous people to land, I remember thinking at the time, "That's a big decision." And I asked myself if I would have made that decision. I hope I would.

Looking back it was a big decision because I could sit down at one of those tables with you now and write the reasons why the court should not – land law is very important to individuals, it affects the rights of other people, it's been land law since the 1850s, it's been upheld by the Privy Council, the earlier High Court – this would have lots of economic and social consequences. If you want to change it, you have to look to Parliament.

But Parliament had not done anything about it for 92 years of Federation. And before that, for 150 years of colonial state government in Australia. I want you to note it was not an elected parliament that fix this up, it was fixed up by the High Court of Australia.

By the court, without a Bill of Rights, but looking to the principles of the common law and saying if there is one principle that is laid down in international human rights law that is clear it is that you cannot discriminate against people in respect of their rights by reference to their race.

That is what Justice Brennan wrote in Mabo. He went outside the Australian legal system, he went to the international principles that had been used to attack White Australia and attack apartheid in South Africa and said, "You cannot do this on the basis of race," and appealed to a fundamental principle of a universal human rights alliance to countries in the world, upheld by the treaties of the United Nations.

That was a very important illustration to citizens of Australia, that our legal system had an inadequacy. We didn't have an external standard. We didn't have the great principle as part of our law that we could appeal to in order to take a step which fundamental justice and equality of all people within the country demanded.

And that was done by unelected judges in the High Court by using principles of the common law in that instance, but principles of the common law are not always available.

When I was in Budapest, I went, during a quiet time in the conference, to the great synagogue in Budapest. It's a huge building. In fact, I read there that is the second-largest synagogue in the world. I assume the largest is in Jerusalem or somewhere in Israel. But its enormous and it stands as a citadel and as a warning of the dreadful things that were done to the Jewish population of Hungary and other minorities, but overwhelmingly to the Jewish people.

Hundreds of thousands of them were gathered together, lined up, and march off to a railway station and put on a train and murdered, because of their race and religion. And that was done in my lifetime. That was done in living memory.

And in the synagogue they have a museum which tells the detail of that terrible time. And the detail shows that we've got to be very careful about minorities.

Democracies look after majorities. Democracies are good in looking after majorities. Essentially, that's why we in Australia never got a Bill of Rights – because when the constitutional conventions were being held in the 1890s, and the proposal for a Bill of Rights like the American Bill of Rights was put forward, they said, "Well, the Americans might need this but we don't, because we are British people and we are a fairly monochrome society. And if there are any problems, parliament will fix it up."

But there was a flaw in that thought and the flaw was it will fix it up if it affects the majority. It won't fix it up if it affects a minority and especially an unpopular minority. And I would add as a rider, or if it affects women and it is not accepted by the patriarchy that in colonial and postcolonial times was in charge of this country.

This was a reminder also of the fact that lying behind a lot of prejudice that exists in our world, is often a religious view. Now, I haven't turned my back on my religion. I wouldn't normally refer to it, but what I'm going to say now, I have to be frank and put it on the table.

I was raised as an Anglican. I went to the local Church of England church, I sang in the choir and I was a good little boy of the Anglican church. And I'm still quite happy being in the Anglican church because they have, after all, ordained women priests in some parts of Australia, and they have consecrated women bishops, and they are having a big dialogue about gays in the church, so a little bit of progress is being made.

But it isn't universal, and there are a lot of people in the church who don't agree with universalism in human rights. The problem, you see, with the Jewish people, was a little passage in the book of Matthew. Matthew's gospel. There is a passage in that book at the point where Pontius Pilate puts Jesus on trial and he says, "I can find no fault with this man at all," and he washes his hands.

Then he gives the Jewish people a choice – would you have me release to you Barabbas, who was a murderer? Or Jesus, with whom I can find no fault but claims to be the King of the Jews. And they called out – Barabbas.

He said I can't find any fault in him and then there is this passage, "Let his blood be on us and on our children."

And that little passage was the foundation in the Christian churches in Europe for a millennium and a half of hatred towards the Jewish people. And teaching that they were the Christ killers and praying every Sunday for the perfidy as Jews and their conversion to Christ.

So the dreadful sufferings of the Holocaust can indirectly and directly be traced back to this little passage of scripture. So, that teaches how, with religion, you have to be careful that you are not reading things too literally, because how can it possibly be that a mob in Jerusalem in a minor province of the mighty Roman Empire would have the authority or the audacity to claim that this will be something that will be on the blood of their children for ever?

Look it up tonight, I think it is chapter of 25 of Matthew and it is their clearly and that is the basis of anti-Semitism.

There is another little passage in Scripture that is the basis of hatred of LGBT people. This is a passage in the Lot story in Genesis and in Leviticus. About, if a man lies with a man as with a woman, then he is an abomination and surely he shall be put to death.

There is little about homosexuality in the New Testament. But there are passages which have been interpreted as Christ coming to fulfil the old prophets, and therefore the old sayings and rules of Christianity are part of it.

But the consequence have that has been the persecution of LGBT people around the world. Even today the High Court in Kenya rejected an argument put to them that the Constitution of Kenya with provisions protecting privacy and equality and dignity of the people overrode the old colonial British laws against gays.

So it was rejected. It might be accepted in Taiwan, India, but the judge has said, "This is not our culture," so they upheld the criminal laws against gays on 24 May 2019. It is still on, it is still happening.

Many people, after the marriage survey, thought, "Isn't that wonderful? Aren't we fantastic in Australia? Haven't we made a big difference and a change?" 38% only voted against marriage equality. Well, I didn't think that was all that good. 38%!

That means 4 in every 10 of my fellow citizens walking around the streets, who I look in the eye and I deal with on a basis of equality, don't think I and people like me should have civic equality in this country in 2018.

So, we are still victims, in a sense, of those little passages. The Anglican church, my church, gave $1 million in the last weeks of the marriage survey in order to support the vote 'no'. And when I went around Sydney – it may be different here in Melbourne where you are all a bit different – there were signs everywhere saying 'it is OK to vote no'.

Well, 38% voted no, and quite a lot of our leaders voted no. Or they voted to abstain. One very important leader didn't vote. And that is in 2018 in Canberra, Australia.

So, we have a long way to go. And do we have the instruments to change things? Do we have a bill of rights that we can appeal to? Do we have a constitutional bill? Do we have a statutory bill? I won't hold my breath waiting for a constitutional bill. But it doesn't seem all that unreasonable that we in Australia will join the other countries of our legal tradition that have not had a Bill of Rights before and have now adopted a Bill of Rights in statutory form. And with modified entitlements.

This was the proposal that Professor Frank Brennan put forward to the Rudd government, and it was parked, with the statement that we would return to that in our second term. Well, the second term didn't come as expected, and the Coalition didn't favour having a Bill of Rights.

We have to hope that somehow it can be explained that a Bill of Rights has three important values.

The first value is that it gives us something to teach kids at school about universal human rights. And the things we share together. Not just the citizens, the human beings, respecting one another.

The foundation of those principles is Eleanor Roosevelt's Universal Declaration of Human Rights. I was given it in 1949 by my teacher. And he said, "You have to look at this and learn it, because unless we can conform to these fundamental principles of human rights, we will go on killing each other." He fought in the war and knew what killing each other meant.

So, the first reason for having it is in order to educate citizens about their basic rights and duties. In Victoria, your Act is called the Charter of Rights and Obligations, because every right has an obligation. That approach has been adopted in the ACT, Victoria and, this year, earlier this year, in Queensland. So, these measures are coming.

And I think one of the most important reasons for them is that they provide a foundation for educating children. Professor Paula Gerber has done lots of research comparing schoolchildren in Massachusetts and schoolchildren in Victoria.

And as was said by Lisa in the introduction, the difference is stark. In Massachusetts, they know and can talk about these things. In Australia, so deep is the culture of television that when people are asked to admit something, they say, "I will take the fifth," which of course it doesn't apply to Australia – it's the Fifth Amendment to the American Constitution.

That is the first reason.

The second reason was taught to me by another woman lawyer – Gemma Varley QC. First parliamentary counsel. She was the chief drafter of the statute in Victoria. And she said, "The great advantage of the legislative model in Victoria is, you can save things going into the courts because we have to certify a bill as human rights observer and we have to give it a tick of being conformable, or identify provisions that don't conform to the universal principles. And therefore, most of the measures can be fixed up in Parliament."

There was one exception where it wasn't fixed up. And this was an exception during a Labor government for a frisking power. And the Legislative Council called attention to the fact that this was probably incompatible with universal human rights. And the Premier at the time said, "Well, we accept what you have said but we won't change it. And we take legal accountability and responsibility for it."

So that is a second reason. The reason why there are not so many cases is because you provide a mechanism for having the problems ironed out in the drafting stage. They have to sharpen their mind on the universal principles.

And the third reason is that it provides a hook on which to hang the arguments of inequality and injustice. In Australia, as I was going up, there was no hook on which to hang the injustice to gay people. There was nothing much that women could do except agitate in the political realm. And the gays couldn't agitate in the political realm because they had to keep their head down and keep on pretending.

I learned very early in my life that everybody knew there were gays out there and they didn't worry too much about that, so long as they all pretended to be straight. If you pretend to be straight, we will leave you alone. If you put your head above the parapet, we will slap you down, because we don't like to have to face the fact that you exist as someone who is a bit different.

And that is something which ultimately lots of Australian LGBT people began to challenge. And they put their head above the parapet. And with the support of their families, friends, straight allies and thoughtful people, we ultimately made some changes.

So, I am here today to tell you that the course of human rights is rocky. Over there in Hungary, they have a regime, the Orban regime, which replaced the Chief Justice, just removed her, from office. And removed other judges. And that was then challenged in the European Court of Human Rights, because they are answerable to that court.

In America, if President Trump does something which is considered unjust, there is provision for the appeal to the federal courts and ultimately the Supreme Court. But in Australia we have very few weapons if politicians in the majority don't feel it is a matter they are interested in or that there are no votes in it.

And this is why I believe that we in Australia have reached a time when we should consider adopting a federal Bill of Rights, a federal statute of rights, and we should do so quickly.

You might say, "Well, that isn't something that is likely to happen in the recent political events that have occurred." I am not quite so sure.

Basically, the idea of finding the fundamental principles that bind us together and that our rules for a fair society are principles that should be bipartisan and not consigned to one side of politics. And hopefully we can get concurrent on this.

A very good article in this morning's 'Sydney Morning Herald' on the issue of the appeal from the heart by the Aboriginal people of Australia. The Coalition have rejected that idea on the basis that it is equal to establishing a third house of Parliament. Which I don't think it is, and certainly it is not what the appeal from the heart says.

But what has been said, which I think is wise, a Liberal member of the House of Representatives, recently re-elected, he says we must have cooperation between both sides of politics because it would be shameful if we did not come together and solve the issue of what we're going to do about expressing the rights of the Aboriginal people. And I would add, and also the aged, also women, also refugees, also people of different races, also Islamic people, also religious freedoms, but not so the religious freedoms can wipe out other freedoms in this country.

So I am very proud I was asked to come here to honour Anna McPhee. She was a fine, feisty woman. The best Liberal never elected to parliament according to Barry O'Farrell. She was a wonderful person with a marvellous family who are here today to do her honour, as we all want to do.

We need fighters for diversity and equality and I feel the vibes in this room – you know High Court judges are good at telling vibes – the vibes in this room are strong for equality, justice and kindness to one another. Which is the essence of a fair society living under universal human rights.