

STANDING COMMITTEE FOR LONG TERM STRATEGIES

HOUSE OF REPRESENTATIVES

31 JULY 1990



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(Reference: Australia as an information society)

SYDNEY  
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CANBERRA

KIRBY, The Hon. Justice Michael Donald, 2C Dumaresq Road, Rose Bay, New South Wales, was called and examined.

CHAIRMAN - I am very pleased to introduce His Honour Mr Justice Michael Kirby, the President of the Court of Appeal of the Supreme Court of New South Wales. He has had very heavy involvement internationally in issues related to the information society, particularly the problems of information flow across national boundaries. He has been very heavily involved in international conferences on that subject. Bearing in mind that at this stage we have yet to determine the absolutely specific areas that we will deal with, and on which we will bring down specific reports, at this point it is a matter of getting a kind of a broad overview of it. We had the benefit earlier this afternoon of discussions with Don Lamberton, who was speaking as an economist. Your expertise is of a very complementary type to his, not only because of your involvement in the law but also your deep understanding of the changes in our kind of society. I invite you to address the Committee in general terms. You received a copy of the letter of 26 July, over Bernard Wright's signature, suggesting some specific questions that might be addressed. Then, I hope, you will be prepared to entertain questions from the Committee. I invite you to address us.

Justice Kirby - Let me start by congratulating the members of the Committee on their appointment to such an important role. It is often in the nature of our parliamentary process that we live from election to election, and that is a necessary element of a democracy. But it is important, it seems to me, to have a Committee which is going to be looking into the long term. It may not be celebrated in political terms, but if it plants ideas and seeds the relevancy of the parliamentary institution, there really can be few things so important for democracy. Therefore I believe that the Committee is a splendid step, and I am very pleased to be here to be of whatever assistance I can.

My involvement in the area of your concerns came about this way. I was appointed Chairman of the Law Reform Commission in

1975. It had only just been established. Immediately after the Labor Government lost office, Attorney-General Ellicott, as a first reference, gave the Commission a project on privacy protection. That had been promised during the election campaign by the coalition parties, and it put us into a search for the principles that should govern the information society in terms of the legal protections for one of the features of society that might be impaired or lost with the advance of information technology. For that purpose we assembled a team, as we do in the Law Reform Commission, of commissioners and consultants. We had public hearings and ultimately there was a report. The report produced a Bill. The Bill had attached to it certain principles, and those principles in due course were adopted by the Parliament in the Privacy Act. But they came about in an unusual way.

In 1978, when we were in the midst of the project, I was asked to go to the OECD in Paris. At the OECD I was asked to chair a committee of the OECD. That committee was examining transborder data flows and their relevance for the protection of privacy. The committee had on it some extremely interesting and distinguished lawyers. It epitomised, to some extent, the different cultural values in relation to privacy, but also the impact of technology - of informatics - upon different forms of society. After working for approximately two years, the committee produced guidelines on the protection of privacy in the context of transborder data flows. Those guidelines went to the Council of the OECD. The Council adopted them, with Australia supporting the adoption. There was a delay in the adoption by our Parliament, but ultimately they came forward as part of the package for the Australia Card proposal. It was proposed, as it were, that as the price of the Australia Card we would get a privacy package. You will all know that what happened to that was that it did not pass through the Parliament and, ultimately, the privacy legislation was proposed and enacted. It contains the essence of the principles which were adopted by the OECD Committee which I chaired.

The moral of that tale is that, in an age of information technology which is international and rapidly affecting our form of society, we need often to look at problems in an international way. We need to pool our knowledge and information to develop principles because of the very interactive nature of the technology. Unless we do so we will not grapple effectively with the problem because, as in the case of privacy, if you regulate in one jurisdiction the issue of privacy, the data may be kept somewhere else and be immediately retrievable from somewhere else. And so you may not effectively deal with the social issue that you are addressing.

For me it was a very interesting experience, as a person looking at a domestic aspect of informatics, to take part in an international committee of people from different legal systems all seeking to cope with the development of information technology as it affected this one little area. It alerted me to the fact that privacy protection was only one of the many implications for my own discipline, the law, of the new information technology. The other areas included the impact on contract law, because you can get instantaneous contracts, paperless contracts. The implications for crime are that you can have a criminal act partly performed in one jurisdiction having consequences in other jurisdictions. There is also the fact that the proof of information is in fleeting electronic form in a court of law and so on. All of these implications I reviewed in a paper for the OECD which has lately been republished in a series *Essays on Computer Law*.

They come to the ultimate point, which is the point with which I began this submission to the Committee. It is that the ultimate point which is posed by new information technology and, indeed, by the technology of biology, nuclear technology and the other technological advances which are such a phenomenon of our time, is the ability of the parliamentary institution really to cope with the complexity, the sensitivity, the technicality of issues of this kind.

That is why when I started this submission I said that there can be no issue that is more important for your service as members of the Parliament and for interpreting this project which is before you, than to relate it, it seems to me, to the efficacy of our democratic institutions to respond to issues which are at once complicated, technical and sensitive, and to some people boring and uninteresting. They are issues in which there may be few votes and yet, if we are really to adapt our democratic institutions to cope with the problems of this century and the next century, we must somehow fashion instruments which will make the parliamentary institution capable of coping.

So I come not as an economist. I do not even come, Mr Chairman, as President of the Court of Appeal. I am sure some of my colleagues would be - not surprised - but they would consider it inappropriate to participate in a matter that has only a tenuous relevance to the law. I come as a citizen and as a lawyer who has had a particular experience in the Law Reform Commission which has given me a particular perspective of my discipline and of the law-making process. I think there are few issues more important - I speak as a democrat - than making our parliamentary institutions work better. The alternative is to have more and more decisions made by technocrats, whether they are judges or administrators or people in the private offices of Ministers or even of Ministers themselves with the ear of somebody, and not in the parliamentary institution. So that is the focus of the very large reference which you have which interests me and on which I think as former Chairman of the Law Reform Commission and Chairman of the committee of the OECD I have some little contribution to make.

These matters are set out in greater detail in the essay which I will leave with the Committee and which may give you a perspective of the whole range of legal questions which are posed by information technology. They raised the question of: Can Parliament cope, and can we as members of an international community facing problems which have an international dimension, cope with them?

I was in Korea last week on a conference of the World Health Organisation on the issue of AIDS, the legal and ethical issues of AIDS, and that is another global question. Two weeks before I was in London at a conference in my capacity as a Commissioner of the International Commission of Jurists, relevant to the rights of peoples and in particular the peoples of Tibet and the implication of the tremendous changes that have been happening in eastern Europe and elsewhere in recent days. In a few weeks I go to Canada for a conference of the provincial judges to speak to them on the implications of information technology for my own profession, the judiciary. Later in the year I go to a conference in Hungary on the relevance of information technology for eastern Europe in the legal context.

I say this not to parade my series of conferences, but to illustrate the point that more and more problems we are facing today are technological, and more and more of them are international. It would be a great pity if in a time which is otherwise so propitious for democracy, we had the institutions of democracy but were content with a shell and with a shell which could not cope with the complexity and variety and difficulty and technicality of the problems which are now presented. So that, in a sense, is the reason that I am here.

I had a long list of questions which the Chairman had set for me like an examination paper! On many of them I have nothing really that is useful to say to you. They say of lawyers that the law sharpens the mind by narrowing its focus. It is a fact that I can contribute on those matters which are within my own discipline, but stray a centimetre into the economic realm or into other areas and I will be of no use at all to the Committee. But I did see that the opening page raised the question of the capacity of the modern Parliament to work effectively, and that is certainly a matter that concerns me, as is how we do it in a way that is responsive to an informed community. Stimulating an informed Parliament is, I think, a threshold question which is before your Committee. I can conceive of very few questions which are more important, in an age when so many other things are

propitious for democracy, than ensuring that Parliament can cope with issues of this kind of complexity.

CHAIRMAN - Thank you for the preliminary statement, that introductory statement. I wish to ask a preliminary question while other members are considering the areas that they want to probe. This partly follows on from something that Don Lamberton was saying earlier. We have all grown up with the concept of intellectual property being associated with patents and so on and the possession of a piece of paper seemed to give you a property right, but it may be that it is not the possession of a paper right, it is your capacity to get up and do something before somebody else that is going to be absolutely critical. My understanding is that in the United States, despite all the excitement that was generated by the Chakrabarti case as being the first case where a life form was actually patented, I think the biotechnological revolution has really not been accompanied by much activity in patenting. In other words, it is the technological capability of a company or a nation to be able to get in there first, irrespective of whether somebody else has done the fundamental work. Is that your understanding of the situation?

Justice Kirby - It is my understanding, but that is not a reason for failing to keep the law up to date lest we become, as has happened and as you yourself have illustrated in a number of cases, the nation where technological advances are made and the rewards then lost to other countries. You mention in some of your own speeches the airline black box as a classic illustration of how Australians develop things and then, either because we lose interest or have not got the interest to follow through or, in some cases, where the law cannot safeguard that interest and the time within which to secure the support of the technology, nothing much gets done. Therefore, from my perspective, I think it is important to develop institutions which can safeguard the inventions and discoveries that happen in this country. I am not sure that that is happening. I think it is important, especially because intellectual property law is a Federal responsibility,



that the Parliament should ensure that the law is in a situation that can safeguard effectively the technological developments that happen in this country.

CHAIRMAN - You mentioned earlier on that you saw as one of the threshold problems the capacity of a parliament to keep up with issues. I think all of us around the table will feel some concern that issues of increasing complexity appear to be arising at a time when the Parliament is sitting considerably less and therefore the idea of having wide-ranging debates as they have in the British House of Commons about issues of intellectual concern does not really arise. I ask you a very specific question: your role is not that of a parliamentarian but of a judge. What sorts of resources do you have to keep up with things and how do you keep abreast? How many people do you have to have working directly to you to provide you with the kind of information to feel that you keep up and to what extent are you able to rely on, say, the services of the Supreme Court library; to what extent do you have to rely on personal staff; to what extent are you able to get through the work yourself?

Justice Kirby - Like many of you, I work seven days a week and I work long hours. A lot of the burden is inescapably placed upon myself. In judicial work, for example, I cannot delegate the activity. It must be done and the decisions must, under our conventions, be made by me. In my establishment I have a staff of three: a secretary, an associate and a tipstaff. Many, indeed, most judges have a tipstaff who is a retired naval gentleman and is in the nature of a butler. I engage two young law graduates, one male and one female. They are chosen every year and they work for me for a year. They work proofing my speeches and judgments, making suggestions and comments on them; getting material from the library of the Supreme Court which is excellent; looking for material from other libraries and sometimes the Parliamentary Library which is always very helpful; but effectively my resource is very small and even as small as it is, it is larger than some members of parliament throughout the country have. But that, I think, simply casts an obligation on a

civilised and educated person to cope with the rush of data which is constantly coming on all our desks. The easy thing is to simply discard it but we have to find ways of getting into our minds the signal that there is something that is relevant on a particular issue. If I can say so, members of parliament have to broaden their focus because their concerns are not simply the area of the law but they have to be concerned with a whole range of issues that are of interest and concern to their constituents and to the nation.

My establishment is small but I think that just imposes on all of us the obligation, in a country of relatively small resources, to try harder. When I was in Korea I saw how remarkable is the economic development of that society. It is a place without the natural beauty, at least in Seoul, that we have in Australia; it is a place shattered by the Korean War and yet rebuilding one of the most dynamic economies in the world and knocking on the doors of the OECD to get in. It is a society of many autocratic features that we do not have. It is a society with features which, perhaps, we would not be prepared to accept as the price of economic advancement. The economic goals of the nation are very important, but keeping the right sort of society and fashioning a tolerant, diverse, liberal democracy for the twenty-first century is, in my opinion, more important than developing an economy which is going to give a higher GDP than anyone else in the region.

Mr BEVIS - How does a legal framework that is characterised by national and regional boundaries regulate or deal with an information society which by its very nature ignores lines drawn on a map?

Justice Kirby - The first question is to consider whether there are matters that are appropriate for Federal regulation and it would seem to me, though a State officer, that there are many matters in the field of informatics that are only appropriate to Federal regulation, because not only are they national but they are international in character. I do not think Federal Parliament can, in the future, blame the Constitution because the

High Court of Australia has now made it plain that there are heads of power which were formerly not thought to provide a basis for Federal regulation which exist and may be used. Therefore, in terms of Federal regulation, we are now facing a situation where Parliament makes virtually a positive decision whether or not to use the external affairs power, whether or not to use the power in relation to corporations.

Look at the telecommunications power: 'postal, telegraphic, telephonic and other like services'. Now what does that mean? What do the words 'and other like services' mean? If we look at the genus, what is the genus of telegraphic and telephonic services? It is the sending of information through distance. Therefore, it would seem to me that, whether under the external affairs powers in relation to informatics that is coming into the country from overseas or leaving it or whether under the corporations power - because most information is dealt with by corporations - or whether under the largely unexplored telecommunications power, Federal Parliament has virtually plenary power to deal with the issues of information technology. Therefore, to the extent that it does not legislate, it cannot really complain about a lack of power. It cannot blame the Constitution. It is a bit like industrial relations. There was a time when we were inclined to blame our ramshackle system of industrial relations on the Constitution, but that will just not wash in constitutional terms any more because decisions at the High Court of Australia have made it plain that if you want to exercise it, Federal Parliament has the power.

Mr BEVIS - Could I just follow that up: Do you have any comments in an international sense about how as an international community we might set about regulating or dealing with the information society?

Justice Kirby - First of all we have to make some threshold decisions as to the extent to which regulation is necessary and beneficial, because we live in a time, or through a time, when there are many matters which may be best left simply to the marketplace. I think that is a feature not only of Parliament

and of governments, but also of the courts. We, in a sense, a few years later, reflect the ethos of the economics of the time. It is simply the availability of photocopy machines which changes society; and it is the availability of fax machines which has, in such a short time, changed society. I am old enough to remember when, in a legal office, we had a battery of young secretaries who sat there typing out a copy of a report. I think of the inefficiencies of that time and of how we have speeded up the whole process of the law, and that has come about without regulations. It is simply a phenomenon of the technology. So the first question is: To what extent do we need to, or should we, regulate? I certainly would not favour licensing of photocopy machines or fax machines. To some extent the technology is a liberator and it is a purveyor of information which is, I think, one of the features that has led to the revolutions that are occurring in Eastern Europe.

In that information can spread so quickly nowadays and so easily, to that extent the technology has been a liberator. Therefore, I think you have to ask first: What do we need to regulate? What is better regulated and simply left to the explosion of the technology? Nevertheless there will be some values that we will want to preserve. Privacy is an example. Computer crime is another matter that will have to be dealt with. Dealing with conflicts of laws problems: Whose law applies to a message which is commenced in jurisdiction A, switched in jurisdictions B and C and ends up doing some antisocial act in D, E and F? The answer is that you have to take it in stages. However, that there is power in our Federal Parliament to deal with most of the legal issues concerning information technology is, I think, beyond doubt.

Mr NEHL - Could I move on to another area. So far most of the people we have seen and most of the information we have had has been related specifically to technology and what use may be made of it and so on. Having the benefit of having you with us, I think it might be appropriate to talk with you about the media, for instance. An important part of the information for the people that I represent is the local radio station and the local

television station. They do not have faxes in their homes as yet, and they do not have the rest of it. For the ordinary Australian citizen, information comes in that fairly limited fashion where you have had the exercise of hopefully benevolent censorship in terms of the limitation of time for news bulletins and radio broadcasts, and in terms of space for newspapers. I see a situation where you have people who are choosing not to be informed.

Let me enlarge on that very slightly. At a very local level, in Coffs Harbour you have Radio 2CS, which is an excellent commercial radio station. I think it has as its slogan, 'Less talk, more music'. Apart from CHY youth radio, the alternative to that is the ABC, which has a great deal of talk. I think it is fair to say that a great many people choose quite deliberately not to listen to the ABC because it is loaded with information, and choose to listen to 2CS.

Equally with newspapers: if you look at the population anywhere in Australia, and compare it with the sales of the *Sydney Morning Herald* or the *Age* or the *Australian*, you will see that the sales are fairly limited. So I already have two things that I am asking you to comment on. One is: Where do you stand in terms of media as information for the bulk of the people at this stage, and perceivably into the future as well? The second is: Do you have any thoughts or any comments about the decision of people to reject information?

Justice Kirby - The point you raise is a matter that I have often thought about myself: What right do we have to force a knowing information society on people who would rather listen to pop music? One of the questions we have to ask ourselves is: to what extent are decisions made by the consumer, or made for them by the relatively small number of owners and controllers of the media outlets of the country? I understand that some of the surveys - such as the McNair surveys which are taken of people watching programs and rely on people who will fill out program books - do not necessarily accurately reflect the number of people who are ABC listeners. Often they are people who are at

work or away or get home late or listen to the radio late at night and so on. They may watch television at different times. So a preliminary issue is: To what extent are we getting accurate information on the level of interest in our community in the ABC and SBS? I might say that I think that SBS is far and away the best provider of international information and international news that we have in the Sydney area.

Mr NEHL - I wish we could get it.

Justice Kirby - I wish you could get it, too. If I can respectfully say so, it was one of Malcolm Fraser's great gifts to Australia. I am not sure it worked out in quite the way that was expected as a contribution to multicultural Australia, but I think it has a marvellous news service. Perhaps significantly, it is the only one of the television stations of Sydney that is not before the Court of Appeal today in relation to the contempt of court which we are dealing with in respect of the broadcast of television programs showing an accused person walking around a field identifying a pickaxe with which he was said to have committed three murders. In a sense, that in itself is a reflection of the television phenomenon of news partly as entertainment.

Mr NEHL - It raises a totally different question, too.

Justice Kirby - I cannot discuss it, because it is a matter before the Court, but it is not without significance that on this very day of your meeting I am sitting in a court room looking at principles articulated in the 1930s by Sir Frederick Jordan, and trying to apply that which was developed for the print media - and photographs of accused persons in the print media - for the wholly different world of the television medium - the medium of instantaneous international information coming into the living rooms of the homes of the people. I do not think we do, as a society, have a right to force people or dragoon them into receiving information that we think is good for them. That rather smacks of Bulgaria under the ancient regime than Australia in 1990.

What we have to do, it seems to me, is to ensure equal opportunity in education, so that citizens do not suffer serious disadvantages in understanding the information age in which they live simply because they grow up in Emu Plains, Sydney and not in Bellevue Hill, or in Coffs Harbour and not in Vaucluse. I think we have to try, so far as we can, to give an equal opportunity at the start for young Australians to understand the age they live in. The key to their age is technology and understanding its implications for them, their careers, their happiness and their country's future. There will be many people who, notwithstanding that opportunity, will prefer to listen to pop music or to lie on a beach. Who is to say that they are not making a correct decision? We in this room are all people who have devoted our lives, in various ways, to hard work, but there are a lot of people who are out there having a lot of fun. It is a fundamental philosophical question. Is it better to be Socrates dissatisfied, or a pig satisfied? That question was asked in my first lesson in university by Professor John Anderson. At the time, at the age of 19, I thought it a foolish question: that of course it was better to be Socrates dissatisfied. But as I grow older I begin to think there may be something in the porcine view of life! So my answer is we must provide the opportunity and we must, at least in the national broadcaster, provide opportunities for that group of people who will have a disproportional influence on decisions which shape the economy, the politics and the community we live in. But we have also got to recognise that not everybody will be interested. There will be a lot of people who will want just entertainment. As free citizens that is their right, but we should make sure that those decisions are not being imported from overseas or forced on people by those who have the power. I refer to the outlets of media power - which, as I see today, is a very great power indeed. It is a very great power to shape opinion and do so for good, and sometimes in unjust ways - unjust to politicians, unjust to ordinary citizens.

Mr BRADFORD - I must observe, Your Honour, that the responsibility to bring home the bacon, does tend to impact on one's decision in respect of the position one takes in that other matter. The whole area of privacy is very important, and it seems to me that in terms of information there is a conflict. I think there is some legislation floating around that questions the right, for instance, of credit bureaus to disseminate information which, for business people who tap into it, is very important information in terms of the sorts of decisions they make. Could you comment on that area?

Justice Kirby - Throughout our lives judges and politicians share the element of law making. That is the business we are in. We, judges, are mainly law-interpreting, but we also have a law-making function under the rules of the common law. We are in the business of evaluating and then resolving the conflicts of values in society. Today I am sitting there in a court room seeking to resolve the clash between the right to information and the right to a fair trial. That conflict has to be resolved by legal principles that determine where one draws the line, where the media can go in portraying events before a trial and where they must stop in the name of fair trial. Similarly, in the area of privacy, of course there is a clash between the right to information and the need for us sometimes to say that that information may be very interesting and sometimes valuable, but in the name of a higher value, such as the integrity of the individual, we say, 'You cannot have access to it or, if you can, the subject also can have access to it so that he or she can correct what is in the information'. Increasingly, decisions are made not on the basis of face-to-face encounters like this, but by somebody tapping up your profile and making a decision upon you on the basis of data which may be out of date, inaccurate, gossip, or the subject of quite false, malicious, wrong, or simply inoffensively foolish statements. The core of the idea of the OECD committee, which I chaired, was that in the age of informatics, people should normally have a right to know, normally, with some exceptions, the data projection, their data halo as it was said. The law began by protecting the body of the



individual, that is in the most primitive society. Then geographically it spread to protecting their home and then a larger environment. And now the idea is to protect their information zone.

Now Federal Parliament has enacted one important piece of legislation which I have mentioned, the Privacy Act. But it relates only to the Federal agencies; it only applies to Federal authorities. It does not go further in the use of federal power. There is, as I understand it, a proposal from Mr O'Connor - who I think ought to be seen by the Committee - which is under consideration. He is the Federal Privacy Commissioner and a member of the Human Rights and Equal Opportunity Commission. I think Senator Bolkus introduced this proposal during the last Parliament. It is for the purpose of giving rights of access to people to have knowledge of their computer credit information system. The Privacy Act is quite a large piece of the mosaic, and then there is this little piece which will spread into the private sector. But the fundamental principle is as true of information in the hands of the private sector as it is in the hands of the public sector. That is that normally, with exceptions that are laid down by law, people should know how their information profile is projecting them, because decisions are going to be made on that basis. And the question is, how in a cost effective way and a non-inhibitory way and with attention to the competing values, we provide by law for just that?

In the OECD Committee the Americans were very strong for the free flow of information. The French, who had gone in living memory through the misuse of plain old manila folders with the data profiles of the Second World War, were much more alert to the dangers that can arise from misuse of information. One of the most vivid occasions that I remember illustrating this point was at a French conference on informatics which was called by President Giscard D'Estang. In the middle of a statement by the French Minister, a person leapt to his feet in the middle of the conference hall and he said, holding up a little piece of cardboard, 'Do you know why, during the Second World War, 90 per cent of the Jews of the Netherlands perished and why only 10 per

cent of the Jews of France perished? I will tell you. The answer is that, with their typical efficiency, the Netherlands produced an identity pass which could not be forged. It had a stamp and seal of the Netherlands with a metal strip before this became common and it could not be copied, whereas we in France had a funny old cardboard thing with a photograph and a stamp and that could be forged. Sometimes efficiency is not the only value in society; sometimes there are higher values'.

I think that was one of the issues in the Australia Card debate which I do not want to go over but it was one of the reasons why, for my own part, I was concerned about the notion of a national identifier. It had some advantages of efficiency, but efficiency is not everything; there are other competing values. Federalism is in many ways an inefficient system. And yet, for the twenty-first century where there are so many pressures going to occur for centralisation, a little bit of planned inefficiency may not be a bad thing for freedom. I think that illustrates the fact that there are lots of things going for information and the technology will take us hurtling there anyway. But the role of Parliament as it seems to me is going to be to identify particular values which are, as it were, fundamental to our form of society and to provide effective protections so that we do not lose those fundamental values in the enormous force that the technology will bring, most of it for good.

Dr CATLEY - I read through your biographical details, Your Honour, and I see that you are well connected with a number of economies, and I see that you are on *Tide 2000*, a group of international informatics experts. I wonder if I could tap that part of your background and put these problems to you. As far as information in concerned, two of the problems that the Parliament and the Government is grappling with is first of all to plug our business community into the international economy such that they are able to recognise market niches and economic opportunities as quickly as they arise in order to take advantage of them. I should think we would all readily agree that the Japanese have been very, very good at doing this over the last 40 years and the

Koreans and the Taiwanese have picked up on it, and other countries to our near north. It is one of the very important things that we need to tap into ourselves. I wondered if you had any advice about how we might progress along that track, since we are about to encounter grave difficulties in doing it in the telecommunications industry, I fear.

The second thing is that what strikes me about these other very successful economies to our near north, with which you have obviously had something to do, is that the elites have been able to persuade the general culture that there is a life and death struggle in the international economy going on and you have to actually relate what you do as individuals and as a society to the progress of your national entity within that environment; and you have to tap into all the information available to you. As a culture, you need to go further than the beach culture to which you earlier referred. There was a time, maybe for three generations, when the ordinary people of this society could make that choice and it had very little effect on the way in which they progressed, since we had 2 per cent of the labour force producing very efficiently sufficient exports to subsidise a beach culture of that kind. Most of the politicians in the Federal Parliament I think agree that that time has come to an end and we need to try to get across to the people of Australia the urgency of the problem that they have to confront. So the second part of the question is: Do you have any ideas about how the competitive nature of the international marketplace could better be conveyed than with the kind of information services we have at present?

Justice Kirby - The first point to be made is that we have to work with the human materials and the cultural ethos that we have and we must recognise that they are inimical to the sorts of developments that we see to our north and which I think are going to be very hard to transfer to this society. When I was in Korea I was rather surprised at the autocratic nature of their society, its disciplined nature. The individual is not as important as, traditionally, the individual has been in our society and not as

important as I believe the individual should be. I do not think we can simply pick up the cultural norms of a society in which everyday people go to do the work exercises together, to sing the work song, and are subject to autocratic disciplines that we would not tolerate. We would simply find that, even if it were desirable, a difficult thing to sell to Australians. But I come back to what I said earlier: we have to start, as far as we can, with giving people educational opportunities. If I can say so, I think one of the achievements of the present Government has been that we have begun, I think, at last, to turn around the educational retention. As you know, our figures were for a long time one of the most disgraceful features of the educational statistics from the OECD. We were always down there with Greece and Turkey. I think that at 17 years and one day, in Japan, 94 per cent of the population is in education. In the United States, 84 per cent; and Canada roughly the same. In Australia we, until quite recently, were 39 per cent. I think we are now up to about 44 or 45 or 46 per cent. So we have begun to turn that round. The beginning of the economic staging post is obviously to develop an informed, educated, ambitious work force. We do not do that if we turn them out at 15 or 16 into the workplace. So that is why I think Mr Dawkins's efforts in that regard are part of the key to changing the informed, educated, economic base of our society. I just caution against the hope that we will become another Japan or Korea.

In Japan they are very ethnically uniform and indeed they are even more than we once were, I think, a rather xenophobic society. Koreans who have been there for two generations cannot get Japanese citizenship. They took only a handful of Vietnamese refugees, though Vietnam is just down the road. They took nothing like the percentage we took. We took the highest proportion, and we continue to do so, of Vietnamese refugees of any society in the world. Korea pays a price for its autocracy. We see it on the television - the huge demonstrations of people. It may be that they will go the way of Bulgaria and Romania.

There may just be a point at which people will not accept it, even though their cultural norms are so much more sympathetic to discipline.

I did an economics degree a long time ago, but I am not an economist. We live in the age of economists. The dismal science has had the ultimate triumph, but it seems to me that the step that we can positively take is as an educated community, with opportunities in education and information through the media. That is a long haul, but I believe we have started that and I think the Government is on the right track in that respect.

Dr CATLEY - Is the business community?

Justice Kirby - I do not really know enough about that to give a useful answer. I think the Chairman's various speeches about the opportunities lost are sources of despair. What can we do? I just do not really have the expertise to offer anything that is useful for priming the pump for grabbing opportunities which are there. I read recently that it is the competition between Telecom, Aussat and the OTC that leads to confusion overseas. They say, 'Who is the Australian telecommunications authority?'

This is all set out in a book which Don Lamberton's organisation, CIRCIT, is about to produce. It is edited by Professor Mark Armstrong, and I wrote a foreword for it. For that purpose I had to read the book. It is a sad tale of a technologically advanced industry which has not seized all the opportunities that could have been taken in our near north. How we get Australians in this languid society - where many of them are happy on the beach - to look forward to their economic future, is a very difficult cultural challenge. It has not been our national ethos, but education is the starting point.

I think we have made very important strides in recent years. I regard them as some of the most important achievements of the present government. I say that as a university chancellor, because I see the end of the line. I always tell the graduates that for every one who has made it there, there are people of just as much talent who did not make it because their parents

were not interested or did not give them much stimulus, or because they went to poor, downtrodden public schools and really never made it through the system. I tell them that it is their duty, as educated people, to reflect upon those people and to be sensitive to their situation in society.

CHAIRMAN - If I can just make one comment, you overstated one point and understated another. The actual proportion of people of the age cohort, going through year 12 is actually now in excess of 50 per cent. It is a dramatic increase, but----

Mr BEVIS - It is 60 per cent.

CHAIRMAN - I know it is a very dramatic increase.

Justice Kirby - I knew I did not have the exact figure, but I knew it was a very great turnabout.

CHAIRMAN - It is a very dramatic increase, but it also has to be said that I find, to my horror, that we have not improved much in the pecking order in OECD because this phenomenon has happened in virtually every other OECD country. They also are dragging in far more people than we are; so that is good news, but in a sense it is not quite good enough.

Mr SNOW - Some of my experiences as a Federal member now indicate to me some long term problems, and a lot of people come to me who are really not satisfied with the legal advice they are getting. Generally they are poor people, people who speak very poor English. Sometimes they are people who may be schizophrenic or who may have that sort of problem, but they are quite dissatisfied. I find it very hard to just work out how I can help them. I say to them that I am not a lawyer and that they may need to see a lawyer. There are various reasons why they cannot get one, or they cannot get satisfaction, or legal aid is difficult in a country town, it has got to be approved in Sydney and they might have to travel to Sydney. I am having a lot of trouble in that regard, and it seems to me that the problem will grow bigger if we are not careful.

Justice Kirby - There is, of course, a Senate Committee inquiry into the costs of legal services, under Senator Schacht, I think. Interestingly, today I finished an essay for the Australian Council of Churches on a book dealing with justice in the twenty-first century. I was asked to do a chapter on justice and I balanced the good news with the bad news. The good news is

that we have a parliamentary institution. We have a responsive and sensitive people who are concerned about improving the system. We have a stable constitution. We have many fine qualities and an independent, honest and non-corrupted judiciary. But there is a downside too, which, as you point out, involves the problem of actually getting people with serious problems to justice before courts, before independent bodies and getting decisions by neutral tribunals; and the problem of getting people with poor linguistic qualities, abilities, access to legal advice. I will send you a copy of my contribution and thoughts on this. There is no doubt that this is a very big issue. I think the Senate inquiry is very timely. There is a tendency in any vocation - and perhaps not least mine, which after all has a tradition of 700 years behind it - to self-satisfaction. We who sit at the top of the pile and see the big cases and see them efficiently and expertly presented tend to think, 'Does not the system work well? Is it not well-oiled? We are doing our best, we work hard and we give justice'. But there are a lot of people, ordinary citizens, who find it very hard to work the system of justice, and we cannot be satisfied with the appearance of a system which is really only available to the very poor or to the very rich. That effectively is our system at the moment. As I believe Senator Schacht said, one of the problems is the adversary system. That is utterly fundamental, but the head of the German constitutional court astonished an Australian legal convention in my presence once by saying, 'Well you in Australia, you have the Rolls Royce system of justice. You have a wonderful system of justice. We in Germany just got a little Volkswagen system of justice'. But then he said, 'How many people can afford the Rolls Royce and how many can afford the Volkswagen?'. It may be that out of the Senate inquiry there may be some fundamental rethinking. That is the sort of fundamental rethinking that I think will be the role of this Committee. If we just accept things, then nothing fundamental will happen and we will just go on drifting in the South Seas. We will be a sort

of geographical and historical relic of the British Empire, out of place in our environment - European people who to a large extent are down here as a relic of history, a sort of anachronism in a huge continent. We have got to make ourselves worthy of the great land we have, and the responsibility for leaderships in that regard falls largely on the shoulders of the members of our Federal Parliament.

Mr ATKINSON - It seems to me that we have a little bit of a dilemma at the moment. The comment was made a few minutes ago about the number of years that people are spending studying. I wonder at times if that is relevant, when I see people who have come out of the education system with qualifications in particular areas who have a lot of difficulty in getting their spelling right. I wonder also, when we start to look at technology, whether we are not going through an empire building exercise as we see the areas of manual work fall away. In relation to that, I wonder whether the oncosts of that area that we are looking at are not creating problems for us. Look at the technology that we have that has been imported into the country, and the way that we are using it. It seems to me that at the moment we are really not keeping pace with a lot of our competitors, even though we have a lot of this technological equipment in the country. Is it maybe an empire building exercise we are going into? If that is the case, do you see any lever that the governments of countries can place on that to ensure that we keep that equilibrium?

Justice Kirby - As you may have seen in my biodata, I was for a short time a member of the executive of the CSIRO. That was a very interesting experience for me, most especially because I found out how polite scientists are to each other; whereas, of course, lawyers are very direct and sometimes very impolite. They challenge and put things to each other in the knowledge that no personal malice is meant but simply to stimulate the direct answer. The other thing I learned was that in Australia we have to make some quite fundamental decisions relating to our economy and our research. It may be that, boringly enough, the things



that we do best in Australia are in the primary industry area. It may be that concentration on research in that area is the most efficient way we can have marginal advantage over other countries in the region. Maybe we can produce wool and wheat in a more efficient and effective way. But it seems unlikely to me that that is going to be so for long, if it is still true, because such has been the shift in the proportion of the economy that is now regarded as being in the information sector, and such is the change in terms of trade, that it is unlikely that we are going to be able to opt out of the changes that are happening elsewhere in the region. It is possibly undesirable that as a nation we say, 'Well, the Koreans can produce fax machines much more efficiently than we, and the Japanese can produce computer software much more efficiently than we, and therefore we will not bother about them at all'. I think we have to get in on the changes that are happening, and I do not think that is empire building. I think that is making our society and its economy relevant to the sort of community that is going to exist in the twenty-first century.

In universities, I do see a lot of people coming forward with high qualifications. A lot of the very best of talent go, for example, into the legal profession. Like President Carter, I am inclined to think it would be a whole lot better if they went into engineering or into other vocations, and perhaps it is a commentary on our society that lawyers get paid so much more for a service job than the more creative activities of engineering or computer science and so on. I think your Committee should try to get the information on the average salaries of the different vocations. Perhaps you would not be surprised to find that they do not necessarily reflect what we might think is the best social reward, but they are what the market is paying. The market pays enormous amounts to some members of the legal profession, simply because they are few, they are known, they are highly talented and highly skilled, and they can command a very high market price. What we have got to somehow do is to make sure excellence in science and technology is rewarded by the market in a way that

induces young people to go there. Otherwise there is empire building for lawyers and not enough empire building for computer experts. A few more computer empires is what I think we should be trying to encourage.

Mr BRADFORD - I know a lawyer who decided to become a plumber when he found that it cost him \$50 for a plumber, for two minutes, to change a tap washer. He thought he was overpaid. I agree with Rod up to a point. I guess we have got a few teachers here who could probably help us ultimately but one in four children now go to private schools and of course half of private school graduates go onto university. I think 50 per cent is probably much higher than it is out of the State system - I am not sure what that says. I think equality of access is important. But I thought this whole thing about retention was to stop kids leaving school early because they could not get jobs. That was the whole push, to keep them in school for a bit longer so they do not come into the work force, but I am not sure whether that was right.

CHAIRMAN - I do not think it was. It was seen as a subsidiary element. I think the emphasis was on education for its own sake but there was no other way forward, that we could not rely on a mediocrity led recovery.

Mr BRADFORD - No.

Mr NEHL - But surely the emphasis has to be on the number of graduates, not the number of kids being baby-sat in secondary school which is the point you are making which is a political point and I apologise for it.

Mr BRADFORD - I was just trying to clarify my thinking aloud on that. The Prime Minister has said, I think very sensibly, that he is going to address this issue of duplication. We have an enormous amount of waste and none of us would disagree with that but I would have thought the law would have been top of the list in terms of trying to iron out differences there. Can you comment on that?

Justice Kirby - Federalism is legalism as you understand. That was said by Sir Owen Dixon and it is as true today as when

he said it. If you have a Federal constitution and you have a clash between claims on power, you have to have an arbiter. The arbiter is the courts and the courts decide these issues all the time. But that debate has to a very large extent begun to recede because of the interpretations by the High Court of Australia of the heads of power of the Commonwealth Parliament. Those interpretations have been overwhelmingly and for most of federation after 1920, favourable to the Federal Parliament and Federal power. I think there are fewer clashes than might seem in terms of the division of powers.

Mr BRADFORD - But I was getting more down to the basics of uniform company legislation. In my former job I came in contact with the law of defamation because I was in a fairly prominent position and I suddenly found that in every State there were different laws of defamation, for instance.

Justice Kirby - I was Chairman of the Law Reform Commission when we produced a report which proposed a uniform national law. We proposed it be enacted in the Australian Capital Territory as a model throughout the country. The result was that the then Attorney-General, Senator Durack, called the Attorneys-General of the States and Territories together in the Standing Committee of Attorneys-General. Forgive me for saying so, but I always thought that over the entrance door to the meetings of that committee should be the emblazoned inscription, 'Abandon hope all ye who enter here'. The proposal was debated for many years under Senator Durack and later under Mr Bowen and the result was that nothing got done. I have seen in the paper recently that there are efforts to resurrect it. But you are quite right and I think your point about corporate law is a very good point. However, as you know, the High Court of Australia held that an Act enacted by the Parliament was unconstitutional to the extent that it purported to deal with the establishment of corporations. The Constitution, so it was held, assumes that the corporation is established. But I understand that new legislation is going to be presented, if it has not already been presented, which, as it were, leaves the establishment of the corporation to the States

but then says that, after you have established them, it is a matter for Federal regulation. That there is a need for a national law on corporations, I would have thought that we all now believe in this country. I speak as a citizen, of course, not as a State officer. But, as a judge, whenever we have a problem on the meaning of the Company Code of this State, I always insist that notice be given to the National Companies and Securities Commission, so that, if they want to, they can exercise a power to intervene and to put submissions on the national implications. But that is an exception that I insist on because I was once a Commonwealth officer. Most judges would just sail ahead and deal with the matter in terms of their own concept of what the law should be and not see it as part of the national regulation, vital to our economy.

Mr NEHL - I am still running away from technology down to that lowest common denominator. The impact of information or lack of it on the ordinary citizen, I think, is vital. I am really taking up what Jim Snow said earlier. Just as another example. There is a migrant consultant in Sydney who took \$3,000 from a Chinese constituent for filling in a form and submitting it to the Immigration Department. That is a service that Jim or I or anybody else here would provide absolutely free of charge, except for the small fee that goes to the Immigration Department. This lack of information, as I say, is the lowest common denominator. It worries the hell out of me, because there are so many people in this situation who do not have the information; and it is so basic and so important.

CHAIRMAN - Let me just interpolate for a minute. There was a brief, unhappy period when I was a member of the State Parliament, but I was also a member of a firm of solicitors. I had to work out till the end of the year. People would come in and they would say, 'Look, I want some help with something or other'. They would talk about a government department, or they might talk about some area that was not just a government department. I would say, 'I have to get this clear: Are you speaking to me as a lawyer, or are you speaking to me as a member

of parliament?'. They would say, 'What is the difference?'. I would say, 'If you are speaking to me as a lawyer, then I will write a few letters and we might take out a summons or something of the sort. It will take three or four months and it will cost you a couple of hundred dollars up front and with very doubtful result'. They said, 'What if you do it as a member of parliament?'. I said, 'I will pick up the phone and tear strips off somebody at the other end, and the probability is that you will get a result and it will not cost you anything'. They would say, 'Well, I think we will go for the second option rather than the first', I thought that was understandable, but my partners did not see it that way.

Mr NEHL - What I am getting at is that we have been talking so much - not so much with you, but with everyone else - about the technology. We very glibly use the phrases 'information rich' and 'information poor', but the information poor are among us and will be for ever. This is one of the major concerns that we should be having, quite apart from the technology and all the rest of that.

Justice Kirby - As you point out, in a multicultural, multilingual society such as ours has rapidly become, it is of added significance that many people with a different cultural background just do not conceive of a society in which somebody in an important position, like a member of Federal Parliament, would do something for them for nothing. Yet that is our tradition, and it is a fine tradition which we must somehow get through to them as we do to ordinary people. It was an interesting thing in the case today that the father of the accused person went on ABC television only and said, whilst his son was being hunted, 'My son is being hunted. I do not believe he has done this thing. He is being branded as a murderer. I thought under our system of law a person was presumed innocent until he was dealt with in a court of law.' I said to counsel for one of the television stations that a judge could not have expressed his basic rights more clearly. So some of our citizens understand the fundamental nature of our society and its law. They get it at school and

Kirby - I do not know that I would have got very high examination!

- Before we do close you might like to offer a comment to the questions that you did not answer to this point, we have talked in a sense about the future where we are going, and I said earlier on when I spoke to Don Lamberton that what we need to do is focus on between three and six issues which do not need to be dealt with very exhaustively but simply to say these are very important issues which need some sort of resolution. I will not go into it as I said earlier on but one of the things is that the country has been in a state of stagnation - not really stagnation - since that time and has raised all sorts of fundamental issues about access to information that is not delivered on line, you know, to the book and so on. In a sense, since then it is a Cinderella area, and that one of the areas that we might be interested in would be to say to what extent is the Commonwealth responsibilities relative to the States in dealing with access to non-book material with all the implications of that flow in that area. Now that is an example, but it is useful I think if you could suggest a couple of areas related to the areas of your expertise that you would like to be an appropriate term of reference for us to look into a report and one which we do not purport to come up with a final answer, but simply to refer it somewhere in the report, 'These seem to us to be very critical questions, what are we doing about it, and what should be done?'

Kirby - Can I make three observations. First, my experience in the Law Reform Commission, which was, after all, was as a participant, though at a distance, in the process. It taught me many things but amongst them that the Federal system is very difficult to move. There are many suggestions on so many issues which are vote-winning and so on, but getting legislators to concentrate on some of the hard questions is institutionally quite difficult.

The enemy of action is a blank page and another enemy of action is unmanageable bites: taking on too much. Therefore, I think your instincts to identify a small number of issues at first, a program, are very good. That is, after all, the way the Law Reform Commission operates. I think it has been reasonably successful in that regard.

Secondly, if you look at yourselves, you are first and foremost parliamentarians of the Federal Parliament of Australia. Therefore I come back to what I began with: there can be nothing more important than your looking at yourselves and at your institution. That institution is the fulcrum of our system of government and therefore, because our Constitution is apparently impervious to change, it is probably going to outlast all of us and it is going to be the very centre point of our democracy. Getting its institutional arrangements in a good working order for an age of great technological change is going to be, I think, one of your primary obligations.

Thirdly, you are also law-makers and therefore the focus of my concern is of interest, the way this technology affects the law. In this essay, which I will leave with you, I have set out a few of my thoughts, but I will be happy to try to help the Committee by putting down a few more ideas and perhaps giving some ideas. But I think your instincts, from my experience of nine years in law reform, are right.

CHAIRMAN - Thank you very much for your appearance here today. We are still at the beginning of our work, but I hope that we can make achievements.

Resolved (on motion by Mr Nehl, seconded by Dr Catley):

That, pursuant to the power conferred by section 2(2) of the Parliamentary Papers Act 1908, this Committee authorises publication of the evidence given before it at public hearing this day.

Committee adjourned at 6.12 p.m.