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COMMENT ON UNESCO INITIATIVES ON AN INTERNATIONAL
INSTRUMENT ON BIOETHICS

[164TH EXECUTIVE BOARD MEETING, 13-31 MAY 2002]

The Hon Justice Michael Kirby AC CMG

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I have studied the report of the Director-General 164 EX/15.

My dot points would be as follows:

*The Director-General is to be congratulated on elevating the ethics of science and technology, together with bioethics, to one of the five main priorities of UNESCO's programme [para 13].

The work of the International Bioethics Committee is greatly appreciated in Australia. The chairman of the IBC, Professor Ryuichi Ida recently visited Australia. He met the Minister for Foreign Affairs (the Hon Alexander Downer MP) and had consultations in Canberra and Sydney with many interested Australian individuals and organisations. [15].

With respect to Article 11 of the Universal Declaration of the Human Genome and Human Rights and reproductive cloning of human beings, Australia has federal and State law which reflects this provision. The issues of cloning and of embryonic stem cells have recently attracted a widespread national debate in Australia with some differences of view expressed at the federal and State governmental levels. These are

evidence of the High controversy and complexity of the issues involved. However, it is vital that any initiative that UNESCO takes, or joins in, should observe a clear distinction between reproductive cloning and therapeutic cloning. Not only are the scientific issues different, the ethical questions are distinct. There are particular problems of definition in differentiating between these concepts. Such problems must be carefully attended to before any international convention against reproductive cloning of human beings is considered. Moreover, it will be important to coordinate the work towards an international convention on that subject [par 23] and pursuit of the idea of a universal instrument on bioethics [par 31]. In many ways, the latter is a preferable course and it could be set back by premature controversies surrounding the former.

The DG is also to be congratulated for his initiative in respect of intellectual property and genomics [par 26]. The international symposium on ethics, intellectual property and genomics in January 2001, and the follow-up, have addressed issues of the greatest practical importance and urgency. The DG should be supported in his endeavours to promote cooperation between other agencies, notably the World Trade Organisation (WTO) and the World Intellectual Property Organisation (WIPO) in following up the legitimate concerns that were voiced at the UNESCO symposium [par 27].

Whilst work towards a universal instrument on bioethics is to be welcomed, care should be taken to avoid premature rule-making. The

technology is advancing at an astonishing rate. The difficulties of securing universally agreed ethical norms are illustrated in the reports of the working groups of the IBC (notably on embryonic stem cells and on intellectual property). UNESCO will do well to avoid proposing premature legal interventions whilst the technology and its legal and ethical implications are in such a State of flux.

I attach a note which I sent to a working group of the UNESCO IBC on the preparation of a universal instrument. This was summoned to meet in Paris last week. I could not attend because I was sitting in Court in Canberra. I have lodged a mild protest at the fact that so many meetings of the IBC that I would like to attend are fixed without regard to my sitting obligations. I hope that this can be avoided in the future as we are reaching some critical points. You will see from the attached note that I am rather cautious about the Franco-German pressure towards an international convention against reproductive cloning. The countries that matter have their own laws on the subject. Such a convention is of dubious worth and need. It is of no relevance to most countries of the world. The really urgent issues are those that touch intellectual property. But they involve big money and I am suspicious of the European focus on a "soft law" area.

You will recall that in his discussions with us and Professor Ida, Mr Downer also expressed reservations about such multi-lateral initiatives. I share his doubts and I am suspicious of the motivation. You might care to consider preparing a briefing note for the Minister or his officers on these issues. Let me know if I can help.