ATTORNEY-GENERAL'S DEPARTMENT

Submission No. 232.1

Secretary

01/7476

20 September 2001

Mr Grant Harrison
Secretary
Joint Standing Committee on Treaties
Parliament House
CANBERRA ACT 2600

Dear Mr Harrison

INTERNATIONAL CRIMINAL COURT

I refer to my letter dated 24 August 2001.

In that letter, I indicated the Department was aware that the Committee had received further submissions raising constitutional issues concerning the International Criminal Court.

The Office of General Counsel has now considered the submission of Emeritus Professor Geoffrey Walker and a joint opinion of Charles Francis QC and I C F Spry QC. The Office has provided the Department with supplementary opinions on the matters raised in those documents.

The Department's Office of International Law has also considered matters covered in Professor Walker's opinion.

I attach a summary of the further advice received from the Office of General Counsel and the Office of International Law. The advice concludes there is nothing in the opinions of Professor Walker or Messrs Francis and Spry that affects the original opinion of the Office of General Counsel. A summary of that earlier opinion was enclosed with my letter of 24 August 2001.

Yours sincerely

ROBERT CORNALL

INTERNATIONAL CRIMINAL COURT

SUMMARY OF ADVICE OF OFFICE OF INTERNATIONAL LAW AND SUPPLEMENTARY ADVICE OF OFFICE OF GENERAL COUNSEL

IN RESPONSE TO FRANCIS/SPRY OPINION AND WALKER SUBMISSION

It is argued that the International Criminal Court fails to comply with some aspects of Chapter III of the Constitution, including section 80 relating to trial by jury. However, Chapter III does not regulate the ICC and is inapplicable to it. While the remarks of Deane J in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 do not form part of the decision in that case, they are directly relevant to the issue and provide the only judicial comment on it. Moreover, Deane J regarded the protection provided by Chapter III as crucially important, and would not have made a comment which might detract from those protections without careful deliberation.

The United States case of *Ex parte Milligan* (1866) 71 US 2 does not provide the basis for an objection under the United States Constitution to ratification of the ICC Statute. The principle in *Milligan* has been held not to apply where there has been a violation of international law, even where it takes place in the United States and is committed by a United States citizen. This means that in the United States a non-Article III court can deal with crimes committed by civilians against international law.

There will be no delegation of the legislative power of the Commonwealth to either the ICC itself or the Assembly of States Parties. The ICC will exercise powers conferred on it by the treaty establishing it. The Assembly is empowered to perform certain functions, including voting on amendments to the Statute, but no amendment will apply to a particular State unless it ratifies the amendment.

Section 49 of the Constitution allows Parliament to determine the powers, privileges and immunities of members of Parliament. The Parliament has legislated pursuant to section 49 in the *Parliamentary Privileges Act 1987*. The Parliament could, consistent with section 49, adopt legislation which implements a treaty which limits the privileges and immunities of members of Parliament. In any event, the existing privileges do not give members immunity from the ordinary criminal law for actions not connected with Parliamentary proceedings.

There is no reason to conclude that the High Court would reject longstanding precedent and take the view that ratification of the ICC Statute would not be within the Commonwealth's external affairs power under the Constitution.

Article 12 of the ICC Statute does not purport to assert jurisdiction over countries that have not ratified the Statute. It allows non-States Parties to choose to accept the Court's jurisdiction. There are other conventions which allow States Parties to prosecute the nationals of States which are not parties to those conventions. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is an example.

ATTORNEY-GENERAL'S DEPARTMENT

Secretary

01/5846

24 August 2001

Mr Grant Harrison
Secretary
Joint Standing Committee on Treaties
Parliament House
CANBERRA ACT 2600

Dear Mr Harrison

INTERNATIONAL CRIMINAL COURT

In his letter dated 26 June 2001, the Chairman of the Joint Standing Committee on Treaties asked the Attorney-General to obtain an opinion as to whether it is within the Commonwealth's constitutional authority to enact legislation to implement the Statute of the International Criminal Court (ICC).

The Chairman's letter enclosed a paper highlighting some of the issues raised on this point during the Committee's inquiry.

The Attorney-General has now received an opinion about this matter from the Office of General Counsel of the Australian Government Solicitor, issued with the authority of the acting Chief General Counsel.

To assist it in formulating its opinion, the Office of General Counsel was provided with:

- the paper enclosed with the Chairman's letter
- the dissenting view in the Committee's report on Australia's Role in United Nations Reform which was authored by the Chairman and three other members of the Joint Standing Committee on Foreign Affairs, Defence and Trade; and
- the draft ICC legislation.

The Attorney-General has authorised me to provide the Committee with the attached summary of the advice from the Office of General Counsel.

The Department is aware that the Committee has recently received a number of other submissions raising constitutional issues about the International Criminal Court.

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If those submissions involve issues not dealt with in the enclosed summary, I will provide you with further comments.

Yours sincerely

ROBERT CORNALL

INTERNATIONAL CRIMINAL COURT

SUMMARY OF ADVICE OF OFFICE OF GENERAL COUNSEL

The ICC will not exercise the judicial power of the Commonwealth when it exercises its jurisdiction, even where that jurisdiction relates to acts committed on Australian territory by Australian citizens. Ratification of the Statute will not involve a conferral of the judicial power of the Commonwealth on the ICC. Nor would enactment by the Parliament of the draft ICC legislation involve such a conferral.

It is a fundamental principle of Australian Constitutional law that the judicial power of the Commonwealth is vested in the High Court, other federal courts and other courts that the Parliament vests with federal jurisdiction (Chapter III courts). The judicial power of the Commonwealth cannot be vested in a body that is not a Chapter III court. However, the draft ICC legislation does not purport to confer Commonwealth judicial powers or functions on the ICC. The legislation has been drafted on the basis that the powers and functions of the ICC have been conferred on it by the treaty establishing it.

Ratification of the ICC Statute would not involve any breach of the Australian Constitution. If Parliament did attempt to enact legislation, based on a treaty, which attempted to confer the judicial power of the Commonwealth on a court other than a Chapter III court, there is little doubt that the High Court would find such legislation invalid. However, this is not the case with the ICC.

The judicial power exercised by the ICC will be that of the international community, not of the Commonwealth of Australia or of any individual nation state. That judicial power has been exercised on previous occasions, for example in the International Court of Justice and the International Tribunal for the Law of the Sea. Australia has been a party to matters before both of these international judicial institutions.

In *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, Deane, J considered Australia's participation in an international tribunal to try crimes against international law. He concluded that it would be international judicial power which such a tribunal would be exercising. Chapter III of the Constitution would be inapplicable, since the judicial power of the Commonwealth would not be involved.

Numerous respected United States commentators have considered the alleged unconstitutionality of ratification of the ICC Statute by the United States and, in relation to those arguments which are relevant in the Australian context, have resoundingly concluded that there is no constitutional objection to ratification. For example, Professor Louis Henkin (*Foreign Affairs and the United States Constitution* (2nd ed) 1996 at p.269) has written that the ICC would be exercising international judicial power. It would not be exercising the governmental authority of the United States but the authority of the international community, a group of nations of which the United States is but one.

Decisions of the ICC would not be binding on Australian courts, which are only bound to follow decisions of courts above them in the Australian court hierarchy. However, decisions of courts of other systems are often extremely persuasive in Australian courts. It is a normal and well established aspect of the common law that decisions of courts of other countries, such as the United Kingdom are followed in Australian courts. Similarly, were an Australian court called upon to decide a question of international law, it could well find decisions of international tribunals to be persuasive.