



Australian Government
Attorney-General's Department

Criminal Justice Division

05/4666

24 May 2005

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| TT 7 December 04 |
| Submission No:7.1..... |

Dr Andrew Southcott MP
Chair
Joint Standing Committee on Treaties
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Dr Southcott

Joint Standing Committee on Treaties (JSCOT) hearing on 7 March 2005 - United Nations Convention Against Corruption – questions on notice

I am writing to provide answers to the questions that the Attorney-General's Department took on notice at the JSCOT hearing on 7 March 2005.

I apologise for the delay in providing this response and trust that the information is of assistance to you.

Yours sincerely

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Criminal Justice Division

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To what extent does the Attorney-General's Department believe that the external affairs power would confer on the Commonwealth Parliament additional jurisdiction – that is to say, jurisdiction over subject matters not presently within Commonwealth jurisdiction – as a consequence of this treaty being entered into and coming into force?

The Government has made an assessment that no new Commonwealth legislation is necessary to give effect to the United Nations Convention Against Corruption. No exploration has been undertaken of the extent to which the treaty would confer additional legislative power on the Commonwealth. It would also not be appropriate to disclose any such advice.

It is a more usual policy process to first determine the policy objectives to be achieved, and then consider what legislative power is available to implement those objectives. In the case of the United Nations Convention Against Corruption, the Government's view is that present policy and legal arrangements are appropriate to give effect to the Convention and that no additional legislation is required.

Australian officials were involved extensively in negotiations for the Convention and participated to ensure that the existing Commonwealth/State arrangements would meet any treaty obligations.

If Commonwealth legislation is contemplated when giving effect to a treaty, the Commonwealth looks at the range of powers available under the Constitution. These include the external affairs power and any other power that might be available given the content of the treaty. A valid exercise of the treaty implementation aspect of the external affairs power depends on the legislation being reasonably appropriate and adapted to giving effect to the terms of the treaty. The Constitution also contains express and implied limitations on Commonwealth powers that may constrain the exercise of legislative power under the external affairs power.

Could the Attorney-General's Department respond to whether that enhancement of jurisdiction referred to in the first question is affected by whether the language in the relevant article of the treaty is mandatory, for example, as in article 12, or apparently discretionary, as in article 7 and, in particular, in article 7.3?

A determination of the extent to which Commonwealth legislative power is expanded by a treaty will involve a consideration of the exact nature of the obligations in the treaty, including whether they are specific or general and whether they involve an element of discretion. For legislation that implements a treaty to be a valid exercise of the external affairs power, the legislation must be appropriate and adapted to fulfilling the obligations in the treaty. Depending on the exact language used, discretionary treaty language may form the basis of legislation that is a valid exercise of the external affairs power.