

Submission No. ....232.....



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.

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.