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Commonwealth Computer Offences

Introduction

6.1 As noted in Chapter One, the Council of Europe Convention on Cybercrime (European Convention) requires States parties to establish a range of computer offences including:

- access to a computer system without right (Art 2);
- interference with data without right (Art 4);
- interference with the functioning of a computer system without right (Art 5); and
- the production, sale, procurement for use, import distribution a device or access data with intent of committing a computer offence (Art 6).

6.2 In addition to specific computer offences, Articles 7 to 11 require States parties to criminalise computer related offences such as forgery, fraud, child pornography, copyright infringements and related ancillary conduct. These obligations are already implemented in Australia through a mix of Commonwealth and State and Territory law.

6.3 The Constitution does not grant the Commonwealth express legislative power over criminal activity *per se*. However, the Commonwealth Parliament can validly make laws to create criminal offences and provide for their investigation, prosecution and punishment, provided that the offences fall within, or are incidental to the exercise of a constitutional head of power.

6.4 Existing Commonwealth computer offences are provided for in Part 10.7 of the *Criminal Code Act 1995*. Part 10.7 computer offences cover acts of

illegal access, modification and impairment of computer data and are limited to conduct that involves a Commonwealth computer or computer systems, Commonwealth data or commission of crimes by means of a telecommunications service.

6.5 The offences were based on model laws developed by the Model Criminal Code Officers Committee in 2001 and have not been uniformly implemented across all Australian jurisdictions. However, State and Territory computer offences apply generally in their respective jurisdictions and therefore provide national coverage in practice.

Cybercrime Legislation Amendment Bill 2011

6.6 Schedule 3 of the Cybercrime Legislation Amendment Bill 2011 (the Bill) repeals the current restrictions that apply to the Commonwealth offences, removing any requirement that the offence relate to commonwealth property or be conduct via a telecommunications service.[1] The effect of these amendments is to use the Commonwealth's external affairs power under the Constitution to create comprehensive computer offences which are compatible with articles two, four and five of the European Convention.

6.7 None of the States or Territories objected to Australia acceding to the European Convention on Cybercrime. However, some States expressed concern about the impact of unrestricted national offences on the validity of concurrent to State law

6.8 The Commonwealth Attorney-General's Department has said that, by removing the constitutional limits on the computer offences, Australia will overcome the patchy coverage of computer crime across the various Australian jurisdictions.[2] The Committee was told that the existing savings provisions of the Criminal Code will apply, so that in the event of *any inconsistency* with State and Territory laws, State and Territory law will still be valid.[3] In other words, although the proposed Commonwealth computer offences would operate without restriction, it is not the intention of the Commonwealth to 'cover the field'. Finally, the Explanatory Memorandum to the Bill also states that:

1 *Explanatory Memorandum*, Cybercrime Legislation Amendment Bill 2011, p. 47.

2 Ms Catherine Smith, Assistant Secretary, Telecommunications Surveillance Law Branch, Attorney-General's Department, *Committee Hansard*, Canberra, 1 August 2011, p. 24.

3 Ms Catherine Smith, Attorney-General's Department, *Committee Hansard*, Canberra, 1 August 2011, p. 24.

> Ensuring that Commonwealth laws meet the obligations under articles 2,4 and 5 of the Convention, without reliance on State and Territory laws, will also ensure that the jurisdictional obligations of article 22 of the Convention are fulfilled in respect of those offences.[4]

6.9 Article 22 of the European Convention requires States parties to extend jurisdiction to offences:

- in its territory;
- on board a ship flying the flag of that Party;
- on board an aircraft registered under the law of that Party; or
- by one of its nationals, if the offence is punishable under the criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State.

6.10 In its National Interest Analysis for accession to the European Convention, the Commonwealth indicated that Australia proposes to make a reservation in relation to Article 22(2) of the Convention and comply with the Convention through a combination of Commonwealth and State laws.[5] The Committee understands that this is because State and Territory laws do not meet the jurisdictional obligations of Article 22 of the Convention.[6]

Impact on the validity of concurrent State criminal offences

6.11 The governments of Western Australia, Victoria and New South Wales told the Committee that they support Australia's accession to the Convention provided that accession does not lead to conflicts between Commonwealth, State and Territory offence provisions.[7]

6.12 The Committee's attention was drawn to the current uncertainty over the constitutional division of legislative power to make laws with respect crime. On 22 September 2010, the High Court handed down its judgment in *Dickson v The Queen* [2010] HCA 30, in which the Court invalidated certain Victorian legislative provisions (conspiracy to steal

4 *Explanatory Memorandum*, p. 47.

5 *National Interest Analysis* [2011] ATNIA 9, Accession by Australia to the Convention on Cybercrime, paragraph 36. See also Premier of Western Australia, *Submission 11*, p. 3.

6 Article 22(2) permits States parties to make a reservation in relation to extended jurisdiction, ie where an offences is committed outside the territorial borders of the state or by a national outside the territorial borders of any state.

7 Premier of Western Australia, *Submission 11*; Robert Clark MP, Victorian Attorney-General, *Submission 17*; New South Wales (NSW) Government, *Submission 23*.

Commonwealth property).[8] The decision has brought into question the approach to resolving questions of the validity of concurrent and overlapping State and Commonwealth offences more generally.

6.13 The Victorian Attorney-General, Mr Robert Clark MP, has advised that in the *Dickson Case* the High Court took a broader view of what counts as constitutional inconsistency than many previously expected and this has introduced a notable degree of uncertainty into the constitutional law governing overlapping criminal laws.[9]

6.14 Similarly, Associate Professor Dr Jeremy Gans of the University of Melbourne submitted that, in his opinion, the judgment appears to stand for the proposition that a state criminal law will be invalid to the extent of its overlap with federal criminal law, if the federal criminal law includes protections for defendants not available under state law.[10] He concluded that, as the Bill will widen the area of overlap between federal and stated offences, the potential scope for invalidity will be extended to include computer offences.[11] Dr Gans also observed that, if passed, the potential for invalidity would:

> ... include computer offences that involve neither federal crimes, federal computers nor the internet.[12]

6.15 In the case of Victoria, it was explained that the proposal to remove the nexus with the Commonwealth from the existing offences so that:

> Such an expansion of the scope of federal criminal offences in this area would mean that there would be a significant degree of overlap between the Commonwealth's computer offences and Victoria's existing computer offences in ss. 247A to 247I of the *Crimes Act 1958 (*Vic).[13]

6.16 The Government of Western Australia has also raised concerns about the impact of broader Commonwealth offences, rather than Australia's traditional reliance on a combination of Commonwealth and State and Territory criminal laws.[14] The Premier of Western Australia informed the committee that the Bill would potentially render invalid offence

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8 (2010) 241 CLR 491.

9 Victorian Attorney-General, *Submission 17*, p. 2.

10 Dr Jeremy Gans, *Submission 2*, p. 3.

11 Dr Jeremy Gans, *Submission 2*, p. 2.

12 Dr Jeremy Gans, *Submission 2*, p. 2.

13 Victorian Attorney-General, *Submission 17*, p. 1.

14 Premier of Western Australia, *Submission 11*, p. 1.

provisions that are stronger, more far reaching and comprehensive than the Commonwealth offences.[15]

Direct versus indirect inconsistency

6.17 The Commonwealth Attorney-General's Department has assured the Parliament that, in the event of 'any inconsistency the savings provisions of the Criminal Code, will protect the validity of State laws.[16] However, the Committee notes that the state governments of NSW, Victoria and WA as well as Dr Gans have all made submissions that differ from this view.

6.18 Participants in the inquiry argued that the savings provisions of the Commonwealth Code do not have the effect of protecting the validity of State law when the inconsistency is *direct* (as opposed to indirect).[17] In other words, where the offences are in fact concurrent and overlapping the likelihood of invalidity is increased despite the savings provision. The NSW government advised, for example, that NSW has implemented the model code computer offences. Removing the 'carriage service' and 'Commonwealth computer' limitation from Part 10.7 would effectively create identical offences under NSW and Commonwealth legislation.[18]

6.19 Moreover, in the *Dickson Case*, the High Court reached its conclusion that part of Victoria's criminal law was invalidated by the Commonwealth Code despite the presence of a savings clause for state criminal offences in the theft provisions of the *Criminal Code 1995* (Cth).[19]

6.20 Further, expert evidence is that invalidation of a State law cannot be remedied by retrospective State legislation, as a result of an earlier High Court decision in 1984 (*Metwally v University of Wollongong* (1984) 158 CLR 447).[20] Similarly, the Western Australian Premier referred the Committee to the invalidation of NSW's anti-discrimination law for inconsistency with the Commonwealth *Racial Discrimination Act 1974* (*Viskauskas v Niland* (1983) CLR 280, *Metwally v University of Wollongong* (1984) 158 CLR 447).[21] The Western Australian Premier argued that, in light of existing

15 Premier of Western Australia, *Submission 11*, p. 3.

16 Ms Sarah Chidgey, Assistant Secretary, Criminal Law and Law Enforcement Branch, Criminal Justice Division, Attorney-General's Department, *Committee Hansard*, Canberra, 1 August 2011, p. 32.

17 Premier of Western Australia, *Submission 11*, p. 2.; Victorian Attorney-General, *Submission 14*, p. 2; Dr Gans, *Submission 2*, p. 2.

18 NSW Government, *Submission 23*, p. 3.

19 Dr Jeremy Gans, *Submission 2*, p. 2.

20 Dr Jeremy Gans, *Submission 2*, p. 2; *Metwally v University of Wollongong* (1984) 158 CLR 447.

21 Premier of Western Australia, *Submission 11*, p. 4.

jurisprudence on retrospectivity, an invalidation of State cybercrime law may mean that a State Parliament is prevented from enacting new offences that take a stronger stance.[22]

6.21 It was also argued that the full impact of *Dickson's Case* is yet to be determined and the High Court's pending decision in *Momcilovic v The Queen* may help clarify the law in this area. The Committee was told that *Momcilovic v The Queen*, was part heard on 8-10 February 2011, and further heard on 7 June 2011.[23] The judgment is forthcoming, and is expected in the latter half of 2011.[24]

6.22 The Governments of Victoria, WA and NSW have asked the Commonwealth not to proceed with the Bill and accession to the European Convention until the High Court has clarified the matter. The Attorney General of Victoria submitted that:

> Until the High Court's approach to the criteria for identifying inconsistency in the area of overlapping State and federal criminal offences is made clearer, the prudent course would be for the Commonwealth Parliament to avoid risking unintended consequences by expanding the scope of the Commonwealth criminal law without yet knowing the effects of such a step.[25]

6.23 Similarly, the New South Wales Government submitted that obligations can be met based on the laws of Australia's constituent States and Territories. The New South Wales Government argues, therefore, that Australia should meet its obligations through amendment (if necessary) of State and Territory laws, if accession is considered an urgent priority.[26]

Committee View

6.24 The Committee acknowledges that none of the States or Territories objected to Australia's accession to the European Convention. The primary concern of some States relates to the impact of unrestricted national offences. Also, that as a matter of international law, all the legislative steps to meet Australia's obligations under the Convention may be undertaken

22 Premier of Western Australia, *Submission 11*, p. 3.

23 Victorian Attorney-General, *Submission 17*, p. 2; Premier of Western Australia, *Submission 11*, p. 3.

24 NSW Government, *Submission 23*, p. 4.

25 Victorian Attorney-General, *Submission 14*, p. 2.

26 NSW Government, *Submission 23*, p. 4.

under either Commonwealth or State and Territory or a combination of both.

6.25 Nonetheless, some of the evidence to the Committee indicates a continuing concern about the impact on the validity of state law of comprehensive computer offences at the federal level. Without a detailed analysis of all state provisions, the Committee is not in a position to draw any conclusion on the extent of the problem, other than to note that it may be significant.

6.26 It is likely, but not guaranteed that the High Court will clarify and remove the uncertainty caused by *Dickson's Case* in its forthcoming judgment in *Memoclovic v The Queen*. It seems prudent for the Attorney-General to consult with the States as soon as the judgment has been handed down.