



Australian Government
Attorney-General's Department

**National Security
Law and Policy Division**

11/2745

21 April 2011

Committee Secretary
Joint Standing Committee on Treaties
PO Box 6021
Parliament House
Canberra ACT 2600
AUSTRALIA

Email: jsct@aph.gov.au

Dear Committee Secretary

Treaties Tabled 1 March 2011 – Accession by Australia to the Convention on Cybercrime

On 8 April 2011, the Department undertook to seek the agreement of relevant States to provide submissions made by State Governments on Australia's proposed accession to the Council of Europe Convention on Cybercrime, in response to questions on notice received from Senator Cash.

We have received that agreement and responses from the Queensland Department of the Premier and Cabinet and the Attorney-General of Victoria, the Hon Robert Clark MP are attached. In relation to those submissions, we believe the following information is of assistance.

In relation to concerns raised by the Queensland Department of the Premier and Cabinet, we note that the main resource implications will lie with the Australian Federal Police, who will be responsible for the operation of the 24/7 assistance centre. Agencies will be able to rely on existing technical capabilities in compliance with the Convention.

The submission from the Victorian Attorney-General raises concerns about Commonwealth and State powers with respect to criminal laws.

Australia already meets most of the offence requirements under the Convention, including those concerning illegal interception, computer-related forgery and fraud, child pornography and infringement of copyright. While all States and Territories have offences in place that would address at least some of the Convention requirements in relation to computer offences, a number of gaps in coverage remain.

Existing Commonwealth laws cover almost all computer offences, as they apply where a carriage service such as the internet is used in the commission of the offence.

However, full compliance with the Convention obligations can be achieved by removing current requirements for offending to involve use of a carriage service or a Commonwealth computer or data from Part 10.7 of the Criminal Code Act 1995.

The incremental expansion of the Commonwealth offences to fully implement the Convention's obligations would have no substantive effect on State and Territory offences. Part 10.7 of the Criminal Code contains a savings clause that explicitly provides that the Commonwealth computer offences are not intended to limit or exclude the operation of any law of a State or Territory. This savings clause would continue to apply.

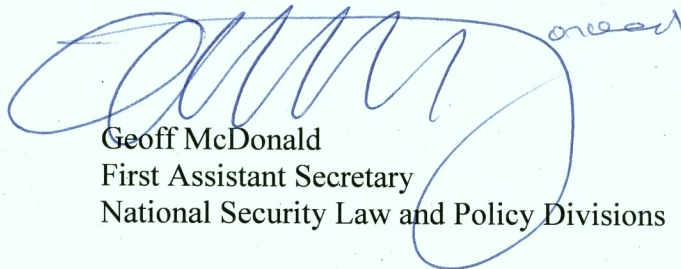
Whilst a decision in relation to Momcilovic is still pending, the Commonwealth is firm in its position that the current provisions are valid.

It is important that in areas where the Commonwealth has legislative responsibility, its offence regimes are comprehensive and address contemporary forms of offending. Given the transnational nature of cyber crime, it is necessary and appropriate for the Commonwealth to enact and maintain effective criminal offences in this area.

We do not consider that any uncertainty about the concurrent operation of Commonwealth and State criminal laws warrants delaying accession to the Convention.

The action officer for this matter is David Cramsie who can be contacted on 02 6141 2996.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Geoff McDonald', is written over a large, stylized blue oval. The signature is written in a cursive, flowing style.

Geoff McDonald
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The Hon Robert McClelland MP
Attorney-General for the Commonwealth
Parliament House
CANBERRA
ACT 2600

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<input type="checkbox"/> Priority B	<input type="checkbox"/> Reply by O'Connor	
<input type="checkbox"/> Priority C	<input type="checkbox"/> Brief required	
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<input type="checkbox"/> Reply by AGD	Action Area	
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Dear Attorney-General

Australia's Proposed Accession to the Council of Europe Convention on Cybercrime

I understand that the Australian Government is proposing to accede to the Council of Europe Convention on Cybercrime.

While there is much to be said in principle for the proposed accession to the Convention, I would urge the Australian Government to refrain from accession until the scope and inter-relationship of federal and state legislative power in relation to criminal matters is clarified.

The constitutional division of legislative power in this area and the way in which federal and state criminal laws may operate concurrently were recently made uncertain by the High Court's decision *Dickson v The Queen* [2010] HCA 30; (2010) 270 ALR 1. In that decision the High Court invalidated certain Victorian legislative provisions insofar as they were held to be inconsistent with certain provisions of Commonwealth's Criminal Code dealing with the same subject matter (conspiracy to steal Commonwealth property).

The full impact of the *Dickson* decision is yet to be determined. It is anticipated that the High Court's pending decision in *Momcilovic v The Queen* may help to clarify the law in this area.

Given the current situation, it is therefore also uncertain what impact the Commonwealth's accession to the Convention would have on federal and state criminal laws and the criminal legislative powers of the different state and federal jurisdictions. Depending on the outcome of *Momcilovic*, it could be that accession to the Convention by the Commonwealth could lead to a substantial increase in the scope of federal responsibilities in this area and a greater likelihood of various state laws being constitutionally invalid if they are inconsistent with federal laws, thereby dramatically reducing the capacity of state authorities to take action against cyber-crime.

*Noted
response pending
11/9/11*

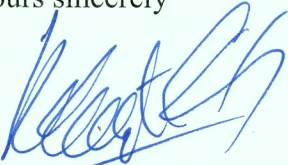


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Therefore, pending clarification of the above matters, I request that the Commonwealth not accede to the Convention at this stage.

In the meantime, the states and the Commonwealth can continue to work together to ensure that the substantive law within Australia meets the goals embodied in the Convention. Refraining from acceding to the Convention need not involve delaying improving the substantive law relating to cybercrime.

Yours sincerely



ROBERT CLARK MP
Attorney-General

30/3/11

cc. State and Territory Attorneys-General ✓

Text of the submission of the Queensland Department of the Premier and Cabinet, received on 14 March 2011.

Queensland is supportive of the Australian Government considering acceding to this Convention.

It is our view that cyber crime is very likely a growing threat to Australian consumers, businesses and government (especially given Australia's high internet connectivity rate), and that the Convention may assist in combating this transnational threat. This is particularly true given the potential for some of the current international arrangements to have lagged behind the dynamic nature of the threat.

We note that implementation of Convention obligations may incur a cost at the sub-national level (e.g. reviewing current legislation/offences to ensure compliance, ensuring there is technical capacity to conduct data interceptions). We look forward to discussing that further to inform the development of the National Interest Analysis, should the proposed action reach that stage.