

## SUBMISSION NO. 5



Government of Western Australia  
Department of the Premier and Cabinet  
Office of the Director General

Our Ref: 24-72885

Mr Kelvin Thomson MP  
Chair  
Joint Standing Committee on Treaties  
Parliament House  
CANBERRA ACT 2600

Dear Mr Thomson

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

Thank you for your letter dated 1 March 2011 seeking comments on the tabling of the *Accession by Australia to the Convention on Cybercrime* (the Convention). I am writing to convey the views of Western Australian Government agencies.

Accession to the Convention will further strengthen mutual assistance and exchange of information between agencies. It is important to note that accession to the Convention should not create further bureaucracy which could act to stifle established links between agencies, particularly those formed at a State level. WA Police already has strong ties with a number of overseas policing agencies and a number of service providers in attempting to tackle cybercrime. It would be detrimental if accession to the Convention were to erode these links.

It is understood that Australia's proposed reservation to Article 22(2) of the Convention is to ensure that Convention obligations will be complied with through a combination of State and Commonwealth laws. In relation to offences committed outside the territorial jurisdiction of any State, outlined in Article 22(1)(d), it should be noted that State parliaments do have extra-territorial legislative competence to make constitutionally valid criminal laws which operate outside of the territory of WA and the of Australia. In WA, section 12 of the *Criminal Code* is an example. Consequently, it would be appreciated if States were to be consulted regarding the drafting of Australia's reservation in relation to Article 22(2).

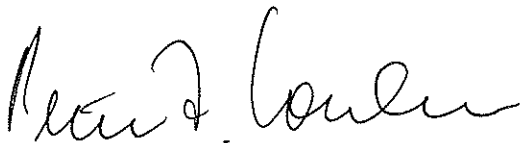
It is essential that the drafting of any Commonwealth legislation implementing the treaty, especially in relation to criminal law offences, should be done in consultation with States and Territories. This will ensure that State offences operating within WA are not overridden, even inadvertently, by Commonwealth legislation. A 'savings' provision should also be considered for inclusion in this proposed Commonwealth legislation which will ensure that State criminal laws operating extra-territorially are not overridden.

The potential for direct inconsistency between Commonwealth criminal offences and State criminal offences so that the latter are rendered inoperative by section 109 of the Commonwealth Constitution also needs to be considered. Also for this reason, it would be beneficial if Commonwealth amendments could be the subject of close Commonwealth-State negotiation as to both their substance and drafting.

A further issue which warrants consideration is access to stand-alone computers when investigating cybercrime. Subdivision D of Division 474 of Part 10.6 of the *Criminal Code Act 1995 (Cth)* criminalises the use of a carriage service for child pornography or child abuse material. Currently this excludes such offences as producing or possessing child pornography on a stand-alone computer.

Thank you once again for the opportunity to comment on Australia's accession to the *Convention on Cybercrime*.

Yours sincerely



Peter Conran  
**DIRECTOR GENERAL**

C. Christian Porter MLA  
TREASURER; ATTORNEY GENERAL

C. Karl J O'Callaghan APM  
COMMISSIONER OF POLICE

22 MAR 2011