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Senator Catryna Bilyk
Chair, Joint Select Committee on Cyber-Safety
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Dear Senator Bilyk

Inquiry into Cybercrime Legislation Amendment Bill 2011

Thank you for the opportunity to make a submission to the Joint Select Committee on Cyber-Safety in relation to its inquiry into the Cybercrime Legislation Amendment Bill 2011 (the Bill).

One of the effects of the Bill, if passed, would be that the existing computer offences in the *Criminal Code Act 1995* (Cth) would no longer need to have a nexus with the Commonwealth, for example through being concerned with data held in a Commonwealth computer or with the use of a carriage service. 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).

While there may be good arguments for allowing for a system of overlapping State and federal offences to help combat cybercrime in Australia, I would urge the Joint Select Committee to recommend that the Bill not be proceeded with at the current time. This is because the constitutional law governing overlapping State and federal criminal offences is currently uncertain, and a High Court decision in the area is expected in the near future.

By way of background, the constitutional division of legislative power in this area and the way in which federal and state criminal laws may operate concurrently were made uncertain by the High Court's decision in *Dickson v The Queen* [2010] HCA 30; (2010) 241 CLR 491, handed down on 22 September last year. 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 High Court, in its reasons, appeared to take a broader view of what counts as constitutional inconsistency than many had previously expected. This has had the effect of introducing a notable degree of uncertainty into the constitutional law governing overlapping criminal laws.

State Government Victoria

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. The *Momcilovic* case concerns certain overlapping Victorian and Commonwealth drug laws, a significant part of the criminal law in both jurisdictions. That matter was part heard on 8–10 February 2011, and further heard on 7 June 2011.

It is important to stress that the threat of constitutional invalidity is not necessarily abated through the insertion of a 'savings clause' into the relevant Commonwealth statute. Such clauses are only effective where the threatened inconsistency in question is *indirect*. Where the inconsistency in issue is *direct*, then a savings clause is of no effect. Direct inconsistency between State and Commonwealth laws can come about where one law commands what the other prohibits. It can also come about where one law detracts from a right conferred by the other law. The precise criteria for determining direct inconsistency is one of the matters currently unclear in the wake of the *Dickson* decision.

In cases of direct inconsistency between State and Commonwealth laws, the inconsistency is a matter of the operation of the laws in question. Where the two laws are in fact directly inconsistent in their operation, then a statement in the Commonwealth legislation that concurrent operation is intended will not alter the fact of direct inconsistency and cannot prevent the operation of the Constitution, as a higher law, from invalidating the State law.

On 11 May 2011 the Commonwealth Parliament's Joint Standing Committee on Treaties recommended that Australia accede to the Council of Europe's Convention on Cybercrime. The Treaties Committee's report on this matter (Report 116) appears to endorse the view that a savings clause in the relevant Commonwealth legislation will be sufficient to prevent the invalidation of any State law.

I understand that the Bill is not intended to alter the current s 476.4 of the Commonwealth's Criminal Code, which purports to prevent the Code's computer offences from excluding or limiting the operation of State or Territory laws. Be that as it may, such a clause is by no means guaranteed to protect Victorian or other State laws if the High Court were to find that any such laws in this area were directly inconsistent with a Commonwealth law.

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 Commonwealth criminal law without yet knowing the effects of such a step. In the meantime, the States and the Commonwealth can continue to work together to ensure that the substantive law within Australia provides an effective tool in the combating of cybercrime.

Yours sincerely

ROBERT CLARK MP
Attorney-General
20/5/11

cc: Commonwealth, State and Territory Attorneys-General