



Australian Government
Attorney-General's Department

**Security and Critical
Infrastructure Division**

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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

After the Committee's public hearing on Friday 25 March 2011, the Department received questions on notice from Senator Cash. Responses to these questions are at **Attachment A**.

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

Yours sincerely

~~Geoff McDonald~~
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Australia's Accession to the Council of Europe Convention on Cybercrime

Question on Notice – Senator Michaelia Cash

I refer to the submission provided to the Joint Standing Committee on Treaties by the Government of Western Australia in relation to Australia's accession to the Council of Europe Convention on Cybercrime (**The Convention**) dated 22 March 2011, and ask:

1. *Will the Department provide copies of the submissions received by other States with regards The Convention?*

When it invited submissions in relation to the proposed accession, the Department did not indicate that it would be disclosing the contents of those submissions beyond the Department. Therefore, we would not provide copies of submissions without the agreement of individual submitters.

The Department is in the process of seeking such agreement and will endeavour to provide the outcomes to the Committee as quickly as possible.

2. *Due to the serious nature of the concerns raised by the WA Government in its submission, will the Minister ensure that his Department provides a copy of the WA Government's submission to all other States for their comment? If so, when? If not, why not?*

The Department will not be providing a copy of the WA Government's submission to other States and Territories for comment. However, the Attorney-General will write to all State and Territory Attorneys-General about the issues raised in the WA Government's submission and similar issues raised by other State and Territory governments in relation to Australia's proposed accession to the Convention. Letters are expected to be sent by mid April 2011.

The Department, in answering questions 8, 9 and 10 addresses issues relating to the interaction of State and Territory laws which indirectly address some of the concerns raised by the Western Australian Government.

3. *In the WA Government's submission it is stated:*

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 cyber crime. It would be detrimental if accession to the Convention were to erode these links.

- a) *What if any additional bureaucracy will, or could, be created by Australia's accession to the Convention?*

The purpose of the implementing legislation is to increase the availability of police powers for foreign purposes and remove barriers to providing certain types of assistance. This will

facilitate greater international cooperation while relying on existing police links and as such will not create additional bureaucracy.

Further, the Australian Federal Police will continue to be the body receiving requests for international assistance through its existing 24/7 response centre.

b) *If additional bureaucracy is created, what safeguards will be put in place to ensure there is no erosion of the links between State agencies/bodies and overseas agencies?*

As advised in our answer to question 3(a), the Department does not believe that extra bureaucracy will be created as these types of assistance are not currently available in Australian law in relation to the sharing of this type of information.

4. *In relation to Australia's proposed reservation to Article 22(2) of The Convention:*

a. *Please outline the basis for the proposed reservation?*

Article 22(1) requires Parties to establish jurisdiction over any offence established in accordance with Articles 2 through 11 of the Convention when the offence is committed:

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

Article 22(2) allows Parties to reserve the right not to apply, or to apply only in specific cases or conditions, the second to fourth of those jurisdictional requirements.

As extended geographical jurisdiction applies to most Commonwealth offences that will be relied upon for compliance with the Convention, those offences meet all of the jurisdictional requirements set out in Article 22(1). The *Telecommunications (Interception and Access) Act 1979* (Cth) (the TIA Act) and the *Copyright Act 1968* (Cth) could be amended so that the offences they contain also meet all of those requirements.

While State and Territory offences can have some extraterritorial effect, jurisdiction cannot be extended in the same way that it can be for Commonwealth offences. A State or Territory can generally only claim jurisdiction over an offence where some or all of the conduct constituting the offence or an effect or result of that conduct, occurs in that State or Territory. However, Australian state and territory offences could not be applied so as to meet the second to fourth jurisdictional requirements set out in Article 22(1) in cases where there is no direct link between the conduct constituting an offence, or an effect or result of that conduct, and a State or Territory. Therefore, where Australia is relying on State and Territory offences to meet the offence obligations in the Convention (for example, to meet

the requirements in Articles 7 and 8 relating to computer related forgery and fraud), a reservation under Article 22(2) will be required.

- b. Will the Commonwealth Government be consulting with the States regarding the drafting of this reservation? If so, will the Minister outline the consultative procedure and timetable? If not, why not?*

The Department is of the view that this reservation is technical in nature and does not affect the operation of any existing laws, but rather reflects that Australia relies on a federated system of laws. If in the course of drafting the reservation it appears that it could have an impact on State and Territory laws, consultation would be undertaken at that time.

5. *Should Australia accede to The Convention, what existing Commonwealth legislation will be required to be amended or, what new Commonwealth legislation will be required to be introduced, to enable the implementation of the Convention?*

Commonwealth legislation that will be relied upon to meet the Convention obligations includes:

- the Copyright Act
- the Criminal Code
- the *Mutual Assistance in Criminal Matters Act 1987* (MA Act), and
- the TIA Act.

The amendments that would be required to meet Convention obligations are outlined below.

Criminal Code

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. In practice, existing Commonwealth laws would cover most computer offences, as they apply where a carriage service such as the internet is used in the commission of the offence. However, to ensure full compliance with the Convention obligations, the offences in Part 10.7 of the Criminal Code Act 1995 (Cth) would require amendment to remove current requirements for offending to involve use of a carriage service or a Commonwealth computer or data.

MA and TIA Acts

Amendments to these Acts would be necessary for Australia to meet the obligations in the Convention relating to law enforcement processes and powers and the enhanced exchange of information between Parties.

The necessary amendments to the MA Act (and some of the TIA Act amendments) were included in the exposure draft of the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 (the Bill).

The proposed amendments would enable:

- a warrant to covertly access stored communications (such as email records) to be sought for foreign law enforcement purposes (this type of assistance is currently only available for domestic law enforcement purposes)
- the collection and disclosure of historical telecommunications data (such as call charge records) for foreign law enforcement purposes on a police to police basis, and
- the collection and disclosure of prospective telecommunications data, subject to a formal mutual assistance request and Attorney-General approval.

The proposed amendments aim to remove barriers to providing assistance to foreign law enforcement agencies while ensuring appropriate safeguards are in place. Further, the use of powers for foreign law enforcement purposes would be modelled on existing domestic thresholds and safeguards.

In addition to the amendments released as part of the draft Extradition and Mutual Assistance reforms, additional amendments would be required to:

- enable agencies to request carriers and carriage service providers to preserve communications that are stored on their networks (at the time the request to preserve them is made) until such time as the agency can authorise the access to those communications via a stored communications warrant
- enable foreign agencies to request the preservation of stored communications and the disclosure of certain associated information) whilst a request for mutual assistance to release those communications is progressed, and
- protect the confidentiality of the existence of authorisations for the disclosure of non-content telecommunications data, currently made under Chapter 4 of the TIA Act.

Copyright Act 1968

Article 10 of the Convention refers to offences related to copyright infringement, which are already provided for in the Copyright Act. However, subject to any permitted reservations, the geographical jurisdiction of the existing offences would need to be extended to implement the Convention.

Issues of Jurisdiction

Article 22 of the Convention is discussed in the Department's answer to Question 4. The Convention permits parties to make reservations to Article 22. Subject to any such reservations, implementation of Article 22 can be achieved by amendments to the Copyright Act and TIA Act would be required to apply extended geographical jurisdiction to the indictable offences in those Acts.

6. *Has the Commonwealth Government consulted with the State Governments to date in relation to the impact on State laws should Australia accede to The Convention? If so, please advise of the consultative procedure to date. If not, why not?*

At the September 2010 meeting of the Standing Committee on Treaties (SCOT), Ministers were briefed on the requirements and obligations of the Convention and the impact it may have on State and Territory police.

As indicated in the response to question 2, the Attorney-General will also shortly be writing to his State and Territory counterparts about issues State and Territory governments have raised in relation to Australia's proposed accession to the Convention.

7. *Will the Commonwealth Government be consulting with the State Governments with regards to the Commonwealth legislation required to implement the Convention? If so, will the Minister outline the consultative procedure and timetable? If not, why not?*

As discussed in the Department's answer to question 5, the proposed amendments to the MA Act and some of amendments to the TIA Act to implement Convention obligations relating to international assistance were released for public consultation on 31 January 2011 in the exposure draft of the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill

As indicated in the response to question 2, the Attorney-General will also shortly be writing to his State and Territory counterparts about issues State and Territory governments have raised in relation to Australia's proposed accession to the Convention.

Amendments to Commonwealth legislation to meet Convention obligations will not have any substantive impact on State and Territory laws. As outlined in the responses to the remaining questions, there is no intention to override State and Territory laws and savings provisions in the Criminal Code will remain unaltered.

8. *In relation to the legislation referred to in Question 5, will a "savings" provision be included in the legislation to prevent State criminal laws and other relevant laws which operate extra-territorially from being overridden? If not, why not and what would the effect be of not providing such a provision?*
9. *Should Australia accede to The Convention, what measures will the Commonwealth be required to put in place to ensure that in the event of direct inconsistency between Commonwealth Criminal offences and State criminal offences, the latter are not rendered inoperative by section 109 of the Commonwealth Constitution?*

As there would otherwise be significant overlap in our responses to questions 8 and 9, we are providing a consolidated response to the two questions.

Accession to the Convention will not require the enactment of any new offences.

Savings provisions already apply to the Commonwealth fraud, forgery, telecommunications and computer offences in Chapter 7, Part 10.6 and Part 10.7 of the Criminal Code respectively. The savings provisions are at sections 261.1, 475.1 and 476.4 of the Criminal Code and each provide that the Chapter or Part is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory. These provisions will be retained in their current form.

Inclusion of savings provisions is not necessary for the provisions of the *Telecommunications (Interception and Access) Act 1979* (Cth), the *Mutual Assistance in Criminal Matters Act 1987* and the *Copyright Act 1968* (Cth), as the Commonwealth legislation covers the field with respect to these issues.

10. *Is it the intention of the Commonwealth Government to override state laws should Australia accede to The Convention and if so will the Minister provide particulars of the areas of law to be overridden?*

It is not the intention of the Commonwealth Government to override State laws should Australia accede to the Convention.