NSW Government Submission

to the

Commonwealth Joint Select Committee on Cyber-Safety

on the

Cybercrime Legislation Amendment Bill 2011

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NSW has no concerns in principle with Australia acceding to the Council of Europe Convention on Cybercrime ('the Convention'), provided that accession will not lead to conflicts between Commonwealth State and Territory offence provisions. In general, NSW supports the *Cybercrime Legislation Amendment Bill 2011* (the Bill) and notes that it may assist in improved international co-operation and exchange of evidence.

However, NSW has concerns with the proposed amendments to Part 10.7 of the *Criminal Code Act 1995 (Cth)*. The removal of restrictions from existing Commonwealth computer offences contained in the Criminal Code expands the scope of these offences to cover matters currently dealt with through State legislation. This expansion of the Commonwealth offences may bring the constitutional validity of NSW computer offences into question.

It is noted that the NSW Attorney General, as well as his predecessor, has previously expressed these concerns to the Commonwealth.

Articles 2, 4 and 5 of the Convention require state parties to adopt legislation and other measures to establish as criminal offences the following conduct: access to a computer system without right (Article 2); interference with data without right (Article 4) and interference with the functioning of a computer system without right (Article 5).

Part 10.7 of the Commonwealth *Criminal Code Act 1995* presently contains offences which criminalise this type of conduct. Those offences are based on model laws developed by the Model Criminal Code Officers Committee in 2001, and cover acts relating to illegal access, modification and impairment of computer data. However, in their current form the computer offences in the Criminal Code are restricted to conduct involving Commonwealth computers, Commonwealth data or the use of a carriage service, such as the internet.

In recent correspondence to the Victorian Attorney General, which was copied to the Attorneys General of all States and Territories, the Commonwealth Attorney-General noted that there remain discrepancies in Australia's computer offence framework as some jurisdictions have not implemented the model computer offences. Consequently, it is noted that the Commonwealth proposes to remove the restrictions from the existing Commonwealth computer offences under Part 10.7 of the Criminal Code, allowing national offences to operate concurrently with state offences. Removing these restrictions will extend the ambit of the Commonwealth computer offence provisions to conduct that does not involve use of a carriage service, and will also extend the application of those offences to all computers or data in Australia, in effect creating national legislation.

NSW has implemented the model code computer offences. Removing the "carriage service" and "Commonwealth computer" limitations from Part 10.7 would effectively create identical offences under NSW and Commonwealth legislation.

Significantly, the High Court's recent decision in *Dickson v the Queen* [2010] HCA 30 has rendered uncertain the way in which federal and state criminal laws operate concurrently. In *Dickson,* the High Court took a new and broader interpretation of the scope of the inconsistency rule in s.109 of the Constitution. Section 109 provides that where a State and a Commonwealth law are inconsistent, the Commonwealth law prevails and the State law is invalid to the extent of the inconsistency. In *Dickson,* the offender was charged with conspiracy to commit theft under sections 321 and 42 of the Victorian *Crimes Act 1958 (Vic)*. The offender appealed his conviction, arguing that the Victorian law was inconsistent with equivalent offences available in Commonwealth legislation, namely the theft and conspiracy provisions contained in sections 131 and 11.5 of the Commonwealth Criminal Code.

The High Court upheld the appellant's argument, stating that provisions in a state law will be directly inconsistent where they alter, impair or detract from the operation of federal legislation. Differences between the legislation cited by the Court in this instance included that the Commonwealth offence only applied to offences punishable by twelve months imprisonment or a fine of 200 penalty units or more; that the Commonwealth offence required the proof of at least one overt act to support the conspiracy; and that the Commonwealth provision included a complete defence of withdrawal. The court also noted that under Victorian law, the jury could return a majority verdict, while Commonwealth offences require a unanimous verdict. In this way, the Court found that the state provisions imposed on the accused more onerous obligations than those provided by the federal legislation, and that the state provisions were therefore inconsistent and invalid by operation of section 109 of the Constitution.

The uncertainty created by the result in *Dickson* has prompted both Victoria and NSW to express concerns to the Commonwealth regarding moves to expand the application of Commonwealth computer offences (amendments which are now contained in the *Cybercrime Legislation Amendment Bill 2011*). In response to these concerns, the Commonwealth Attorney General wrote to NSW to advise that the removal of restrictions from Part 10.7 would not have a substantive effect on State and Territory offences, as Part 10.7 includes 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. Savings clauses of this nature are intended to prevent the question of inconsistency under section 109 of the Constitution from arising.

However, the decision in *Dickson* has cast doubts on the effectiveness of such savings provisions. In *Dickson*, the Court rejected the application of a theft offence savings clause to an offence of conspiracy to steal, and raised doubts as to whether existing savings clauses would suffice. While it did not

form part of the judgment, during hearings in the High Court, Gummow J appeared to criticise savings provisions, describing them as a “very compressed form of drafting”.

The case of *Momcilovic*, which is currently before the High Court, raises issues about the operation of Victorian drug offences in the field of the Commonwealth serious drug offences. It is likely to shed some light on the significance of *Dickson* and clarify the effect of the High Court’s findings on concurrent State and Commonwealth criminal offences. The matter was listed for further argument in the High Court in early June and a decision is expected in the latter half of 2011.

NSW remains of the view that Australia should not accede to the Convention until the decision in *Momcilovic* has been handed down, and the significance of *Dickson* and *Momcilovic* on Australia’s system of concurrent criminal offences is known. NSW’s in-principle support for accession is contingent on an outcome in *Momcilovic* that does not result in further conflict between Commonwealth and State and Territory offence provisions.

The NSW Department of Attorney General and Justice has been informally advised by the Commonwealth that the Convention does not require a party to meet its obligations through national legislation, but that the obligation can be met based on the sum of the laws of a party’s constituent states and territories.

NSW is therefore of the view that, in light of the current uncertainty around concurrent federal and state offences, Australia should seek to meet its obligations through amendment (if necessary) to State and Territory laws, rather than through national legislation, if accession to the Convention is considered an urgent priority.