

SUBMISSION NO. 4

SECRETARIAT GENERAL

DIRECTORATE GENERAL OF HUMAN RIGHTS AND
LEGAL AFFAIRS

ECONOMIC CRIME DIVISION
Please quote: JC/AS/2079 australia



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Jane Hearn BA/LLB
Inquiry Secretary
Joint Select Committee on Cyber Safety
Joint Standing Committee on Migration
Department of the House of Representatives
CANBERRA ACT 2600 II
By email: jane.hearn.reps@aph.gov

Strasbourg, 14 July 2011

Subject: Australian Cybercrime Bill – your mail of 4 July 2011

Dear Ms. Hearn,

Thank you very much for your mail of 4 July regarding the Cybercrime Legislation Amendment Bill introduced by the Attorney General and the report to be prepared by the Joint Select Committee on Cyber-Safety.

It is rewarding to see that Australia is determined to take rapid steps towards accession to the Budapest Convention. We are also impressed by the fact that the Australian authorities promote legislative reforms and capacity building in other countries of the Asia-Pacific region (we recently held a joint workshop in Tonga with the Attorney General Department for Pacific Island States on cybercrime legislation and the Budapest Convention).

Regarding formal Council of Europe positions on legislative amendments, we recently changed procedures and the process has become more formalised. We are still able to provide such analyses but it would take us several weeks to do so (and would not be feasible within the timeframe you indicated).

However, in general terms, I believe that the proposed amendments indeed close the remaining gaps in your legislation (in particular the possibility of expedited preservation at domestic level and in response to an international request, and the broadening of offences such as illegal access beyond Commonwealth computers).

Regarding the intention of the Budapest Convention to protect human rights and meet criminal law objectives, it would be difficult for us to pass a judgement without a detailed analysis of the system of safeguards in place in Australia.

A priori we do not see contradictions between your Bill and the Convention. As you perhaps know, the Budapest Convention leaves it to the domestic law of each party to establish such safeguards and conditions, and only provides guidance of a general nature:

15 (1) ... Each Party shall ensure that the establishment, implementation and application of the powers and procedures provided for in this Section are subject to conditions and safeguards provided for under its domestic law, which shall provide for the adequate protection of human rights and liberties ...

15 (2) Such conditions and safeguards shall, as appropriate in view of the nature of the procedure or power concerned, inter alia, include judicial or other independent supervision, grounds justifying application, and limitation of the scope and the duration of such power or procedure.

You may also wish to consult paragraphs 145ff of the explanatory report which note, inter alia, that while countries under their domestic law should apply certain principles, such as the principle of proportionality, different investigative measures require specific types of safeguards and conditions depending on the level of intrusiveness. In this connection, specific safeguards and conditions are mentioned for the interception of content data and to some extent also for the real-time collection of traffic data (see para 215 of the explanatory report).

Overall, we see the amendments introduced by the Cybercrime Bill as a positive step; their adoption would certainly reinforce Australia's criminal justice response to cybercrime and allow for accession to the Budapest Convention.

Yours sincerely

Alexander Seger
Head of Economic Crime Division