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ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

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

Dear Chair

I am writing to you in relation to Report 116 of the Joint Standing Committee on Treaties and its recommendations in relation to Australia's proposed accession to the Council of Europe *Convention on Cybercrime* (the Convention). I thank the Committee for the work in considering the Convention.

I note that the Committee supports Australia's accession. However, recommendation 14 of the Report is that I report to the Committee about any proposed amendments to Commonwealth or State and Territory law in support of the Convention.

The measures necessary for accession are contained in the Cybercrime Legislation Amendment Bill 2011, which I introduced into the House of Representatives on 22 June. The Bill has been referred to the Joint Select Committee on Cyber-Safety for inquiry.

Outline of the Bill

The Bill will amend the *Telecommunications (Interception and Access) Act 1979* (the TIA Act), the *Criminal Code Act 1995* (the Criminal Code), the *Mutual Assistance in Criminal Matters Act 1987* and the *Telecommunications Act 1997*. Australian law already complies with most of the Convention's obligations and so changes will be relatively minor to existing policies. The Bill will:

- enable enforcement agencies to require specific communications to be preserved by carriers and carriage service providers to prevent the loss of evidence
- ensure Australian agencies are able to obtain and disclose telecommunications data and stored communications for the purposes of a foreign investigation
- provide for the extraterritorial operation of certain offences in the TIA Act
- amend the computer crime offences in the Criminal Code so that they have adequate scope, and
- create confidentiality requirements in relation to requests to access telecommunications data.

No changes to State or Territory laws are necessary to facilitate accession.

Responses to concerns raised in Report 116

I note that the Committee's Report highlights particular concern in relation to potential impacts on Australian law in acceding to the Convention. These were the protection of individual rights and privacy and impacts on the validity of State and Territory laws.

Individual Rights and Privacy Protections

I note that submitters raised concerns as to whether accession to the Convention will result in legislation inconsistent with existing policy frameworks in relation to privacy.

I am confident that the Bill is consistent with privacy policies in Australia. The Bill does not institute a data retention regime, in which all data generated by a carrier or carriage service provider is required to be retained for a prolonged period.

The preservation regime in the Bill is targeted to communications that are identified in relation to a person, or telecommunications service and are relevant to an investigation. Communications can be preserved for domestic purposes for a maximum of 90 days and for a foreign purpose until the outcome of a mutual assistance request is finalised.

The preservation notice must be revoked at any point before 90 days where an agency realises that the communications are no longer relevant to the investigation, or a warrant for their access is executed. The *Privacy Act 1988* will apply in relation to whether that information should be deleted. In the event that the notice is revoked at a point where the carrier or carriage service provider still needs the information for a lawful purpose under the Privacy Act, the information must be deleted when that purpose no longer exists.

The communications that are preserved will only be accessible to domestic agencies by way of a stored communications warrant and in relation to communications preserved for a foreign purpose, access must also be authorised by me.

Further, the Bill will enhance privacy protections by requiring that all authorisations to disclose telecommunications data are to be made by agencies only after considering the privacy implications of making such a disclosure. Currently, the TIA Act has no such requirement for authorisations to disclose data already in existence.

The Bill does not lower any thresholds that already exist in the TIA Act in relation to access to these powers. Agencies will also need to keep records of each authorisation made and report to the Parliament on the number of authorisations they make each year.

Jurisdiction

The Committee's Report also indicated concerns regarding the possible impact on State and Territory laws. As the Committee has been previously advised, I am confident that the Bill will not override the validity of any State or Territory laws.

The Bill amends Part 10.7 of the Criminal Code, so that offences in that Part relate to any computer offence, rather than in circumstances which fall under existing Commonwealth powers, such as in relation to crimes committed by way of a carriage service.

Despite this expansion, the Bill retains existing savings provisions in the Criminal Code so that it is clear that in the event of any inconsistency, State and Territory laws will remain valid.

The action officer for this matter in my Department is Greg Sadler who can be contacted on (02) 6141 3470.

Yours sincerely

Robert McClelland