SUBMISSION NO. 11

Premier of Western Australia

Our ref: 24-85035/AJ

Senator Catryna Bilyk
Chair
Joint Select Committee on Cyber-Safety
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: jscc@aph.gov.au

Dear Senator

Thank you for your letter of 7 July 2011 requesting a submission on the Cybercrime Legislation Amendment Bill 2011 (Cth), which proposes to implement, via Commonwealth legislation, the Council of Europe Convention on Cybercrime. This Commonwealth Bill was second read by the Commonwealth Attorney-General in the House of Representatives on 22 June 2011.

In relation to this matter, you have particularly requested comments on the issue of "whether the removal of restrictions from the Commonwealth computer offences (Part 10.7 *Criminal Code*) might give rise to any questions of constitutional validity of State offences".

Accordingly, the following comments are provided to your Committee.

First, the Commonwealth Bill proposes to amend several Commonwealth statutes, including the *Telecommunications (Interceptions and Access) Act 1979* (Cth); the *Telecommunications Act 1997* (Cth); the *Mutual Assistance in Criminal Matters Act 1987* (Cth); and the *Criminal Code Act 1995* (Cth). In particular, this submission relates to the proposed amendments to the Commonwealth *Criminal Code* and the extension of Commonwealth computer offences.

Second, as you may be aware, some jurisdictions, for example Victoria, have enacted model computer offences developed by the Standing Committee of Attorneys-General in 2001. However, Western Australia has not enacted those model offences because, in the view of this State, the computer offences provisions in section 440A of the WA *Criminal Code* are more appropriate, flexible and sufficiently comprehensive.

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Third, the Commonwealth Attorney-General has suggested that the amendments to the *Criminal Code Act 1995* (Cth) in the 2011 Commonwealth Bill will be consistent with the 2011 model provisions. He has also indicated that these proposed amendments to Commonwealth offences to enable accession to the above Convention will not "significantly affect" State laws. That is, the Commonwealth Attorney-General has conceded that these Commonwealth amendments will, to some degree, "affect" State laws. This is important, not only because criminal law has been and remains the primary responsibility of the States, but also because of assurances (detailed below) from the Commonwealth regarding the "savings" of State laws.

Fourth, the extension of Commonwealth laws is revealed in the Commonwealth Attorney-General's second reading speech, which states:

> "Computer crimes in Australia are set out in Commonwealth as well as state and territory law.
>
> Commonwealth offences are currently limited to circumstances in which a carriage service has been used or Commonwealth computers or data are involved in the commission of an offence. For situations not covered by Commonwealth laws, state and territory offences are used by law enforcement agencies.
>
> In order to ensure full compliance with convention requirements, the Criminal Code will be amended to remove the current limitations on Commonwealth computer offences. The amended powers will be supported by the external affairs power, Australia implementing this legislation as part of its compliance with that international treaty obligation."

That is, the proposed new Commonwealth computer offences (based upon an international Convention and the external affairs power) will noticeably extend further than their current operation, reach and extent. This is important in relation to the matters below relating to the "savings provisions" and direct inconsistency between Commonwealth and State computer offences.

Fifth, as you may be aware, "savings provisions" in Commonwealth legislation are inserted to overcome the possibility that the Commonwealth legislation will be construed or interpreted to cover the field and invalidate State legislation within that field. Consequently, section 476.4 in Part 10.7 of the *Criminal Code Act 1995* (Cth) is a "savings provision". In this regard, the Commonwealth Attorney-General's second reading speech stated:

> "In the event of any inconsistency between Commonwealth and state or territory laws, the savings provisions contained in the Criminal Code will ensure the validity of those state and territory laws".

You will note that the Commonwealth Attorney-General refers to "any inconsistency". However, with respect to direct inconsistency, this is not the case.

"Savings provisions", including section 476.4, do not overcome direct inconsistency between Commonwealth and State legislation. Therefore, despite "savings provisions", under section 109 of the Commonwealth Constitution, where there is a direct inconsistency between Commonwealth and State computer offences, State offences will be invalid.

This is important because the High Court has recently, in the *Dickson* case (2010, HCA 30) has extended the scope of what might be considered a direct inconsistency between Commonwealth and State provisions. Given that this broader application of direct inconsistency was enunciated by *Dickson* on 22 September 2010, there is still a good deal of uncertainty in relation to the law concerning the overlapping of State and Commonwealth offences. In addition, there is currently further litigation on these matters before the High Court in *Momcilovic v Queen*.

Accordingly, it would be much more appropriate if the above proposed amendments to the Commonwealth computer offences in the *Criminal Code Act 1995* (Cth) were not proceeded with, especially where there are existing State computer offences, until this area of constitutional law is clarified; for example, when the High Court delivers its decision in the *Momcilovic* case. As indicated above, the reason is that the reliance by the Commonwealth Attorney-General on section 476.4 would be of no effect if there was a direct inconsistency between the proposed Commonwealth offences and existing State offences. The result would be that the State offences would be invalid.

Sixth, prior to the introduction of the Commonwealth Bill, these matters have been the subject of correspondence, for example, between the Commonwealth Attorney-General and the Victorian Attorney-General, and WA officers and Commonwealth officers.

In addition, Western Australian officers raised the issue of Australia's proposed reservation to Article 22(2) of the Convention to ensure that Convention obligations will be complied with through a combination of State and Commonwealth laws. In this regard, the National Interest Analysis [2011] ATNIA 9, at paragraph 36, indicates that Australia proposes to make a reservation in relation to Article 22(2) of the Convention and that "Australia intends to comply with Convention obligations through a combination of Commonwealth and State laws". This reinforces the need to wait until the *Momcilovic* decision and to ensure that there is no direct inconsistency between State and Commonwealth computer offences.

Seventh, such inconsistency would invalidate State computer offences which were, for example, stronger, more far-reaching, and comprehensive than the Commonwealth offences. It may even prevent a State Parliament from enacting new offences which were thought to be required to improve existing State offences. That is, given the use of the external affairs power, and the provisions of the Cybercrime

Convention, combined with the invalidation of State laws by inconsistent Commonwealth offences, Australia, via State legislation, may not be able to take an even stronger stance in relation to criminal offences involving cybercrime. A similar example of this effect, albeit in the field of racial discrimination, was the invalidation of New South Wales' anti-discrimination legislation for inconsistency with the Commonwealth *Racial Discrimination Act 1974* (Cth) as illustrated by the High Court cases of *Viskauskas v Niland* (1983) 153 CLR 280 and *Metwally v University of Wollongong* (1984) 158 CLR 447).

Finally, it has been noted that the Commonwealth Attorney-General's second reading speech indicated that:

> "To date, over 40 nations have either signed or become a party to the convention, including the United States, United Kingdom, Canada, Japan, South Africa and others."

Although non-Council of Europe countries can become signatories to this Convention, it is noticeable that of the "over 40 nations", 38 of these are European. Significantly, the People's Republic of China is not within the group of non-Council of Europe countries to have become a signatory.

For all of the above reasons, the Commonwealth Government should not progress this Commonwealth legislation until there has been clarification of the constitutional issues and further discussions to ensure that no State computer offences are rendered invalid.

Yours sincerely

Colin Barnett MLA
PREMIER

22 JUL 2011