Additional Comments—Senator Scott Ludlam, Australian Greens

The Cyber-Safety Committee has again proven its worth in engaging with the complex and difficult issues pertaining to online security by providing useful analysis and recommendations that validate and address some concerns of experts and stakeholders.

The Australian Greens continue, however, to believe that there are fundamental flaws in the Cybercrime Bill and the controversial European Convention on Cybercrime that it seeks to implement.

The Greens regret to agree with submissions and evidence objecting to the fast tracking of this Committee process. Setting five business days for civil society organisations that largely rely on volunteer labour to provide input, is unfair. A seven day extension, while welcome, is not good enough given the importance of the matters in question.

With this Bill the Attorney General's Department yet again seeks to fast track legislation, which yet again extends well beyond its nominal purpose, to yet again encroach upon on the civil liberties of Australians in the name of law enforcement and counter-terrorism. The Attorney General's track record in this regard is demonstrated through numerous amendments to the Telecommunications Act, Intelligence Services Amendments, and the woefully inadequate "reforms" the government undertook to the extreme Howard anti-terrorism laws. Once again with this Bill, a major expansion of the surveillance state is occurring with entirely inadequate justification.

Some examples of the Attorney General overreaching well beyond the requirements of the Convention:

- The preservation regime in this Bill provides for ongoing collection and retention of communications, which is not provided for by the Convention. The Ombudsman and several other submitters argued that the ongoing preservation of communications amounts to an interception, which is

governed by a specific interception warrant regime with stricter thresholds and more reporting and oversight.

- The Bill extends preservation notices to ASIO, which is not a requirement of the Convention but has been done automatically on the basis of 'interoperability' with law enforcement agencies. This was acknowledged in the report but not commented upon. ASIO's ongoing mandate creep and the unjustified expansion of its powers are worthy of comment.

- Under the Convention, police may decline to pass traffic data where the offence is a political offence or is otherwise inconsistent with fundamental values and human rights standards. This is not reflected in the Bill. The Convention does not require States parties to lower their own standards.

- The Bill allows the AFP to require a carrier(s) to preserve traffic data on an ongoing basis on behalf of a foreign country in response to a mutual assistance request. The ongoing preservation of traffic data is not provided for in the Convention.

- The retention of the traffic data may be for up to 180 days, although this is not required by the Convention. The extended period is said to accommodate the slowness of mutual assistance processes. The Australian Privacy Foundation argued that 180 days is excessive and twice that required by the Convention.

The following improvements should be made to the Bill

- The Greens do not believe Recommendation 6 goes far enough to uphold Australia's opposition to the death penalty. The disclosure of telecommunications data to a foreign country in relation to an offence that carries the death penalty should be refused in the absence of an assurance that the foreign country that the death penalty will not be imposed or carried out. As it stands, Recommendation 6 leaves the door open for Australian law enforcement agencies to directly or inadvertently support an overseas prosecution which would lead to an execution. This is completely unacceptable.

- The Ombudsman has asked that his powers to inspect and audit compliance with the preservation regime be clarified to ensure he can check compliance with the Act and not mere record keeping. This request was not dealt with by the Committee but should be addressed through amendments when the Bill is debated.

- Preservation of data is a new mechanism. It will require carriers to retain communications and traffic data at least until a stored communication warrant is obtained. There is no direction in the Bill on how carriers should handle such data or the interface standards between the industry and law

enforcement agencies. The Explanatory Report to the Council of Europe Convention on Cybercrime makes a point of stating that the cybercrime treaty is not about retention but about targeted law enforcement. In May 2011 the European Data Protection Supervisor issued an opinion concluding that the European directive on data retention is incompatible with the EU Charter of Fundamental Rights (art. 7 and 8).

- The Bill allows the AFP to pass traffic data obtained for a domestic investigation directly to foreign counterparts without the need for any request. Thus a secondary disclosure may be proactive. The is no restriction on the number or type of countries that may receive traffic data from the AFP.

- There is no independent oversight of compliance with police authorised disclosures, and none envisaged in relation to disclosure to foreign counterparts. It may be difficult to make oversight meaningful in this context. However, it is possible that authorisations could be reviewed from a fundamental human rights perspective, which the Greens believe is preferable.

- The European Convention exhaustively defines traffic data. In contrast, the Bill relies on the principal Act and does not use Convention terminology. It is impossible therefore to say whether 'telecommunications data' in the TIA Act (which is defined rather indirectly as 'non-content data') is the same at the Convention definition of 'traffic data'. This does not present any difficulty for accession to the Convention. It does present a problem for citizens who wish to know what the law is.

- The Australian Privacy Foundation argued that the preservation regime in the Bill (Chap 3 TIA Act) does not require law enforcement agencies to make a decision as to whether telecommunications data (as opposed to content of communications) may be sufficient. It is possible to amend the Bill to require them to make that decision. In practice, however, it is likely that police will go for telecommunications data if it is sufficient because there are no warrant requirements (Chapter 4 of the TIA Act). A statutory signal would make privacy advocates more confident there will be grounds in the future for holding law enforcers to account if they exceed 'necessity and proportionality test'. Such a provision would provide a basis for argument in later proceedings.

- The threshold offence is determined by reference to the foreign country's law and does not require dual criminality as a precondition either to mutual assistance (discretionary) or for issuing the stored communications warrant. The Australian Privacy Foundation recommended that proposed section 5EA incorporate a dual criminality test, to at least ensure there is some comparable offence in both Australia and the foreign country. This

was not picked up by the Committee but is worthwhile as a secondary protection that can be exercised by the 'issuing authority'.

The Australian Law Reform Commission has recommended that the Telecommunications Interception Act be reviewed in its entirety – a proposition strongly supported by the Greens. The TIA Act has been subject to numerous amendments. It is technically difficult and would benefit from 'post enactment review' by a parliamentary committee or independent review by the ALRC. The more technically difficult an Act is the more likely there is to be uncertainty about obligations, mistakes and misinterpretation. Telecommunications is supposed to be part of the second stage review of Australian privacy law but Government's progress has been delayed. Perhaps the Attorney's appetite for undue haste could be exercised in this direction.

The Australian Greens believe that the Committee has proposed substantive amendments that the government must act upon. These additional comments have proposed further improvements to the Bill. It is our strong view that the government not proceed until these combined amendments have been drafted and thoroughly debated.

Senator Scott Ludlam