New Zealand Law Society
Te Kāhui Ture o Aotearoa

Budapest Convention and Related Matters Legislation Amendment Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

28 November 2024

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Budapest Convention and Related Matters Legislation Amendment Bill (**Bill**). The Bill seeks to facilitate accession by New Zealand to the Council of Europe Convention on Cybercrime or 'Budapest Convention' (**Convention**). It contains amendments to the Mutual Assistance in Criminal Matters Act 1992 and the Search and Surveillance Act 2012 to ensure that New Zealand legislation is consistent with the Convention.

1.2 This submission has been prepared with input from the Law Society's Criminal Law and Human Rights and Privacy Committees.[1]

1.3 The Law Society **does not request a hearing** on this submission.

2 General comment

2.1 The Law Society commends the intention of the Bill to enable New Zealand's accession to the Convention. There has been extensive consultation on and wide support for the proposal.[2] However, some adjustments are needed, in the Law Society's view, to further the Bill's aim of "align[ing] New Zealand's legislation with the Budapest Convention in a way that is consistent with human rights obligations".[3]

2.2 These primarily relate to further safeguards that would be advisable for "preservation directions", new powers which the Bill seeks to introduce to the Search and Surveillance Act 2012. Providing for preservation directions would be the Bill's most significant proposed change to New Zealand law. The Law Society has concerns regarding the following matters:

(a) the lack of independent approval for preservation directions.

(b) the lack of independent review of a decision to issue a preservation direction, a concern that is heightened if the power to issue directions remains with the Commissioner of Police.

(c) the unnecessarily long maximum duration of preservation directions.

(d) gaps in requirements to give notice that a preservation direction has ceased; and

(e) overbroad confidentiality provisions, including (in the case of mutual assistance) requirements that go further than needed to comply with the Convention.

2.3 The submission raises a further question regarding the drafting of an offence provision (clause 62, which inserts new section 254 to the Crimes Act 1961).

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1 More information about the Committees is available on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/.

2 See generally Tim Cochrane "Accession to the Budapest Convention by Aotearoa New Zealand: Data Preservation, Mutual Legal Assistance, and Digital Privacy" in James Mehigan and Christian Riffel (eds) (2021) 19 *New Zealand Yearbook of International Law* 32 (**Cochrane, 2021**).

3 Explanatory note to the Bill.

3 Preservation directions: background and privacy implications

3.1 A preservation direction is an interim measure before a related application is made for a production order, to ensure that evidence is preserved pending the making of the production order. The Bill proposes that the Commissioner of Police (**Commissioner**) can require a person who possess or controls documents to retain those documents before a production order has been made.[4]

3.2 According to the Bill's explanatory note, the establishment of preservation directions would align New Zealand law with the Convention's articles 16 and 17, which cover the expedited domestic preservation of stored computer data and preservation and disclosure of traffic data; and articles 29 and 30, which address the same topics in the context of mutual assistance. As such, the Bill's definition of "document" includes computer data, a computer program, a record of traffic data, and the record of the content of a telecommunication.[5]

3.3 The Bill envisages that the Commissioner will issue preservation directions to support both domestic and overseas criminal investigations:

(a) For domestic investigations, the Commissioner can issue directions if the enforcement officer "is about to apply" for a production order or "has applied" for one but is waiting for a determination.[6] There must be reasonable grounds to believe the documents are "particularly vulnerable to loss or modification"; and other criteria must also be met that mirror the requirements for production orders (including reasonable grounds to believe that an offence has been, is being, or will be committed). The maximum duration of a preservation direction for domestic investigations is 20 days, without the possibility of renewal, or until a pending application for a production order has been determined.[7]

(b) For mutual assistance matters, the Commissioner is required to issue a preservation direction when a foreign enforcement authority requests a direction on the basis of an ongoing investigation or extant criminal proceedings and a mutual assistance request is "in progress" (unless doing so would prejudice New Zealand's sovereignty, security, or national interests, or the request relates to offences of a political character).[8] Unlike for domestic investigations, the documents need not be vulnerable to loss or modification, but only "relevant to the investigation or proceeding".[9] For mutual assistance matters, a preservation direction's maximum duration is 150 days, but the direction can be renewed up to four times to a maximum total of 870 days.[10]

3.4 Preservation directions interfere with the right to privacy protected under article 17 of the 1966 International Covenant on Civil and Political Rights (ICCPR) and domestically

[4] Clause 18, new section 79F of the Search and Surveillance Act 2012 (**SSA**).
[5] Clause 11, new s 70 SSA; see also clause 35, new section 42A to the Mutual Assistance in Criminal Matters Act 1992 (**MACMA**).
[6] Clause 18, new s 79E SSA.
[7] Clause 18, new s 79I SSA.
[8] Clause 19, new s 88D SSA.
[9] Clause 19, new s 88B SSA.
[10] Clause 19, new ss 88G and 88K SSA.

through section 21 of the New Zealand Bill of Rights Act 1990 (**Bill of Rights**).[11] In practice, as the Ministry of Justice has noted, preservation directions "are most likely to be issued to telecommunications companies and data storage providers".[12] These businesses deal with vast quantities of customer data, much of it containing deeply personal information. As preservation directions can only be issued when the data at issue is "particularly vulnerable to loss or modification", the effect of a business being subject to a preservation direction is likely to be that data is retained containing personal information that the business likely would have otherwise deleted. Articles 16, 17, 29, and 30 of the Convention were drafted with the goal of preserving data vulnerable to loss in mind.[13]

3.5 The Human Rights Committee, the official body of independent experts created by the ICCPR to monitor the implementation of that treaty, has made clear that restrictions to ICCPR rights must conform to the principles of necessity and proportionality along broadly similar lines to section 5 of the Bill of Rights. States "must demonstrate [the restrictions'] necessity and only take such measures as are proportionate to the pursuance of legitimate aims".[14] Restrictive measures "must be the least intrusive instrument amongst those which might achieve their protective function".[15] The Law Society's recommendations relating to independent oversight and clarifying and strengthening some of the Bill's requirements are intended to support this objective.

4 Safeguards on preservation directions

Independent approval

4.1 In the Law Society's view, independent approval should be incorporated into the preservation direction regime as an appropriate and necessary safeguard, both in respect of domestic investigations and mutual assistance matters.

4.2 The Bill as presently drafted proposes that the Commissioner of Police would be responsible for issuing a preservation direction. The rationale is that directions will often need to be issued quickly. However, the Law Society considers that a judge or another authorised person such as a justice of the peace (being the same independent authorities that the Search and Surveillance Act 2012 charges with issuing production orders) should make preservation directions. A prescribed statutory timeframe could assist to ensure that steps can be taken swiftly where required.

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11 See the variety of domestic and international sources cited for this proposition in Cochrane, 2021 at 53 including *R v Cox* (2004) 21 CRNZ. Regarding privacy implications of the proposals more generally, see Office of the Privacy Commissioner "Privacy Commissioner's submission on New Zealand accession to the Budapest Convention on Cybercrime" (25 September 2020).

12 Ministry of Justice "What is a data preservation scheme?" (public consultation on a proposal for New Zealand to join the Budapest Convention on Cybercrime, 15 July 2020) at 2.

13 See Council of Europe *Explanatory Report to the Convention on Cybercrime* at paras 149–169 and 282–292, https://rm.coe.int/16800cce5b

14 Human Rights Committee, *General Comment No 31*, CCPR/C/21/Rev 1/Add 13 (26 May 2004) at para 6.

15 Human Rights Committee, *General Comment No 27*, CCPR/C/21/Rev 1/Add 9 (2 November 1999) at para 14; *General Comment No 34*, CCPR/C/GC/34 (12 September 2011) at para 34. See the Convention, art 15, which refers to the ICCPR.

4.3 Independent approval guards against the potential for abuse when the same entity exercising a power is also responsible for authorising that exercise of power. Approval independent of the law enforcement agencies requesting directions would be an appropriate safeguard to ensure that those agencies use preservation directions for the purposes for which they are designed: as provisional measures to preserve data crucial to an investigation that may otherwise be lost.

4.4 It would also be consistent with the Convention. Articles 16 and 17 of the Convention are subject to article 15,[16] which requires each state party to ensure that powers and procedures created pursuant to the Convention "are subject to conditions and safeguards under [the state party's] domestic law, which shall provide for the adequate protection of human rights and liberties" including in terms of the ICCPR "and other applicable international human rights instruments".[17] Article 15 specifies that that "[s]uch conditions and safeguards, shall, as appropriate in view of the nature of the power or procedure concerned, inter alia, include judicial or other independent supervision".[18]

4.5 The Bill's departmental disclosure statement records that "[t]he Privacy Commissioner has raised concerns about provisions in the Bill which grant the Commissioner of Police the power to issue preservation directions and responsibility for reviewing preservation directions issued" but that these concerns could not be resolved "without undermining the policy intent, which is that preservation directions should be able to be issued quickly."[19] The Law Society appreciates this challenge, but considers that there are practical ways to overcome it. Independence need not entail a lack of necessary haste. As the Privacy Commissioner considered, "[d]elegation of the preservation [direction] power to relevant Chief Executives is an inappropriate delegation of a power to override New Zealanders' privacy rights. Such an authority more appropriately sits with the judiciary."[20]

Provision for independent review

4.6 The Bill also contains a right of review for preservation directions.[21] Because the directions are confidential, the right to request a review is limited to the person subject to the direction. If a review is applied for, the Commissioner must delegate responsibility for the review.[22] Although the Commissioner may choose to delegate this responsibility to an independent adjudicator, there is no requirement to do so.

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16 Convention, arts 16(4) and 17(2).

17 Convention, art 15(1).

18 Convention, art 15(2). See also, for example, *Podchasov v Russia*, App No 33696/19, Judgment, European Court of Human Rights (13 February 2024) at para 62: "The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of [Article 8 of the European Convention, on the right to respect for private and family life]. The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes."

19 Ministry of Justice "Departmental Disclosure Statement" at 3.5.1.

20 Privacy Commissioner, 2020 at 2.

21 Clauses 18 and 19, new ss 79J and 88O SSA.

22 Clauses 18 and 19, new ss 79K and 88P SSA.

4.7 In the Law Society's view, reviews of decisions to issue directions should be carried out independently, for the same reasons that independent approval should be required for the issuance of a preservation direction. If the Commissioner of Police is to retain the approval power, the importance of this recommendation is heightened.

Reduced maximum duration of preservation directions

4.8 Where preservation directions are sought for a domestic investigation, the Bill sets the maximum duration of the directions at 20 days.[23] However, if an application for a production order is made within those 20 days, a direction can continue in force indefinitely, for a longer period, until the application is determined.[24] In the Law Society's view, an initial maximum duration of 20 days may be longer than is necessary to achieve the Bill's legitimate aims.

4.9 The Bill requires that a preservation direction is only issued if the applicant "is about to apply" (or "has applied") for a production order. A 20-day maximum suggests that there are circumstances in which "about to apply" could stretch to 20 days, which is inconsistent with the plain and ordinary meaning of the term "about to" and could inappropriately encourage law enforcement officials to change their practice of applying for production orders as quickly as possible. The Law Society suggests that a period significantly shorter than 20 days could be advisable, with the same proviso that once an application for a production order has been made, the direction would remain in force until that application was determined.

4.10 For preservation directions for mutual assistance matters, the maximum duration is significantly longer: 150 days initially, with the potential for up to four renewals of 180 days each, to a total of 870 days.[25]

4.11 In the Law Society's view, this goes significantly beyond what is needed or what is desirable to implement the Convention. The Council of Europe's commentary on article 29 of the Convention notes that "the process of executing a formal mutual assistance requests … may take weeks or months".[26] As such, article 29(7) requires that requests for expedited preservation of stored computer data "shall be for a period not less than sixty days, in order to enable the requesting Party to submit a request for the search or similar access, seizure or similar securing, or disclosure of the data".[27] In relation to article 29, the commentary observes "[p]reservation is a limited, provisional measure".[28] In the Law Society's submission, a limit of 60 days would enable New Zealand to adhere to its international obligations under the Convention. If mutual assistance requests are taking more than two years to be executed under New Zealand's existing processes, the Law Society suggests that rather than embedding the potential for lengthy delay into law, it would be advisable to amend those processes to enable timelier execution.

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23 Clause 18, new s 79I(1) SSA.
24 Clause 18, new s 79I(2) SSA.
25 Clause 19, new ss 88G(1) and 88K SSA.
26 Council of Europe *Explanatory Report to the Convention on Cybercrime* at para 282.
27 Convention, art 29(7).
28 Council of Europe *Explanatory Report to the Convention on Cybercrime* at para 282.

More specific notice requirements

4.12 The Bill imposes requirements relating to notification of and confidentiality concerning the existence of preservation directions. The Law Society has concerns regarding gaps in the provisions for notice requirements, which it would be desirable to clarify to lessen the chances of unnecessary data preservation.

4.13 The Bill contains the following requirements:

(a) If an application is made for a production order in relation to all or any of the documents described in a preservation direction, notice of the production order application must be given to the person affected by the preservation direction as soon as practicable after the application has been made.[29] The notice given is to specify that the preservation direction continues in effect until the application is determined and is revoked when it has been determined.

(b) For domestic investigations, if an application for a production order is refused, the preservation direction (if still in force) is revoked and the Commissioner of Police must give written notice of the revocation to the person who is subject to the direction.[30] For mutual assistance matters, the Commissioner must likewise give written notice to the person subject to the preservation direction if the direction is revoked or partially revoked.[31]

4.14 However, the Bill does not require this to occur within any specified time. Although by inference it may be understood that the Commissioner should give notice as soon as practicable, the Law Society suggests that clarity would help lessen the chances of unnecessary data preservation. The Commissioner could be required, for example, to provide written notice "as soon as practicable, and in any event, no later than 24 hours after the direction has been revoked". The notice should specifically state that the person is now legally permitted to delete, erase, or modify the documents the preservation direction covered, unless another law requires otherwise.

4.15 The Bill also does not address circumstances in which a preservation direction has been issued, but law enforcement agencies ultimately do not apply for a production order. As such, there are no notice requirements related to this outcome. It may be that it has been considered an unlikely outcome (given the preservation direction pre-requisite, at least in the domestic context, that a production order application has been or is about to be made). Regardless, the Law Society suggests that the Bill could specify that if an internal decision is taken not to apply for a production order while a preservation direction is in force, the direction should be considered revoked and notice given to the person subject to it. Without such a requirement, the risk that data is preserved unnecessarily is high, especially for preservation directions for mutual assistance matters that have expiry dates months into the future.

29 Clause 18, new s 79I(4) SSA.

30 Clause 18, new s 79I(6) SSA.

31 Clause 19, new s 88N(3) SSA; see also new s 88W(2) which requires notice "[a]s soon as practicable after the preservation direction ceases to apply in relation to particular documents or classes of documents".

Confidentiality provisions

4.16 Anyone subject to a preservation direction is required to keep the direction's existence confidential until they receive notice from authorities that disclosure is permissible.[32] There are exceptions to providing such notice, allowing confidentiality to continue to be enforced.[33] In regard to these provisions, the Law Society has three concerns:

(a) The drafting of, and consequent broad discretion conferred by, the exceptions (which mirror conclusive reasons for non-disclosure in the Official Information Act, without however making equivalent provision for independent review).

(b) There is presently no general requirement to inform those whose data was retained that they have been the subject of a preservation order. Where confidentiality requirements have ceased, this would be desirable.

(c) Both by criminalising disclosure and in general, the Bill imposes more stringent confidentiality requirements than the Convention requires.

The drafting of the exceptions and absence of review

4.17 In domestic investigations:

(a) The chief executive of the relevant law enforcement agency must give the person subject to the preservation direction written notice once related criminal proceedings have commenced or related investigations have been discontinued.[34] Upon receiving notice, the person who was subject to the preservation direction is no longer required to keep the direction confidential. Without such notice, disclosing the existence of the direction (subject to limited exceptions) is a criminal offence.[35]

(b) However, the requirement to give notice is subject to several exceptions. The relevant chief executive is not required to give the person such notice if they are satisfied on reasonable grounds that the disclosure thereby enabled would "endanger the safety of any person" or would prejudice "the supply of information to the law enforcement agency", "any international relationships of the law enforcement agency", "the maintenance of law", or "the security or defence of New Zealand".[36]

4.18 These same exceptions are also relevant in mutual assistance matters. In the mutual assistance context, a person is no longer subject to criminal sanction for disclosure once the direction expires or is revoked. However, relevant authorities can give notice that the confidentiality requirement continues to apply, on the same grounds that allow for exceptions to notice in the context of domestic investigations.[37]

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32 Clause 18, new s 79Q(4)(g) SSA.
33 Clause 18, new s 79R SSA.
34 Clause 18, new s 79R(1)(a)–(b) SSA.
35 Clauses 18 ad 19, new ss 79Q and 88U SSA.
36 Clauses 18 and 19, new ss 79R(2), 88W(3) and 88V(4) SSA.
37 Clause 19, new ss 88V(2) and 88W(3) SSA.

4.19 In the Law Society's view, the wide discretion allowed about whether confidentiality should still apply are a vulnerability in the Bill. Conferring a wide discretion to permanently prohibit disclosure carries risks that the exceptions could be misused.

4.20 In saying this, it should be noted that the grounds for doing so mirror the conclusive grounds for non-disclosure provided for in the Official Information Act 1982 (**OIA**), if anything, setting a marginally higher test.[38] The Law Society agrees that given such grounds are conclusive under the OIA (in the judgement of the relevant Minister or chief executive), it is accordingly difficult to see in principle why they should not be equally conclusive in the context of the Bill. However, under the OIA the grounds for decision will be notified, and independent review of the decision is provided for via the Ombudsman.

4.21 The present context, by contrast, does not enable review — both because the Bill omits provision for any review of these decisions and further, for domestic investigations, there is no equivalent trigger point to the OIA in the form of notice of the decision. If the chief executive judges it appropriate not to give notice, confidentiality will simply remain in force.[39] By contrast, in the mutual assistance context, relevant authorities must give notice that although the direction has expired or been revoked, confidentiality requirements remain extant.

4.22 The Law Society considers that the most desirable approach would be to include safeguards in the Bill comparable to those in the OIA. To achieve this, two changes are recommended:

(a) Framing, for domestic investigations, a provision equivalent to the mutual assistance approach, which requires notice to be positively given of a continuing confidentiality requirement on stated grounds.

(b) For both domestic investigations and mutual assistance, this would then enable provision to be made for independent review, perhaps by the same decision-maker as the Law Society has recommended should be provided for in relation to the original preservation direction. Providing for such a review can be expected to facilitate greater accountability and encourage rigour by the relevant authorities in their decision-making about continuing confidentiality.

4.23 More generally, the Committee may wish to explore with officials the policy reasons underlying different approaches to confidentiality that will exist in different parts of the Search and Surveillance regime if the Bill proceeds as proposed. For example:

(a) For production orders, there appears to be no confidentiality requirement equivalent to the new requirements to be introduced for preservation directions and surveillance device warrants.[40]

[38] The wording, while not identical, is not materially different in the Law Society's view: compare "[g]ood reason for withholding official information exists, for the purpose of section 5, if the making available of that information *would be likely to* …" (Official Information Act 1986, s 6) with "the chief executive is not required to give notice *if satisfied on reasonable grounds that* disclosure that the direction has been issued or of the information contained in the documents concerned *would* …" (Bill, cls 18 and 19, new ss 79R(2), 88W(3) and 88V(4) SSA).

[39] Clause 18, new s 79R(2) SSA.

[40] Search and Surveillance Act 2012, pt 3, subpt 2.

(b) The process differs again in respect of confidentiality of surveillance device warrants (proposing, in that context, that an application may be made by the person subject to confidentiality for the prohibition on disclosure to be lifted, which can be declined on the same grounds discussed above).[41]

4.24 As a general point, optimising consistency within the regime would seem desirable, and the Committee may wish to examine the rationales for these different approaches.

Notice to the person whose information has been retained

4.25 Once the person subject to the preservation direction receives notice that they may disclose its existence, best practice suggests those whose data was retained should also be informed about the preservation direction through written notice. Other than in the circumstance of material obtained under a production order (or other seizure) that is to be sent out of New Zealand, where the Bill provides for written notice to 'notifiable persons',[42] the Bill appears to contain no provisions of this kind.

Criminalising disclosure exceeds Convention requirements

4.26 The Bill's requirements in respect of confidentiality and provisions criminalising disclosure go further than the Convention requires. For domestic investigations, the Convention requires only that states parties "adopt such legislative and other measures as may be necessary to oblige the custodian or other person who is to preserve the computer data to keep confidential the undertaking of such procedures for the period of time provided for by its domestic law".[43]

4.27 While criminalisation may be an effective, expedient method, the Law Society notes that in respect of mutual assistance matters the Convention does not in fact require states parties to put in place measures requiring confidentiality on the part of persons subject to preservation directions. Given the rights-limiting nature of criminalisation and without evidence that foreign countries routinely expect confidentiality, it is hard to discern the objective of criminalisation for disclosure of preservation directions in mutual assistance matters. The Law Society urges reconsideration of the choice to criminalise disclosure in circumstances in which New Zealand's international obligations do not require it.

5 Dealing in or possessing software or other information for committing crime

5.1 The Bill amends various offence provisions contained in the Crimes Act 1961. These include a proposed new section 254 (dealing in or possessing software or other information for committing crime), which, while generally recreating the effect of section 251, ensures more complete alignment with article 6 of the Convention.[44]

5.2 The new section 254 applies more widely than other provisions in the Bill, in that it applies to software which can be used to commit any crime, not merely crimes dealing with dishonesty offences. It could, for example, apply to software designed to allow

[41] Clause 21, new sections 179A and 179B.
[42] Clause 37, new s 49A MACMA.
[43] Convention, art 16(3).
[44] Clause 62.

someone to gain access to a computer-controlled security camera system to access intimate video footage (an offence under section 216H of the Crimes Act). This extension does not seem objectionable.

5.3 In one respect, the new section may benefit from clarification. Section 254(3) is an offence of wide potential ambit. It provides:

> A person commits an offence if the person—
>
> (a) possesses any software or other information that would enable the person to access a computer system without authorisation; and
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> (b) intends to use that software or other information to commit an offence.

5.4 Almost any computer professional will have "software or other information" that could enable access to a computer system without authorisation. Subsection (3)(b) provides the safeguard against unduly wide criminal liability.

5.5 However, there may be potential concerns with the use of the phrase "would enable the person to access a computer system". As it reads, it appears to require the prosecution to show that the software or information would allow the defendant to *successfully* access *any* computer system. On its face, this could include a system to which the defendant had authorised access if the defendant intended to commit an offence via that authorised access — such as sending threatening messages by e-mail. That would appear to be well outside the aims of the Bill. On a literal reading, no offence would be committed where either the software could not in fact provide access to any system (though it was intended to do so and was designed to do so), or the defendant had the software but not the skills to use it effectively to access any offence.

5.6 The Committee may wish to consider and take advice on whether this was the intended extent of liability. A further matter for consideration in this regard is the potential for defendants to seek disclosure of information about computer systems' security features to found arguments that the software or information that they had would not enable access to that system. It is highly unlikely that third parties would wish to release relevant information, but not ordering disclosure would or could interfere with fair trial rights. Again, the Law Society draws this to the attention of the Committee, as a matter on which they might want to seek officials' further advice.

Nāku noa, nā

Taryn Gudmanz
Vice President