



**TCF Submission to Justice Committee on the Budapest Convention and Related Matters  
Amendment Bill  
28 November 2024**

**Introduction**

1. Thank you for the opportunity to comment on the [Budapest Convention and Related Matters Legislation Amendment Bill](#) (the Bill).
2. This submission is provided by the New Zealand Telecommunications Forum (TCF). The TCF is the telecommunications sector's industry body which plays a vital role in bringing together the telecommunications industry and key stakeholders to resolve regulatory, technical and policy issues for the benefit of the sector and consumers. TCF member companies represent 95 percent of New Zealand telecommunications customers.
3. The TCF supports the aims of the Budapest Convention and New Zealand's accession to it. We are acutely aware of the increasing number of scams and cyber based crime affecting New Zealanders. Our members are engaged in many activities to help address scams and fraud, and support law enforcement efforts.

**Summary of submission points**

4. The focus of our submission is the obligations the Bill will put on telecommunications companies to assist with data preservation (preservation directions) and produce records of traffic data or content of telecommunications (production orders). We also comment on a proposed change to a key definition in the Telecommunications (Interception Capability) Act.
5. On preservation directions we:
  - a. Support the restriction to documents kept as part of business as usual, the requirement that all requests go through the Commissioner, the absence of

forward looking requirements, and the cap on the number of possible extensions.

- b. Submit that preservation directions should not be available for domestic investigations. This is inappropriate and not necessary for proper accession to the Budapest Convention.
  - c. Recommend the requirement (proposed for the domestic process) that the applicant for a preservation direction has applied or is about to apply for a production order, should also apply for foreign investigations.
  - d. Consider the duration for preservation directions for foreign investigations is too long and recommend the Committee takes further advice on timeframes.
  - e. Note the offence for disclosing that a direction has been made conflicts with privacy obligations for the telecommunications sector.
  - f. Note the uncertainty concerning the range and volume of requests from overseas agencies, and submit that the Minister or the New Zealand Police be given the power to pay reasonable costs to network operators.
7. The Bill also contains a substantive change to a key definition in the Telecommunications (Interception Capability) Act, which has not been discussed with our members. This is to replace the definition of “call associated data” with a definition of “traffic data”. It is not clear what impact this change will have on the obligations of network operators. We consider such a change to domestic legislation unnecessary for the proper accession of the Budapest Convention. It would also create uncertainty, and undue burden on network operators to potentially implement costly and unscoped technical changes to their existing lawful intercept capabilities.

#### **Data preservation directions and telecommunications**

- 8. Clauses 18 and 19 of the Bill make changes to the Search and Surveillance Act to enable enforcement officers to apply to the Commissioner of Police to get a preservation direction (new section 79B refers). Preservation directions are for “documents” which includes computer data, a computer programme, and a record of traffic data or the content of a telecommunication.
- 9. New section 79H states that preservation directions “may require a network operator to preserve a record of traffic data, preserve the content of telecommunications, or produce a record of pathway information only to the extent that the network operator stores the record concerned in the ordinary course of business”.

10. The Bill has a number of sensible clarifications and limitations, which we support.

This includes:

- a. the restriction to records that are stored as part of business as usual (new section 79H)
- b. all requests to network operators going through the Commissioner, with no requirement to work with a multitude of domestic agencies or with international agencies directly (new sections 79B and 88B)
- c. the requirement (currently included for the domestic process) that the applicant for a preservation direction has applied or is about to apply for a production order (new section 79E)
- d. the absence of any forward looking requirements, for example seeking information that might be useful in the future, which would equate to inappropriate defacto monitoring
- e. having a cap on the number of potential extensions (new section 88J)
- f. providing immunity from civil or criminal liability for parties required to execute preservation directions (new section 79T).

11. There are also some problematic aspects of the provisions concerning preservation directions, which we expand on below. These concern the:

- a. application of preservation directions to domestic investigations (we think this is inappropriate and not necessary for proper accession to the Budapest Convention)
- b. duration of preservation directions for foreign investigations (too long)
- c. absence of the connection between preservation directions and production orders for foreign investigations (should be included)
- d. offence for disclosing that a direction has been made (conflicts with privacy obligations).

*Exclude preservation orders for domestic investigations*

12. The 2020 consultation paper said it is unlikely that preservation orders would be applied for by a domestic agency due to the speed a local production order can be obtained. We also note that in urgent cases network operators can be called on to provide assistance. This is enabled under Rule 11 of the Telecommunications Information Privacy Code 2020 (see in particular (1) (f) (g) and (k)).

13. The TCF therefore submits that domestic preservation orders be removed from scope. This will also reduce the risk they are misused and will help address the cost issue we raise later in this submission.
14. We also consider that changes to domestic laws of this nature should be a matter of specific public consultation and debate and should not be inadvertently captured by related legislative change.

*Duration for preservation directions for foreign investigations is too long*

15. The proposed duration of a preservation direction sought to support a foreign investigation can be up to 150 days (new section 88G). Directions can be renewed up to four times (new section 88J), taking us to a maximum of 750 days (which is more than two years). This is a long time for network operators to store and secure the material. It would require changes to business processes with additional costs.
16. We think that 750 days is an excessive amount of time for a foreign law enforcement agency to get their equivalent of a production order and pass it to the New Zealand Police (who would then seek a production order in New Zealand to support the investigation - see new sections 43 and 45 of the Mutual Assistance in Criminal Matters Act). This compares to 20 days for domestic directions plus the time to get a production order if one is sought (new section 79I) and 40 days under the Copyright Act (which requires retention of information about the allocation of IP addresses to account holders for the purposes of the infringing file sharing regime).
17. We recommend the Committee seek further advice on timeframes for foreign investigations.

*Include a connection to production orders for preservation directions for foreign investigations*

18. There is no requirement that an application for a preservation direction for a foreign investigation only be granted where an application for a production order (or the foreign equivalent) has been applied for or is about to be applied for. We submit that this requirement for domestic preservation orders (set out in new section 79E) be mirrored for international applications. This would result in greater alignment between preservation directions and production orders for foreign investigations. If the direction and the order are related there will be less administration and processing for network operators and for the Police, as the information in question is more likely to be the same.

*Privacy limitations*

19. The offence (in new sections 79Q and 88T) for disclosing that a direction has been made would conflict with privacy obligations in the situation where a customer

directly asks a network operator if a preservation direction exists in relation to their telecommunications information.

20. Rule 6 of the Telecommunications Information Privacy Code says that “an individual is entitled to receive from a telecommunications agency upon request - confirmation of whether the agency holds any telecommunications information about them”. Similarly, information privacy principle 6 (in the Privacy Act) provides that “an individual is entitled to receive from an agency upon request - confirmation of whether the agency holds any personal information about them”.

21. We suggest the Committee talks to the Privacy Commission about this issue.

### **Cost recovery**

22. The Bill makes no provision for cost recovery when network operators are called on to comply with a preservation direction. The proposed approach for domestic preservation orders is based on current processes and will likely have moderate cost implications. However, there is some uncertainty relating to the range and volume of requests from overseas agencies. Given these uncertainties the TCF recommends that the Minister or the New Zealand Police be given the power to pay reasonable costs where these are material. Even if it is not initially used, making provision for cost recovery is a necessary safeguard if network operators are swamped with requests.

23. A number of assumptions were made about costs in the 2020 consultation<sup>1</sup>:

- a. That only 10-15 preservation directions will be issued in New Zealand annually. This is based on the existing number of mutual assistance cases. We think this underestimates the likely number of directions, for a number of reasons:
  - i. The Bill enables preservation orders to be sought for domestic cases, not just the international ones. Domestic preservation orders are not currently available, so the inclusion of domestic cases is likely to result in a materially higher number of preservation directions. We suggest earlier in this submission that domestic cases be excluded.
  - ii. The concept of “cyber-enabled crime” under the Budapest Convention is extremely broad. It covers any criminal act assisted, facilitated or escalated in scale by the use of technology. This can be expected to result in an uplift in the volume of preservation directions.

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<sup>1</sup>[Consultation paper: New Zealand accession to the Budapest Convention on Cybercrime](#)

- iii. The number of mutual jurisdiction cases is on the rise, and these cases (e.g. Kim Dotcom) can be very resource intensive to assist.
  - iv. The availability of preservation orders will make it more likely that law enforcement in other countries will seek mutual assistance. Being able to get a preservation direction will make it more worthwhile seeking mutual assistance to support a prosecution.
- b. The average cost of preservation order was set at \$1000. Our members consider it is likely to exceed this.
24. There are precedents for cost recovery. New Zealand Police contribute to the costs of telecommunications operators complying with production orders. The Crown also provided funding for up-front capital costs when the Telecommunications (Interception Capability) Act was passed in 2004<sup>2</sup>.
25. We have similar concerns about the costs associated with production orders for foreign investigations.

#### **Telecommunication Interception Capability and Security Act amendments**

26. The Bill proposes changes to the Telecommunication (Interception Capability and Security) Act in subpart 3. These changes relate primarily to replacement of the definition of "call associated data" with the term "traffic data" and are described in the Bill as "*some substantive changes*" to align with the concept of traffic data as it appears in Article 1 of the Budapest Convention.
28. We consider that these substantive changes in the new section 3AB are unclear, and stress that any substantive changes which may impact the obligations of network operators in respect of Lawful Intercept should be made explicit and clear and discussed with industry prior to implementation.
29. It is unclear what the practical consequences will be for network operators following this change. Our members who are network operators are concerned that an unintended consequence of this change could be that the current technology standards used for current or future warrants may require amendments or improvements that have not been scoped or identified.
30. Members have also expressed serious concerns that the new definition of traffic data could be interpreted to compel network operators to intercept specific categories of data only, in accordance with the categories in ss(1)(a).
31. We consider such a change to domestic legislation unnecessary for the proper accession of the Budapest Convention and that it would create uncertainty, and undue burden on

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<sup>2</sup> See sections 15 and 16 of the 2004 Act.

network operators to potentially implement costly and unscoped technical changes to their existing lawful intercept capabilities.

31. The TCF is happy to answer any questions the Committee may have on the views set out in this submission. We would like to be heard in person if the Committee hears submissions. Please contact [kim.connolly-stone@tcf.org.nz](mailto:kim.connolly-stone@tcf.org.nz) in the first instance.