

Departmental Disclosure Statement

Budapest Convention and Related Matters Legislation Amendment Bill
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Justice.

The Ministry of Justice certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

6 September 2024.

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Part One: General Policy Statement

The Budapest Convention and Related Matters Legislation Amendment Bill ensures that New Zealand's legislation fully aligns with the requirements of the Council of Europe Convention on Cybercrime (also known as the Budapest Convention).

The Budapest Convention improves cooperation on cross-border investigations and prosecutions by providing a consistent framework for defining computer crimes, enabling lawful access to evidence, and outlining expectations on how relevant international agencies assist each other. The Convention requires these provisions to be designed in a way that upholds and promotes human rights, particularly the right to be free from unreasonable search and seizure.

The public has a reasonable expectation that law enforcement agencies will have the tools available to collect digital evidence and that the law will recognise and address computer-related crime. Acceding to the Convention will strengthen New Zealand law enforcement agencies' abilities to tackle crime through greater access to digital evidence in New Zealand and overseas. It will also foster international cooperation on those issues. Additionally, implementation of the Convention's provisions was recommended by the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019.

This Bill is an omnibus Bill. Standing Order 267(1)(a) provides that an omnibus Bill to amend more than one Act may be introduced if the amendments deal with an interrelated topic that can be regarded as implementing a single broad policy. The policy implemented by the Bill is to align New Zealand's legislation with the Budapest Convention in a way that is consistent with human rights obligations, in order to enable New Zealand to accede to the Convention.

The changes made by the Bill—

- are required to accede to the Budapest Convention; and
- are desirable to accede to the Budapest Convention; and
- are consequential to the required and desirable amendments.

The main legislative changes are amendments to the Search and Surveillance Act 2012 and the Mutual Assistance in Criminal Matters Act 1992.

The primary change to the Search and Surveillance Act 2012 introduces preservation directions in support of domestic criminal investigations and overseas criminal investigations and proceedings. The Bill enables the Commissioner of Police to issue a preservation direction requiring documents, including computer data, to be preserved where there are grounds to believe that the documents are particularly vulnerable to loss or modification. A preservation direction is an interim measure for ensuring that evidence in the form of documents is preserved before a production order is sought requiring those documents to be produced.

The Bill also requires a person who is subject to a preservation direction or assisting in executing a surveillance device warrant (such as a telecommunications provider) to keep the existence of the direction or warrant confidential for a period of time to avoid prejudice to a criminal investigation.

The Bill amends the Mutual Assistance in Criminal Matters Act 1992 to enable production orders and surveillance device warrants to be applied for in support of international criminal investigations and proceedings, with appropriate oversights to ensure human rights are upheld. This ensures that the full suite of investigatory tools available in New Zealand is available, where appropriate, to support international criminal investigations and proceedings.

In expanding the range of investigatory tools available to support international criminal investigations and proceedings under the Mutual Assistance in Criminal Matters Act 1992, the Bill also introduces new measures to ensure human rights are upheld and affirmed. In particular, the Bill includes a requirement that people affected by a search are notified before seized material is sent offshore, so that they can apply for judicial review if they think the search was unreasonable. This builds on existing common law requirements, as discussed by the Supreme Court in *Dotcom v Attorney-General* [2014] NZSC 199; [2015] 1 NZLR 745 (see paragraph [201], in particular). In addition, the Bill provides that only a High Court Judge can issue search warrants, production orders, and surveillance device warrants under the Mutual Assistance and Criminal Matters Act 1992.

The Bill amends the Crimes Act 1961 to ensure that New Zealand law fully aligns with the requirements of the Budapest Convention relating to computer-related offending.

New Zealand's accession to the Budapest Convention, including the legislative measures necessary to achieve this, has undergone a public consultation process as part of undertaking a national impact analysis.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p>The Review of the Search and Surveillance Act 2012, New Zealand Law Commission and the Ministry of Justice, 2017 (accessible at https://www.lawcom.govt.nz/assets/Publications/Reports/NZLC-R141.pdf), particularly recommendations 44 and 53.</p> <p>Ko tō tatou kāinga tēnei: the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019, 2020 (accessible at https://christchurchattack.royalcommission.nz/the-report/), particularly recommendation 18.</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	YES
<p>The Bill ensures New Zealand complies with the Council of Europe's Convention on Cybercrime, also known as the Budapest Convention. The Convention can be accessed at https://rm.coe.int/1680081561. Accession to the Convention will occur once the Bill has passed.</p>	

2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?	YES
<p>National Interest Analysis: The Council of Europe Convention on Cybercrime, prepared by the Department of Prime Minister and Cabinet and the Ministry of Justice, accessible at https://www.parliament.nz/resource/en-NZ/PAP_111537/1d0d9f0ea47ad05ae2e26dbf00143b5fa88a9d70</p>	

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>The national interest analysis satisfied the requirements for regulatory impact analysis.</p> <p>National Interest Analysis: The Council of Europe Convention on Cybercrime, prepared by the Department of Prime Minister and Cabinet and the Ministry of Justice, accessible at https://www.parliament.nz/resource/en-NZ/PAP_111537/1d0d9f0ea47ad05ae2e26dbf00143b5fa88a9d70.</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
<p>The RIA did not consider the national impact analysis to meet the threshold for independent review, although this was primarily due to it being a national impact analysis rather than a regulatory impact analysis, and not due to any specific assessment of the significance of the proposal.</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	YES
<p>The Bill's amendments to the Mutual Assistance in Criminal Matters Act 1992 go slightly beyond what was anticipated by the national impact analysis. In addition to what was originally proposed, the Bill codifies common-law requirements to notify affected parties before evidentiary material is sent offshore under the Act. This provides greater clarity for law enforcement and will ensure new search powers included in the Bill are exercised in a way that is compliant with human rights.</p>	

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
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2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
<p>The national impact analysis included high-level analysis of the size of costs and benefits on pages 12-15. This includes estimates of compliance costs for businesses.</p> <p>National Interest Analysis: The Council of Europe Convention on Cybercrime, prepared by the Department of Prime Minister and Cabinet and the Ministry of Justice, accessible at https://www.parliament.nz/resource/en-NZ/PAP_111537/1d0d9f0ea47ad05ae2e26dbf00143b5fa88a9d70.</p>	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	NO
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO
<p>The key benefits of the Bill arise from New Zealand's accession to the Convention and will not be affected by the level of compliance.</p> <p>Additional benefits arising from the new investigatory tools for law enforcement could be undermined by a failure to comply – for example, preservation directions will rely on the compliance of the person who holds the records. However, this is unlikely, as we expect compliance to be high. This is the case with similar provisions in the Search and Surveillance Act, like production orders. Failure to comply is an offence under the Bill.</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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<p>The primary policy intent of the Bill is to become compliant with the Budapest Convention, and care has been taken to ensure it complies with the Convention's obligations. New Zealand is not yet a party to the Convention but intends to accede once the Bill has passed.</p> <p>Consideration has also been given to how amendments to the Mutual Assistance in Criminal Matters Act (MACMA) might affect arrangements for mutual legal assistance. Because mutual legal assistance is reciprocal, any changes to what New Zealand is able to request through MACMA creates new obligations. The Bill ensures that any provisions within MACMA to make outgoing requests are mirrored by powers to act on incoming requests.</p>

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

<p>Māori have been consulted on the decision to accede to the Convention. Public consultation in 2020 garnered a number of submissions from Māori groups and individuals. Officials undertook further, targeted, consultation in 2023.</p> <p>Issues raised by Māori include the risk that measures for accession could exacerbate the disproportionate representation of Māori in the criminal justice system, or that it could undermine data sovereignty. Officials have sought to address these concerns as much as possible when developing the Bill.</p> <p>We do not think the Bill will significantly impact the representation of Māori within the criminal justice system as its overall impact on the system is expected to be minimal.</p> <p>Some degree of data-sharing is necessary to meet the requirements of the Convention, however, we consider that the Bill contains a number safeguards to ensure data is only shared when it is likely to be evidence of criminal offending. Large datasets with a high degree of Māori interest are not likely to be captured by new provisions.</p>

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

<p>Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. This will be accessible on the Ministry's website at https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/the-bill-of-rights-act/advice/</p>
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Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
<p>The Bill creates the following new offences in the Search and Surveillance Act:</p> <ul style="list-style-type: none"> - failure to comply with a preservation direction (cl 18-19) - false application for a preservation direction (cl 18-19) - disclosing matters relating to a preservation direction (cl 18-19) - disclosing that a surveillance device warrant has been issued (cl 21) <p>The penalties for these offences align with penalties for similar offences already in that Act.</p> <p>Clauses 58 and 61-62 of the Bill amend existing offences in the Crimes Act relating to the development and procurement of software for committing crimes. These amendments are minor and the penalties remain the same.</p> <p>Clauses 36 and 38 of the Bill amend the Mutual Assistance in Criminal Matters Act so that the power to issue search warrants, production orders and surveillance device warrants under that Act sit with High Court judges. Currently, search warrants can be issued under MACMA by an issuing officer, while the other powers are not possible under MACMA.</p>	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
The proposals were developed by the Ministry of Justice.	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
<p>Clauses 18 and 19 of the Bill create preservation directions in the Search and Surveillance Act. These are a new power for law enforcement to require documents to be preserved by the person that holds them. These documents will generally be customer records held by businesses.</p> <p>The amendments to the Mutual Assistance in Criminal Matters Act extend existing powers in the Search and Surveillance Act (namely production orders and surveillance device warrants) to make them available in response to mutual legal assistance requests. This will enable collection of personal information in circumstances where it is not currently possible.</p>	
3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES

The Privacy Commissioner submitted on the proposal to accede to the Convention during the public consultation period. Officials subsequently consulted with his office on the development of the Bill.

The 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 (this second power must be delegated).

We carefully considered these concerns but have been unable to resolve them entirely without undermining the policy intent, which is that preservation directions should be able to be issued quickly.

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
DPMC and the Ministry of Justice ran a formal public consultation process in 2020, which informed the initial policy decisions taken by Cabinet in 2021. This involved an open call for submissions as well as targeted consultation with industry and Māori. Further targeted consultation with Māori occurred in 2023.	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	NO
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Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	YES
<p>The Bill grants civil immunity to the Commissioner of Police for anything they do or fail to do in good faith while considering an application for a preservation direction order. This aligns with similar protections for issuing officers and judges and ensures the decision is not influenced by concern about any possible liability.</p> <p>The Bill also extends existing provisions in the Search and Surveillance Act which grant civil immunity to those executing a warrant or an order under that Act, ensuring civil immunity also applies to anyone executing a preservation direction.</p>	

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>The Bill creates new decision-making powers in relation to new offences in the Search and Surveillance Act that create obligations to keep confidential matters relating to preservation directions and surveillance device warrants. These obligations create a limitation on the right to freedom of expression. The Bill grants the chief executive of the relevant law enforcement agency the power to make decisions about whether or not to lift the obligation. However, there are only limited circumstances in which the chief executive can decline to lift the obligation.</p> <p>The Bill also creates new decision-making powers within the Search and Surveillance Act by giving the Commissioner of Police the ability to issue preservation directions. If a review of the decision to issue a direction is sought, the Bill also gives responsibility for conducting this review to the Commissioner. As a safeguard, the Bill contains delegation requirements to ensure the decision is not reviewed by the person who made it. However, given the nature of preservation directions, these powers are unlikely to involve decisions that have a significant impact on rights.</p> <p>The Bill amends decision-making powers in the Mutual Assistance in Criminal Matters Act so that only a High Court Judge can issue search warrants under that Act. It also creates new decision-making powers to issue production orders and surveillance device warrants. These powers all have the potential to engage the right to be free from unreasonable search and seizure. However, limiting that decision-making power to the High Court creates a significant safeguard for the exercise of the power, and means ability to authorise search powers under MACMA is more constrained than similar search powers under the Search and Surveillance Act.</p> <p>The Bill also creates a new decision-making power in MACMA by enabling a High Court Judge to lift the obligation (which is itself a provision of the Bill) to notify affected parties before evidentiary material collected can be sent offshore. As the obligation has been included within the Bill in response to a Supreme Court finding that notification is necessary to protect rights, dispensing with the requirement will naturally have an impact on rights. In addition to limiting the decision to the High Court, the Bill sets out the circumstances which must be met before the obligation can be lifted.</p>	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO
4.8. Does this Bill create or amend any other powers to make delegated legislation?	NO

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
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