Further Q&A on the implications of joining the Budapest Convention on Cybercrime – as at 9 September

The Ministry of Justice and the Department of the Prime Minister and Cabinet are consulting on a proposal for New Zealand to join the Budapest Convention on Cybercrime (the Convention). For full information on the proposal see: https://consultations.justice.govt.nz/policy/budapest-convention/

This document responds to a number of questions that have been raised in submissions and consultation meetings to date, to provide further information on the implications of joining the Convention.

What does accession to the Convention mean for collective Māori data? For example, data that could be used to 'profile' a community or data that includes information on a group of individuals?

- We are engaging with Māori directly to help us to understand what impact accession to the Convention could have for different types of Māori data. However, we can confirm that the Convention does not enable the collection of broad sets of data about populations or communities unrelated to specific criminal offending. It does not enable any type of social profiling.

- The Convention only requires law enforcement agencies be empowered to preserve and obtain specified electronic evidence of particular instances of criminal offending. For example, text messages between co-conspirators discussing a planned fraud, text messages between an offender and a victim, or stored evidence of child exploitation material. There is currently a high legal threshold for law enforcement agencies to obtain this type of information, with access ultimately requiring a court warrant. Accession to the Convention would not change this.

- The vast majority of information held or created by both Māori and non-Māori is not evidence of offending or otherwise relevant to a particular criminal investigation. As such, it would not be sought by law enforcement agencies.

- More generally, we are keen to explore with Māori whether and how New Zealand joining the Convention could affect Māori data sovereignty interests. We will consider any suggestions made in submissions about how Māori interests could be protected.

What would agencies do if a request for mutual assistance was received that could be harmful to New Zealand's interests?

- New Zealand has strong legal protections to ensure assistance is only provided in international criminal investigations where it is appropriate to do so. These protections are also required by the Convention. Particularly, New Zealand law requires assistance is only provided in respect of conduct that would amount to a criminal offence in both New Zealand and in the requesting country. Assistance can be refused where (amongst other reasons) the investigation or proceeding:
    - is of a political nature;
    - is discriminatory in nature (i.e. is brought on account of a person's colour, race, ethnic origin, sex, religion, nationality or political opinions); or
    - would prejudice the sovereignty, security, or national interests of New Zealand.

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What is the process for objecting to mutual assistance requests? Who makes the decision? Can the recipient of the request (for example a data storage company) be involved in that determination?

- Under the existing law, when another country makes a request for assistance in obtaining evidence or information about a crime that has taken place overseas, that country provides a description of the criminal investigation or proceeding, along with a summary of relevant facts and law. The request is reviewed by Crown Law against the criteria in the Mutual Assistance in Criminal Matters Act 1992. If a search warrant is required to obtain the information, the Deputy Solicitor-General at Crown Law must be satisfied that, based on the information provided by the requesting country—
    - there are reasonable grounds for believing that an article or thing relevant to the criminal proceedings is located in New Zealand;
    - the request relates to a criminal matter in a foreign country punishable by imprisonment for a term of 2 years or more; and
    - there are no other reasons for refusing the request.

- If the above conditions are satisfied, Crown Law will authorise Police to apply for a search warrant. These warrants will only be able to be issued if the issuing officer (e.g. a judge or a specified court official) is satisfied that the appropriate legal tests are met, as set out in the Search and Surveillance Act 2012 and the Mutual Assistance in Criminal Matters Act 1992.

- Parties required to provide information or evidence under a warrant are able to raise issues directly with Police. Further, these parties are also able to challenge the validity or scope of the warrant in court by way of judicial review.

How can small telecommunications providers be supported if they don't have the resources to go to court to contest a data preservation order / mutual assistance request?

- Any concerns about the scope or legal basis of any preservation order made, or mutual assistance request actioned, could be raised directly with Police or Crown Law respectively in the first instance. The consultation does not propose specific support outside of existing legal aid mechanisms that may be available to help individuals pursue a judicial review claim.

What level would the issuing officers be?

- Different issuing officers are proposed for the different orders referenced in the Convention, depending on how intrusive they are with respect to privacy. Broadly speaking, it is proposed the Courts would retain their authority to issue surveillance device warrants[1] and production orders,[2] while Police and other law enforcement agencies would be empowered to make preservation orders directly.[3]

[1] Surveillance device warrants provide for the covert collection of data over a period of time, e.g. a "wire tap".
[2] Production orders are a less intrusive alternative to a search warrant. They can order a person (usually a third-party to the offence, like a telecommunications company) to provide documents to Police, avoiding the need for Police to physically search through the person's records themselves to locate the specified information.
[3] Preservation orders are the least intrusive of the above orders. They would ensure that specified electronic evidence of criminal offending is not lost or modified before a production order can be sought for that evidence from the courts.

- It is proposed that formal statutory authority for the making of preservation orders would sit with the Commissioner of Police (and with the equivalent position in respect of other law enforcement agencies). However, as a matter of practice, we expect this power would be formally delegated. This is a standard practice with public powers. Formal responsibility and accountability for the use of that power would remain with the Commissioner of Police (or equivalent), and would be backed up by regular reporting on the use of the power publicly to Parliament through the agency's annual report, where preservation order numbers exceed 100 per year.

- We do not expect the volume of preservation orders would be affected in any way by the level of authorisation at which preservation orders are issued. We expect that preservation orders would only be made where it is the appropriate tool and authorised by law.

If the Government decides to join the Convention, when would accession be in practice?

- New Zealand has expressed interest in acceding to the Convention to the Council of Europe. We are awaiting an invitation to be issued. Once we have received an invitation, New Zealand will have 'invited party' status. Invited party status lasts for five years after the Council's invitation to accede. New Zealand would need to complete all steps necessary to accede within this time, including the passage of implementing legislation. Within that five year window, the timing of legislation would be a decision for Ministers, determined by Cabinet's priorities for legislation.