

## **Privacy Commissioner's Submission to the Justice Select Committee on the International Treaty Examination of the Council of Europe Convention on Cybercrime**

### **Introduction**

1. Thank you for the opportunity to provide a submission on the public consultation on the examination of the Council of Europe Convention on Cybercrime (the Budapest Convention), specifically on the National Interest Analysis and proposed legislative changes outlined in the national interest analysis.
2. The Budapest Convention is the only binding international instrument that serves as a guideline for any country developing comprehensive national legislation against cybercrime and acts as a framework for international cooperation between parties to the convention.
3. I understand consultation has been undertaken on the proposal of New Zealand's accession and the required legislative changes to support accession. I understand that submissions mostly supported accession, as it is seen as providing wide-ranging benefits for individuals and companies in New Zealand.
4. The Privacy Act 2020 is New Zealand's primary source of privacy law and governs the collection, use, storage, and disclosure of personal information. It also provides a statutory mandate under section 17 for my Office to examine wider developments or actions that may affect individuals' privacy. I have a role in considering the transfer of personal information from New Zealand to another country under Part 8 of the Privacy Act.
5. The proposed legislative changes should be consistent with the privacy protections afforded under the Privacy Act. Any changes introduced should continue to protect personal information and individual rights and shouldn't threaten individual privacy unless there is an override to individual privacy rights in another legislative instrument.
6. I submit on the proposed legislative changes outlined in the national interest analysis. In particular my comments relate to:
  - Preservation orders
  - Third-party confidentiality orders

### **Recommendations**

7. I propose the following recommendations to the Select Committee.

#### **Preservation orders**

8. Preservation orders are designed to protect a specific investigation or proceeding by requiring evidence to be retained while a production order is being sought. The preservation order scheme that will be introduced was considered by the Law

Commission and the Ministry of Justice. The review recommended a tightly constrained preservation which complies with the Budapest Convention but does not extend significantly beyond those requirements.

9. I understand the final design of the data preservation scheme has been based on the Law Commission's recommendations and has been refined through several rounds of consultation with the public and the telecommunications and cloud computing industries, who are most likely to be subject to data preservation orders.

#### *Process*

10. It is proposed that the power to issue a preservation order would be given to the Commissioner of Police. The power could be delegated by the Commissioner of Police, in accordance with section 17 of the Policing Act 2008. The Commissioner would be able to issue a preservation order at the request of any enforcement agency that is entitled to apply for a production order under the Search and Surveillance Act 2012.
11. The conditions for issuing a preservation order would be aligned with those for issuing a production order. The Commissioner of Police could issue a data preservation order when they are satisfied that:
  - the relevant enforcement agency is about to apply for or has applied for a production order, in respect of the identified data;
  - the requirements for obtaining a production order are likely to be met; and
  - preservation is necessary because the data is vulnerable to loss or modification.
12. I do not support the proposal to provide the Chief Executive of the relevant enforcement agency the ability to make such an order. Delegation of the preservation order power to the relevant Chief Executive is an inappropriate delegation of a power to override New Zealanders' privacy rights. Such an authority more appropriately sits with the judiciary.
13. I recommend that the conditions for a preservation order are aligned with those for a production order.
14. However, if the preservation order scheme is designed in a way that does not require judicial authorisation then it must be used with discretion and have appropriate oversight.

#### *Safeguards*

15. I recommend the following safeguards
  - Preservation orders should be clearly targeted to specific information. Telecommunication and cloud service providers should only be required to preserve data.

- Preservation orders should only be used where there is a clear risk that data necessary for an investigation will be destroyed or erased while a judicially authorised production order is being sought.
- Preservation orders should be as short as possible and should not be extended unless there is a legal basis to do so.
- Telecommunication and cloud service providers as well as the law enforcement agency should keep detailed records of all preservation orders they receive or issue.

### Third-party confidentiality order

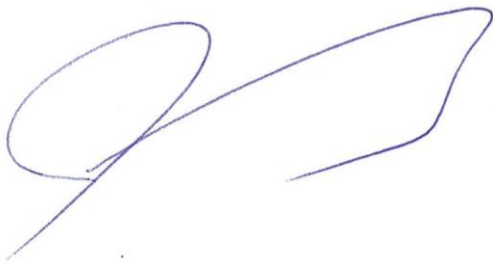
16. The Budapest Convention requires the ability to oblige a service provider (such as a telecommunications company or cloud computing provider) to keep the execution of a preservation order or surveillance device warrant confidential. This guards against the risk of the investigation being jeopardised by the disclosure of the existence of the order or warrant.
17. The Budapest Convention does not require confidentiality in respect of production orders (although the explanatory notes on the Convention do encourage states to consider this measure). However, investigations are equally likely to be jeopardised by the disclosure of the existence of a production order as with a preservation order or search warrant. There is also a risk that if confidentiality orders are only available for preservation orders, but not for production orders, that it could undermine timely applications for production orders, and could create an unintended incentive to use preservation orders.
18. It is proposed to provide confidentiality orders in respect of preservation orders, production orders, and surveillance device warrants. The specific terms of any confidentiality obligation would need to be set out in the relevant order or warrant, but would provide that both existence of the order/warrant itself be kept confidential, along with any other personal information that would not have been collected or retained but for the existence of the order.
19. The confidentiality obligations would cease when a preservation order lapses (where no production order had subsequently been issued in respect of the information), or at the end of an investigation in the case of a production order or a surveillance device warrant. The enforcement agency that sought the order would have a positive obligation to notify any service providers who are subject to an obligation of confidence when an investigation has ended. At that point, the normal Privacy Act principles would apply.
20. I recommend including a responsibility for agencies to notify affected individuals either at the conclusion of the investigation or the expiry of a preservation order, production orders, and surveillance device warrants. This responsibility could be subject to an exception which provided that agencies would not be required to notify the individual if to do so would prejudice the maintenance of the law. This notification would have the advantage of ensuring that individuals can exercise their rights of

redress in regard to any wrongful or erroneous collection of their personal information.

### **Conclusion**

21. I trust my comments in this submission will be of use to the Committee in its considerations. I would appreciate the opportunity to speak to my submission in front of the Committee.

22. I look forward to being consulted further on the drafting of the legislative changes to implement the accession to the Budapest Convention.

A handwritten signature in blue ink, consisting of a large, stylized 'J' followed by a series of loops and a long horizontal stroke.

John Edwards

**Privacy Commissioner**

18 June 2021